PUBLIC LAW BOARD NO. 6746
AWARD NO. 1
CASE NO. 1

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"This claim is being filed in behalf of District 3 employees, due to the Carrier's violation of the June 12, 2002 settlement involving the new Intermodal facility at Rochelle, Illinois referred to as Global III. Claim is in behalf of the following listed District 3 employees that have been disadvantaged due to the Carrier's failure to properly apply the June 12, 2002 Rochelle settlement:

Alcantar, G H - 348507262	Alward, P S - 571296646
Arellano, J A - 351645372	Beaver, R D - 356305680
Belmonte, H H - 335523018	Boyle, J R - 350720536
Braden, W C - 357369258	Brouilette, P K - 359662015
Brown, L J - 341465241	Calcari, W J - 347406884
Campbell, J M - 357364699	Castillo, I R - 354486788
Chavez, J B - 337660509	Chavez, S - 334706429
Clay, S J - 547152279	Clevenger, M J - 354485706
Clydesdale, SA -342642645	Coffey, T W - 354486268
Coy, D V - 352601748	Crowe, D W - 339541037
Dyer, B S - 340787280	Edwards, K L - 349567659
Erickson, C D - 328805667	Estrada, L J - 355709109
Faichney, E D - 353566526	Felder, T L - 325523759
Ferral, I - 335628700	Florczak, R W - 336463283
Fredericks, DD - 320489867	Funderberg, S R - 342766154
Funk, K R - 358480926	Garcia, I - 348506364
Garza, R R - 463849746	Gonzalez, J H - 459023408
Goodin, J D - 335568359	Guy, L - Emp I D 0401482 No SS

Harrington, RL - 355624650	Henderson, D A - 323703218
Hepler, J W - 360580735	Herring, M C - 324628212
Hodgkins, W D - 352506536	Hulstedt, J R - 356824065
Hussung, R - 339540464	Imel, E S - 351724895
Jiminez, J J - 341404776	Johnson, H R - 333444167
Johnson, J E - 333645450	Johnson, J E - 321768981
Jones, E E - 324544292	Keller, M J - 355704721
Larkin, J M - 331562609	Lira, C - 166567697
Luketich, D D - 347402799	Madsen, C N - 330601378
Marshall, G M - 324669868	McCoy, J C - 357783441
Mireles, B - 351608548	Mohr, J A - 339524050
Nauman, N J - 357685536	Norway, G F - 349382405
Olivas, H B - 585668394	O'Malley, T C - 484986597
Osborn, S J - 343568452	Palubicki, C G - 329824513
Perryman, J M - 481061500	Quick, D A - 319668806
Ramirez, F M - 343561493	Remer, S M - 349504465
Ringen, W H - 479062448	Rivera, J - 354487295
Robinson, C A - 335464005	Rodriguez, J G - 355520192
Saathoff, J B - 324544641	Saathoff, J S - 324544629
Sandoval, L A - 333706435	Sawvell, J R - 478130889
Sheley, B D - 357587380	Silguero, S - 354486041
Spooner, K R - 341465201	Vasquez, M M - 339523202
Vazquez, J G - 353705567	Wetzell, P M 327705911
Young, J A - 328527156	Younger, C K - 331707331
Zenner, R A - 360527892	Zink, R D - 355521741

Beginning on December 6, 2002 and continuing the Carrier refused to allow District 3 employees to work on the Global III project as outlined by the June 12, 2002 settlement. The District 3 employees notified Carrier of their desire to work on the project but were either turned away or sent home starting on December 6, 2002 and continuing. In particular, your attention is directed to Item 2 of the settlement agreement which provides: "2. If a District 3 employee has an exercise of seniority, **wishes to work on this project**, and **makes his availability known** to NPS, Union Pacific **will create a position for that employee for the period of time contractors are performing work** that arguably is covered by the sub-department in which the employee holds seniority. Said position will be paid at a rate of pay equal to or higher than the rate of the position last held by the employee, however, such employee may

perform work other than what is encompassed within that sub-department." (Emphasis provided)

As a consequence of the Carrier's December 6, 2002 action, some of the claimants were then furloughed, others had to travel greater distances to continue working, some of the employees lost Holiday pay for Christmas Eve, Christmas Day, New Years Eve and New Years Day. In addition some of the claimants did not qualify for vacation in 2003 due to the Carrier not allowing them to work additional days at Global III which would have given them sufficient days of rendered compensated service in calendar year 2002 to qualify for vacation in 2003.

Contractors are continuing to work at the Global III project while District 3 employees requesting to work on the project have been either sent home or refused the work opportunity.

This claim is being filed as a continuing claim in accordance with Rule 21(d) of the effective Agreement. It is the claim of the Brotherhood that the Claimants be made whole all losses in connection with the Carrier's refusal to allow them to work at Global III from December 6, 2002 until contractors leave Carrier property or all District 3 employees desiring to work on the project are allowed to report to Global III.

Due to employees being sent home, not being allowed to report, being furloughed, not qualifying for Holiday pay, not qualifying for 2003 vacation, incurring additional travel time and mileage it is impossible for the Brotherhood to name the individual claimants and their remedy at this time. However, Carrier has the records readily available which the Brotherhood would be willing to assist in reviewing to identify the claimants and proper remedy."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the

subject matter.

This case involves the interpretation and application of Section 2 of the June 12, 2002 Rochelle Settlement Agreement (herein RSA) entered into by the parties to resolve a contracting dispute and related litigation arising from Carrier's determination to construct a new $181 million intermodal facility at Rochelle, Illinois to become operational by the Fall of 2003. The parties exchanged extensive correspondence and met on numerous occasions after notice of the intended contracting was served in October, 2001, with the Organization contending that the entire project fell within the scope of its agreement and could be performed by its members and Carrier asserting that it did not have sufficient manpower and equipment to construct this size project within the time constraints required. Their inability to reach a compromise led the Organization to serve a Notice of Intent to strike and file a federal lawsuit requesting declaratory and injunctive relief with Carrier cross-claiming and seeking to enjoin the picketing.

Prior to the federal hearing, the parties entered into the RSA to permit the scheduled commencement of construction on the Global III project while protecting the interests of District 3 employees to the lost work opportunity. The RSA defines the scope of the project, limits any requirement that employees exercise seniority to this project in order to preserve any other rights to which they may be entitled, and makes a one time lump sum payment of $600,000 to the Organization for division to employees holding seniority on District 3 as of April 1, 2002. Section 2 of the RSA provides:

If a District 3 employee has an exercise of seniority,

> wishes to work on this project, and makes his availability known to NPS, Union Pacific will create a position for that employee for the period of time contractors are performing work that arguably is covered by the sub-department in which the employee holds seniority. Said position will be paid at a rate of pay equal to or higher than the rate of the position last held by that employee, however, such employee may perform work other than what is encompassed within that sub-department.

Contractor employees began performing work on the Global III project during the Summer of 2002. During the Fall of 2002 Carrier began reducing its forces, resulting in the existence of District 3 employees who were entitled to exercise seniority. In November, some employees were informed by the project supervisor that Carrier was nearing the limit of the number of positions it would create under the RSA since the number of its employees desiring work at the Global III project was approaching the number of contractor employees. When General Chairman ~~Fenhaus~~ Bushman DMC 11-19-04 SVP 11-30-04 contacted Wayne Naro, Carrier's General Director of Labor Relations with whom he DMC 11-19-04 had negotiated the RSA, concerning this development, he was sent a proposed Letter of Understanding (LOU) dated November 14, 2002, which provides, in pertinent part:

> It was agreed that the following understandings would apply to the agreement:
>
> 1. The Carrier will only be required to create positions for employees who make their availability known and who have an exercise of seniority on a one-to-one, employee to contractor ratio for the period of time contractors are performing work that is arguably covered by the sub-department in which the employee holds seniority.

> 3. If the contractor temporarily shuts down operations and the employees who made their availability known in Section 1 no longer have work opportunity under this agreement, the Carrier will offer work opportunity for the same employees upon the contractors return to the project.
>
> 4. Employees, working pursuant to the understanding of June 12, 2002, must exercise their seniority to permanent positions at the first available opportunity.

The General Chairman did not agree to this LOU and disputed what he believed to be an attempt to reform the clear language of the RSA and to create a new dispute over temporary shutdowns. He suggested the parties enter into an expedited arbitration of the issues of (1) whether the RSA is violated when Carrier restricts the number of District 3 employees who may work on Global III to a number equal to the number of contractor employees, (2) cuts off employees' right to work on the project during a temporary cessation of work by contractor employees and then refuses to allow them to return to the project when contractor employees return, and (3) whether District 3 employees should have been permitted to work on Global III when contractor employees of Rockford Blacktop were present performing drainage work, and, if so, what shall the remedies be?

Beginning on December 6, 2002, some District 3 employees were not permitted to work at the Global III project, and were let go from the project in corresponding numbers to the contractor employees that were reduced. On December 20, 2002 all contractor employees left the project site and all District 3 employees were sent home. Contractor employees began returning to the project in mid-January, 2003. The District 3 employees who had been sent home were not permitted to return to the

project, but employees who had an exercise of seniority at the time and made their desire to work on the project known had positions created for them up to the one-to-one ratio with contractor employees.

Carrier rejected the offer for expedited arbitration, stating the outstanding issues to be whether the RSA permits it to limit the number of District 3 employees who can work on the project to a number equal to the contractor employees working (herein the one-to-one ratio issue) and whether Carrier is obligated to recall such employees after they are sent home due to the contractor vacating the project (herein the recall issue). Carrier agreed to process these matters in the normal course of the contractual grievance procedure.

The Organization filed the instant continuing claim on February 3, 2003 alleging that Carrier violated the RSA by permitting contractors to continue to work on the Global III project while sending employees requesting to work on the project home or not permitting them to work. It also pursued its attempt to expedite the procedure through a district court action, which ultimately determined that Carrier was not required to expedite this matter. Carrier's March 31, 2003 denial asserts that the claim is excessive as only one employee with an exercise of seniority made his availability known, listing the whereabouts of all of the numerous claimants contained in the Organization's claim. Carrier noted that it was implicit in the RSA that the number of employees would not exceed the number of contractors, especially considering the substantial cash payment made to employees for the alleged lost work opportunity. Carrier avers that its accommodation of employees who were furloughed on a one-to-one basis on the project was in compliance with the RSA, and that the claim period ended when all contractors left the site on December 20,

2002.

In its May 21, 2003 appeal the Organization noted that many claimants were unable to obtain work at the Global III project despite their efforts to make their availability known and that they have suffered damages including the additional travel expenses incurred by being forced to take a position farther away from their home. The Organization asserts that up to 70 contractors had returned to the project while employees who had been sent home in December were not permitted to return.

Carrier's July 15, 2003 denial objects to the Organization's attempt to add an untimely and improper amendment to its claim to include allegations of a refusal to recall employees, a subject not included in the RSA. Therein Carrier argues that it was never the intent of the RSA to require Carrier to employ unlimited employees when fewer contractors were on site, there was no discussion to that effect during its negotiation, and it would be unreasonable to link any possible loss of work opportunity, for which employees had already been paid, to anything in excess of the number of contractor employees working on the site.

The Organization filed its appeal on November 13, 2003, indicating that Carrier was well aware of the issues long before the claim was filed and that there was nothing new in its claim that the RSA was violated when employees were not permitted to return to the project when contractor employees returned in January. The Organization asserts that it is absurd to start a new qualification period for employment every time a contractor temporarily suspends work, since it is admittedly all the same contracting transaction covered by the original contracting notice. It argues that the RSA is clear and unambiguous, contains no language

supporting Carrier's one-to-one ratio argument, and that parole evidence is improper and fails to support Carrier's position. The Organization notes that $600,000 is a miniscule proportion of the $180 million project which should have been performed entirely by its members.

The additional correspondence on the property, which repeats the parties' positions, also contests the breadth of the remedy requested as well as the fact that the documents which would indicate any entitlement to work on the project or alleged losses may not be uniquely in Carrier's possession. The correspondence contains an allegation by Carrier that it was informed during the course of negotiations that a maximum of five employees could be expected to take advantage of the work opportunity created on the project by Section 2, and a statement from General Chairman Fenhaus responding to such contention. Fenhaus' statement indicates that the context within which the number of employees was discussed was Carrier's proposal for posting bulletins for positions headquartered in Rochelle, and his response in rejecting such proposal that only a maximum of five employees live close enough to Rochelle who would bid from their current assignment to such positions. The General Chairman clarified that the Organization proposed work opportunities for all employees whose positions were abolished or who were replaced, and that the parties agreed to limit the scope of such work opportunity to the parameters of the agreed project limits contained in Attachment A to the RSA.

The Organization also included within its correspondence questionnaires that were returned to it by seventeen (17) District 3 employees dealing with the harm they suffered as a result of Carrier's unilateral institution of its interpretation of the RSA. Carrier included a

written statement from Wayne Naro indicating that the Organization never sought to have unlimited number of positions beyond the actual loss of work opportunity and none can be implied since the standard in the industry is that loss of work opportunity is limited to the actual work performed at any given time. Naro also claimed that the RSA did not limit Carrier's assignment of employees making their availability known under the RSA to work outside the project.

The Organization argues that the RSA is clear and unambiguous and must be enforced as written and Carrier cannot rely upon extrinsic evidence with regard to negotiations or its intentions to vary its terms, citing First Division Award 3442; Third Division Awards 10346, 11068, 18352, 24306 and an unnumbered Public Law Board between BNSF and the Organization (Suntrup, 8/29/99) (herein "the Suntrup award").

The Organization asserts that RSA Section 2 has no limitation on the number of employees or positions to be created by Carrier once an employee meets the specified criteria and a contractor is working on the project and that the one-to-one ratio interpretation is not supported by the agreement. It notes that Section 1 limits applicability to this project only and this work, and contends that the project continued until June, 2003 and that temporary hiatus of work for holidays and cold weather does not end the contractor's presence at the site. The Organization asserts that when contractor employees returned to the project in January, 2003, employees sent home in December should have been recalled to their jobs on the project, as there was no intention to terminate an employee's rights to employment under the RSA every time a contractor left the site. It argues that the $600,000 payment was an insubstantial sum compared with the value of the project and that it was

never intended to entirely compensate employees for their lost work opportunity, as evidenced by the fact that Section 2 was negotiated as an additional protection.

The Organization points to the continuing nature of the claim which covers a single contracting transaction, noting that there was no need for it to file a new claim to add allegations for employees subsequently adversely affected by Carrier's violation of the RSA, citing Special Board of Adjustment No. 1110, Award 1 and Third Division Award 10955. It argues that Carrier has always been fully award of the nature of the dispute and the arguments raised throughout the correspondence between the parties even before the actual claim was filed, and that there is no basis for Carrier's procedural or jurisdictional argument concerning amendments to the claim or the late filing of the "recall" allegation, relying upon Second Division Award 9273; Third Division Awards 12328, 14877, 16691, 17108, 18785, 19252, 19846. The Organization also asserts that the paving and drainage work performed in connection with the Global III project is listed in Attachment A and is arguably within the scope of the RSA, and employees should have been permitted to work on this aspect of the job.

The Organization requests a make whole remedy which it asserts encompasses all types of losses associated with a violation of the RSA including increased travel time it took employees to get to other positions they were forced to displace onto rather than being permitted to work on the Global III project. It notes that the Board has authority to order joint checks of Carrier's records to determine the essential facts regarding the identity of claimants and the losses suffered by them, especially where such records are in the control of Carrier, relying on Special Board of

Adjustment No. 1110, Award 1; Special Board of Adjustment between the parties issued by Fishgold on 4/30/03 (herein "the Fishgold award"); Third Division Awards 313, 316, 330, 6415, 9337, 10955, 18447, 20841, 36983; Second Division Award 9277. The Organization requests that the matter be remanded back to the parties to determine the precise pay and benefits of each District 3 employee adversely affected herein.

Carrier argues that since Section 2 is ambiguous and susceptible to two conflicting meanings, the more reasonable one that is consistent with accepted and applied practice on the property and in the industry must be adopted in this case, citing Public Law Board No. 1844, Award 16; Third Division Awards 31245, 14896, 23963. It notes that the language does not say that an unlimited number of positions must be created to eligible employees unrelated to the work performed by contractors, which is the Organization's interpretation, and that it should not be permitted to inflate the amount of work opportunity accorded to its members. Carrier notes that the intent of the RSA was to make up for the loss of work opportunity to employees as a result of the contracting and must be based upon the number of contractors working, since that is the amount of work which otherwise would have been performed by employees. It asserts that it was never its intention to negotiate an exception to industry standards and practice, and that there is no specific language to do so in the RSA, which would be otherwise required to support the Organization's nonsensical interpretation.

Carrier contends that the claim is limited to the Section 2 allegation on the one-to-one ratio issue which began on December 6, 2002 when it started decreasing contractor and employee numbers on the project proportionately, until December 20, 2002 when there were no longer any

contractors on site for the RSA to apply to, and is not continuing beyond that time. It rejects the Organization's untimely attempt to add the right of recall allegation, which was not handled during the claim processing and which it never agreed was appropriate for resolution herein, citing Third Division Awards 20147, 19564, 20008, 36020. Carrier notes that there is nothing in Section 2 supporting any recall right of employees to work at the project, especially where the right to a position is tied directly to having a seniority option.

Carrier argues that the Organization failed to sustain its burden of showing how the RSA was violated, noting that its unrefuted assertions that the RSA does not require the offer of work through recall or bidding must be accepted as fact, citing Third Division Awards 31529, 29308, and that the Organization was clearly on a fishing expedition and failed to provide sufficient facts to show a violation requiring that the claim be denied, relying on Third Division Award 26033, 27851, 27895.

Carrier concludes that the Organization failed to support its claim for damages requested by any definite facts, noting that the $600,000 payout was designed to compensate District 3 employees for any loss of work opportunity. It asserts that the claim is excessive as it seeks travel time and mileage for undocumented travel to employees while on headquartered positions when the Agreement does not provide for any and it seeks money for a loss of work opportunity in excess of the amount of work available on the project. Carrier relies upon Public Law Board No. 2960, Award 121; Public Law Board No. 1844, Awards 13 & 15 and Public Law Board No. 2960, Awards 142 & 164 in requesting that the claim be denied.

In determining whether the Organization has sustained its burden of proving that Carrier violated the RSA in this case, the Board will first set out its understanding of the issues that are properly before us for resolution. First, whether Carrier violated Section 2 of the RSA by restricting the number of District 3 employees permitted to work on the Global III project to a number equal to that of contractor employees performing work arguably covered by such agreement (herein, the one-to-one ratio issue). Second, whether Carrier violated the RSA by not permitting District 3 employees who had qualified for work on the Global III project prior to December 20, 2002 to return to work on the project without requalification when contractor employees recommenced work on the project in January, 2003. Third, whether the evidence establishes that Carrier violated the RSA by not allowing District 3 employees an opportunity to work on the Global III project at a time when Rockford Blacktop employees performed paving and/or drainage work on such project. Fourth, what is the appropriate remedy for any violations found to have occurred under the RSA herein.

Initially we note that the Board rejects Carrier's argument that the second issue is not properly before us since it is an improper and untimely amendment of the claim filed by the Organization. Carrier's assertion that the Organization attempted to change the nature of the dispute presented in its February 2, 2003 continuing claim by adding a "recall" allegation in its May 21, 2003 appeal letter is not supported by the lengthy correspondence on the property both prior and subsequent to the filing of the initial claim. The record makes clear that the interpretation of Section 2 of the RSA raised by the initial claim encompasses both Carrier's refusal to allow employees to work on the Global III project commencing on December 6, 2002 (when Carrier began

implementation of its one-to-one ratio interpretation) until such time as "contractors leave Carrier property..." While Carrier's interpretation of that event sets the ending date of the initial claim as December 20, 2002, thereby arguing that the recall allegation involving rights of employees in January, 2003 is a new matter not encompassed within the RSA or original claim, the Organization's interpretation of Carrier's obligation protested by the claim continues until the completion of the project in July, 2003 and includes the right of District 3 employees to resume working on the project when contractor employees returned from their extended break in January, 2003. This interpretation was made known to Carrier throughout the correspondence and meetings on the property and through federal court litigation, and cannot be considered a new amendment which the parties were unaware of or had no opportunity to address. See, Third Division Awards 16691, 17108, 19252. This is not a case where the claim presented to the Board is different from the one processed by the parties on the property. See, Third Division Award 20008. Thus, the Board believes that the issue of whether District 3 employees who established an initial right to work on the Global III project under Section 2 of the RSA prior to December 20, 2002 continued such entitlement to a position after return of contractor employees in January, 2003 is properly raised by the instant claim and is part and parcel of the Section 2 interpretive issue presented to us in this case.

A resolution of the first three issues is dependent upon an interpretation of Section 2 of the RSA. That provision initially sets forth three requirements that must be met by a District 3 employee in order to create an obligation by Carrier and a right or entitlement to a position at the Global III project. The language of the RSA is clear and unambiguous when it comes to the employee's qualification requirements. Such

employee must have an exercise of seniority, wish to work on the Global III project, and make his availability known to NPS. It is the Organization's burden to establish that each of the claimants met those three conditions. There appears to be little dispute between the parties with respect to this aspect of Section 2 of the RSA.

It is the balance of the first sentence of that provision dealing with Carrier's obligations to such qualified employee(s) that form the basis of the disagreement between the parties. The one-to-one ratio issue involves the meaning and intention of the language "Union Pacific will create a position for that employee." The second issue dealing with the rights of employees previously qualified to work on the project after return of contractor employees in January, 2003 involves the meaning and intention of the language "for the period of time contractors are performing work." Finally, the third issue relating to the work of Rockford Blacktop on the Global III project involves the language "that arguably is covered by the sub-department in which the employee holds seniority." Thus, an interpretation of the entire sentence of Section 2 is required to dispose of the issues properly before us.

While we have found that the employee qualification requirement language is clear and unambiguous and needs no parole evidence to support the intention of the parties in that regard, Third Division Award 24306; Fourth Division Award 34421, the same is not true for the portion of Section 2 dealing with Carrier's obligations to such employees. The parties substantially different interpretations, both of which we find are based upon a good faith understanding as to the agreement actually reached, reveals the possibility that the language agreed to contains a latent ambiguity concerning the number of positions which must be

created by Carrier and the period of time they must be held open for the employees who qualify for them. In order to ascertain the exact nature of the parties agreement, we look not only to the language chosen by the parties, the Suntrup award, but also to evidence of bargaining history of the RSA and the context within which it was negotiated. Third Division Award 23963.

As noted in the parties' lengthy submissions, their correspondence on the property and the history of litigation leading up to the negotiation of the RSA and the enforcement of its terms, Carrier's desire to undertake the large project of building the new intermodal facility within a limited time period led to the contracting notice and its position that contracting was necessary to accomplish this task. The Organization's position throughout was that all of the work involved was encompassed within the scope of its agreement and should and could be accomplished by its members, and that the contracting transaction would amount to a huge loss of work opportunity for employees. Thus, Carrier's goal in negotiating the RSA was to assure that the work was started and completed in a timely fashion without a work stoppage, and the Organization's goal was to protect as much of the work opportunity it perceived as being lost for its District 3 members who might be adversely affected by the contracting.

In discussions about how to accomplish these goals, one of Carrier's proposals was to headquarter positions at Rochelle, Illinois, and bulletin them. According to statements in the record, this offer was rejected by the General Chairman because he felt that there were an insufficient number of District 3 employees living in the vicinity of the project who would bid on these headquartered positions rather than remaining on

their current jobs, since it would necessitate their travel without the compensation associated with positions with no headquarters. It was in this context that the General Chairman brought up a specific number of employees - five - as the employees he felt lived in the vicinity and would bid on headquartered positions. The proposal to headquarter positions at Rochelle was rejected by the Organization and did not form part of the RSA.

Carrier's contention that it understood that what it was agreeing to in adopting the language in Section 2 obligating it to create positions was a maximum of five positions or employees who would seek to fill such positions is neither borne out by the language of the agreement nor the context within which the number "five" employees was discussed. The RSA does not create an obligation to establish headquartered positions. That was considered by the Organization to be insufficient protection against loss of work opportunity for the large number of District 3 employees on the roster at the time. Carrier did agree to compensate such employees by payment of a lump sum of $600,000 to the Organization for distribution to affected employees. That agreement is contained in Section 4 of the RSA. Independent of that payment, was the additional obligation of job creation contained in Section 2. That provision is clearly another mechanism adopted to deal with loss of work opportunity, over and above the monetary payment agreed to. The fact of the payment does not negate the additional obligation agreed to.

With respect to the one-to-one ratio issue, Section 2 states that once an employee meets the three requirements listed, "Carrier will create a position for that employee." There is no maximum number of positions indicated and no mention of the number of contractor employees on site

as a reference point for determining the extent of Carrier's obligation. The parties agree that neither was mentioned during negotiations. The Organization did not state that it was seeking an unlimited number of positions and Carrier did not indicate that it believed that its obligation was maximized to the extent of contractor employees on site. The language of Section 2 with respect to Carrier's obligation to create positions is unequivocal, and does not limit the number of employees to whom this right or obligation applies. The reference to "the period of time contractor's are performing work" contained in that sentence cannot be read to equate Carrier's obligation to some definite number of contractor employees on site. It does evince an understanding that it is during such time period when contractors are working that the Organization acknowledges the existence of a loss of work opportunity for its employees.

It is not an unreasonable interpretation of the language of Section 2 in the context within which it was negotiated to find that if the work contained in Appendix A to the RSA being performed by contractors was "arguably covered by the sub-department in which the employee holds seniority," such work by any contractor at the Global III project represents a work opportunity that a qualified employee could perform. Thus, the protection afforded in Section 2 is to give preference to employees who could otherwise perform the work over contractors. It does not create an unlimited work opportunity in excess of work that exists, as contended by Carrier. Rather, Carrier's obligation to create positions for eligible employees is only to the extent that there is arguably scope-covered work to be performed by any contractor. If there is insufficient work for all employees meeting the conditions in Section 2, Carrier need not create such work. It need only use such employees first

before using contractors to accomplish the task, thereby maximizing the employees' entitlement to such work. Since any contractor working on site represents a loss of work opportunity, Carrier's obligation to create positions for eligible employees exists only to the extent of the loss of work opportunity.

The intention of the parties was to provide a mechanism by which District 3 employees who no longer had work would be able to be assured a job on this project rather than furlough or a less desirable position, so long as work was available. While it appears that Carrier had an understanding based upon its conversations with the Organization, that there would be some natural limit to its obligation to create positions, there was no actual agreement to any such limit or a definition of how it would apply, other than the existence of a work opportunity defined by the presence of contractors on site. Even if the parties had differing intents when adopting this language, the terms of the written agreement must prevail. The Suntrup award.

The use of such broad language to define Carrier's obligation - will create a position - supports the Organization's contention that no limit on the number of such positions was agreed to so long as there is work to be performed by contractors. If Carrier intended to place a limit on its obligation to create positions for qualified employees, it was incumbent upon it to do express its understanding that such obligation only exists on a one-to-one ratio with contractor employees on site. In the absence of any language in the provision to support such position, Carrier's argument that its obligation is so limited must fail. Carrier has not established the existence of an industry standard to this effect. As noted by the Organization, Carrier was in a better position than it to know when

planning its work force for the Fall and Winter of 2002-2003 while the Global III project was under way, how many employees might be subject to seasonal furlough and would thus have an exercise of seniority. While it may not have anticipated or known how many employees would express an interest in working on the Global III project, it could assess the number of potentially eligible employees. If that number exceeded the possible number of contractor employees that would be performing work on the site, Carrier was obliged to make clear its intention to cut off its obligation to them. Its failure to do so in any ascertainable form must defeat its one-to-one ratio argument.

The second issue which arises from this claim is whether Carrier violated the RSA by not permitting District 3 employees who had qualified for work on the project prior to December 20, 2002 to return to work there without requalifying when contractor employee's recommenced work in January, 2003. As noted above, the Board does not accept Carrier's argument that this issue is an impermissible attempt by the Organization to amend the claim and expand its scope to include a "recall" allegation. This allegation derives from an interpretation of the second part of the sentence of Section 2 concerning Carrier's obligation to create positions "for the period of time contractors are performing work." It is not an independent right of recall, which the Organization agrees was not part of the RSA, but a right of originally qualified employees to resume working after a temporary cessation of work by contractors.

We find this part of the language of Section 2 similarly ambiguous. There appears to be agreement between the parties that there is no work opportunity when no contractor is on site, and that it is the loss of work

opportunity from which an employee's entitlement derives. Thus, the Organization's claim does not include the approximately three week period between December 20, 2002 and the first date in January, 2003 when a contractor returned to the site. The claimants encompassed within this allegation are those who exercised their seniority to different positions within this interim period and no longer met the qualifications set forth in Section 2 when the contractors returned to the site in January, 2003 and those who had retained their eligibility but were not permitted to return to work. It is unclear from the record the specific reasons why these claimants may have exercised their seniority to different positions during this period, or the number of such claimants. The Agreement's requirement that an employee exercise seniority within a defined period after being furloughed to avoid certain consequences may have led to this situation. Entitlements under the RSA do not supplant the responsibilities of employees under the provisions of the Agreement. It is also unclear how many claimants retained their eligibility but were not permitted to return to work on the project in or after January, 2003. Some employee questionnaires appear to present this situation.

As noted above, it is the Organization's burden under the RSA to show that a claimant met the three qualification requirements at a time when a work opportunity at the Global III project exists. Since it is agreed that no such opportunity exists when there is no contractor on site, in order for Carrier's obligation to arise with respect to said employee, he must meet the agreed qualifications when the work opportunity presents itself again. Thus, an employee furloughed from the Global III project on December 20, 2002, must still meet the eligibility conditions when the work opportunity again arises with the return of the first contractor to the site in January, 2003. Even if the Global III project continues to be the

same contracting transaction which gave rise to the RSA, the language of Section 2 does not extend an employee's eligibility throughout periods when there is no loss of work opportunity. It is the Agreement in effect that defines an employee's ability to remain continuously eligible during this extended hiatus period.

There is no support in the language adopted in Section 2 or in external evidence presented for the Organization's position that the "period of time contractors are performing work" language agreed to was intended to mean "as long as the project continues and contractors are performing work." The Organization contends that since the Global III construction was one continuous project accomplished between June, 2002 and July, 2003, covered by one contracting notice, an employee who once establishes his qualifications under the RSA is entitled to continue working on the project until its completion, and temporary suspensions of work are irrelevant. It asserts that Carrier's position to the contrary would lead to an absurd result since it would mean that any minute work break, such as lunch hours or weekends, would result in a reshuffling of positions and a requalification requirement, an administrative nightmare never intended by the parties.

The Organization's argument is based upon an assumption that the work opportunity continues until the project is complete regardless of whether contractor employees are working at a specific hour or on a particular day or week. However, the parties tied the work opportunity to which Carrier's obligation to create jobs applies to the performance of work by contractors in Section 2 of the RSA, not the intended length of the project. Perhaps the scope and length of the transaction was part of the underlying basis for the $600,000 monetary compensation provision.

It is not tied to an employee's entitlement to the creation of a position on the project in Section 2 of the RSA.

The Organization's argument, taken to its logical conclusion, would mean that, so long as the project is not completed, the work opportunity for employees once qualified continues to exist regardless of the presence of a contractor on site at any given time. The language adopted by the parties does not reveal such intention. Nor is there any evidence that such interpretation was discussed.[1] The Organization asserts that it is not attempting to create a recall issue which is admittedly not covered in the RSA, but merely a continuation of work entitlement. It does not contest Carrier's right to furlough these eligible employees after all contractors left the site on December 20, 2002, only Carrier's responsibility to bring them back when contractors return.

If the Organization's interpretation of the duration language is correct, and that it was intended to mean the length of the project, and there is no dispute that the project was not completed when the December and January hiatus period occurred, Carrier's refusal to continue these employees working on the project when all of the contractors decided to take an extended holiday break should also be encompassed within the claim. There has been no such contention or evidence that the parties intended this result. As Carrier should have been aware of the possible number of potentially eligible employees when negotiating the RSA, the Organization should have been aware that

[1] Carrier's November 14, 2002 letter expressing its interpretation of the RSA which the Organization felt was a modification of the agreement, does state that a temporary shut down of work by contractors would not adversely affect the entitlement to return to work upon a contractor's return to the project for employees who had made their availability known previously. However, that letter also sets forth Carrier's understanding of the one-to-one ratio driving its obligation and the requirement that an employee working under the RSA must exercise his seniority to a permanent position at the first available opportunity. Thus, it cannot be said that this statement is contrary to Carrier's position expressed herein.

extended holiday breaks in service may well impact an employee's continued eligibility under the terms of the Agreement.

This issue arises as a result of the interplay between the the rights of the RSA and the obligations of the parties' Agreement. Claimant's rights under the RSA are not affected by hourly lunch or weekend work schedule breaks. These temporary hiatus' of work do not extinguish the continuous right of an employee to return to the ongoing work schedule established for the job, since no furlough occurs impacting the seniority rights of such employee. The parties had no concern about such breaks in service, and there is no contention that Carrier furloughed employees under Section 2 for such short periods of time. If a work opportunity existed for contractor forces to work overtime through such breaks or on weekends, that right extended to qualified employees under the RSA. However, if the length of time that contractors did not perform any work on the site was great enough to require a furlough of employees, as it was in this case, then the employees' obligations with respect to retention of seniority are governed by the Agreement. If those obligations require an exercise of seniority elsewhere during the hiatus period, and the Organization cannot establish that the employee(s) met the qualifications in Section 2 when the work opportunity arose again in January, 2003, Carrier has no obligation to create positions for them, and they are not entitled to any remedy with respect to increases costs associated with their new positions. However, if the Organization can establish that claimants met all three qualifications at the time that the first contractor returned to the Global III project in January, 2003, they are entitled to have jobs created for them for the duration any contractor remained on site as noted above.

The third issue raised by the instant claim is the Organization's

assertion that Carrier violated the RSA by not permitting employees an opportunity to work on the project when Rockford Blacktop was doing paving and/or drainage work. This issue deals with the final phrase of the first sentence of Section 2 of the RSA - "performing work that arguably is covered by the sub-department in which the employee holds seniority." The Organization bears the burden of proving that the paving and drainage work performed by Rockford Blacktop at the Global III project meets this condition. While the language connotes an intention to broadly interpret the scope provision of the Agreement, the fact remains that, despite the extensive nature of the record, it is devoid of any evidence as to when Rockford Blacktop performed work at the project, what, if anything, they did, and whether any employee qualified under Section 2 was denied a work opportunity on the project at the time this contractor was working. Since the Board has found that there was no one-to-one ratio inherent in Section 2 of the RSA with respect to Carrier's obligation to create jobs for qualified employees, we cannot determine on this record whether Rockford Blacktop ever worked at the project when no other contractor was working, creating a defined period of time not concurrent with Carrier's obligation otherwise. The Board must conclude that, on the state of the record before us, the Organization has failed to meet its burden of establishing that Carrier violated the RSA with respect to such work.

Having interpreted Section 2 of the RSA to find a violation in Carrier's failure to permit qualified employees to work under its terms when contractors were performing work on the project, the Board now turns to the appropriate remedy for such violation. In the correspondence on the property Carrier asserted that only one employee made his availability and desire known to it, and that the listing of claimants and

damages sought was excessive. The Organization disagreed, seeking reimbursement for employees who were furloughed from the project commencing on December 6, 2002 to meet Carrier's one-to-one ratio interpretation, as well as those not permitted to work on the project throughout its duration until completion in July, 2003. The Organization argues that it seeks only a make whole remedy, and that it is appropriate for the Board to order a joint check of the records to ascertain the identity of proper claimants and the amount of damages suffered.

The Board acknowledges its authority to remand the matter to the parties to perform a joint check of the records to ascertain which of the eighty-six (86) named claimants were adversely affected by Carrier's institution of the one-to-one ratio interpretation, and to what extent. The Fishgold award; SBA No. 1100, Award 1; Third Division Award 18447; Second Division Award 9277. These records are in control of Carrier, and the parties efforts will be aided by the returned questionnaires filled out by employees and furnished to the Organization. The Board notes that this is a well pled claim to the extent that the Organization identified potentially affected District 3 employees, rather than the entire District 3 seniority roster, and will focus the inquiry of the parties on the named claimants.

The Organization bears the burden of establishing which of the named claimants met the three qualification requirements on dates when contractors were working on the site. Carrier bears the burden of establishing that no contractor was working on the site over any extended period of time other than December 20, 2002 to mid-January, 2003 and/or that such contractor working on site was not performing work that is arguably covered by the sub-department in which the employee

holds seniority.

In directing the parties to conduct a joint check of records, the Board clarifies what it considers to be appropriate make whole relief to remedy Carrier's violation of the RSA found herein as follows.

First, to remedy the one-to one ratio issue violation, the Organization is to be given access to documents concerning the named claimants, their work locations from November 14, 2002 onward, and the dates when they were furloughed from their positions and had an exercise of seniority. The Organization is also to be furnished with documents establishing the contact of such employees with NPS, and whatever other documents are relevant for it to show the identity of claimants and the dates when they retained an exercise of seniority from December 6-20, 2002, and the date of January, 2003 when the first contractor returned to the site to the completion of the project.

Once the list of time that contractors were working on the site performing work arguably covered by the sub-department in which the employee holds seniority is established, and the list of claimants who met the eligibility requirements and their respective dates is agreed to, the lists shall be compared to see which eligible employees were denied a work opportunity under the terms of the RSA and for what period of time. Lost wages are to be calculated under the terms of sentence 2 of Section 2 of the RSA. Any wages earned by said employees during the same time period will be deducted from the amount of lost wages owing. With respect to lost benefits, if the eligible employee's earnings or work days so calculated would have positively affected his 2003 vacation entitlement and/or qualification for holiday pay, the employees shall be made whole

with respect to those lost benefits.

Employees prematurely furloughed between December 6-20, 2002, who were required to exercise their seniority to another position under the Agreement prior to December 20, 2002 and did so, will be eligible for the increase in travel expenses incurred by them for that time period only since they clearly suffered an ascertainable loss as a result of Carrier's improper institution of the one-to-one ratio. Such loss ends with the termination of Carrier's obligation to them under the RSA on December 20, 2002. SBA No. 1100, Award 1. In order for an increase in travel expenses to be reimbursable, it must be ascertainable and documented, not speculative. See, PLB No. 2960, Award 121; The Fishgold award.

Employees who can reestablish all of the elements of their qualification[2] under Section 2 at any time during the January-July, 2003 period when contractors were working on the project performing work arguably within their sub-department, are eligible both for net lost wages as noted above, as well as any increase in travel expenses actually incurred during the period. The Board notes that an exercise of seniority to another position more remote than Global III which underlies the claim for travel expenses may also negate an employee's qualification under the Section 2 requirements of the RSA.

Having found no violation with respect to employees who lost their eligibility for positions under the RSA during the winter hiatus under the terms of the Agreement, or for work associated with Rockford Blacktop

[2] Any employee who let Carrier know of his continuing interest in working on the Global III project when he was prematurely sent home or not returned to work in January, 2003 will be deemed to have satisfied the two elements of making his availability and desire known to NPR. The Organization must show that an employee becoming eligible for a job under the RSA for the first time in 2003 met all three listed criteria in Section 2 before his entitlement to a remedy is established.

on the site, no additional monetary remedy is found to be appropriate. Thus, employees furloughed from the Global III project on December 20, 2002 who lost their eligibility for work on that project during the December 20, 2002-January, 2003 hiatus by protecting their seniority under the Agreement to a position more remote than Rochelle, thereby incurring greater travel expenses than if they had continued working at Global III, are not entitled to a monetary remedy since Carrier owed them no obligation under the RSA during the hiatus period.

The Board will retain jurisdiction to resolve any disputes that may arise concerning the implementation of this award.

AWARD:

The claim is sustained in part, and denied in part.

Margo R. Newman
Neutral Chairperson

Dominic A. Ring
Carrier Member

Dated: November 19, 2004

Steven V. Powers
Employee Member

Dated: November 30, 2004