NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6793

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 1
and	)
	) Award No. 1
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
S. V. Powers, Employee Member
D. A. Ring, Carrier Member

Hearing Date: September 9, 2009

QUESTIONS AT ISSUE:

As Stated by Carrier:

(1) Does the requirement that Foreman and Assistant Foreman drive trucks constitute a change in work methods pursuant to Article III(b) of the October 7, 1959 Mediation Agreement?

(2) If the answer to No. 1 is yes, have Foremen and Assistant Foreman duties and responsibilities been expanded as a result of a change in work methods?

(3) If the answer to No. 2 is yes, what rate of pay is appropriate (a) the current rate, (b) $.45 per hour, or (c) an intermediate rate as provided in Article III of the October 7, 1959 Mediation Agreement.

As Stated by the Organization:

If existing rules and practices permit Union Pacific Railroad Company (UP) to place commercial drivers' license qualifications on particular foreman or assistant foreman positions established under the January 1, 1973 Agreement (as revised) what rate of pay shall apply to such positions: (a) the current applicable foreman or assistant foreman rate as proposed by UP; (b) an increase of $1.00 per hour to the current applicable foreman or assistant foreman rate as suggested by the General Chairman; or (c) an intermediate rate as determined by this Board pursuant to Article III of the October 7, 1959 National Agreement?

FINDINGS:

Public Law Board No. 6793 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Since at least 1999, the parties have had a dispute over Carrier's desire to require all Foremen and Assistant Foremen to possess commercial drivers' licenses (CDLs) and to include the requirement in bulletins for such positions. Ultimately, the parties agreed to resolve their differences in two proceedings. First, they agreed, they would arbitrate the question of Carrier's authority to require CDLs of Foremen and Assistant Foreman. Second, they agreed that if the Board before whom they would arbitrate the first issue held that Carrier had such authority, they would arbitrate the issues concerning whether, and if so how much, additional compensation should be paid to Foremen and Assistant Foremen due to the requirement. On July 22, 2005, Public Law Board 6792 issued its award, holding that Carrier has the authority to require Foremen and Assistant Foremen who may reasonably be required to operate vehicles requiring a CDL to have a CDL. Accordingly, the issues related to compensation are ripe for adjudication before this Board.

Article III (b) of the October 7, 1959, Mediation Agreement provides:

> If as a result of change in work methods subsequent to the effective date of this Agreement, the contention is made by the General Chairman that there has been an expansion of duties and responsibilities of supervisory employees covered by the rules of the collective agreement between the parties hereto resulting in a request for wage adjustment and a mutual agreement is not reached disposing of the issue thus raised, the matter will be submitted to arbitration in accordance with paragraph (c) of this Article.

The Organization contends that the requirement that Foremen and Assistant Foremen have CDLs and that they operate trucks for which a CDL is required amounts to a change in work methods that has expanded those employees' duties and responsibilities in accordance with Article III(b). The Organization agrees with Carrier that Foremen and Assistant Foremen have always driven trucks but maintains that the trucks they have driven have been pickup trucks which require only an ordinary driver's license to operate. The Organization urges that the change in work methods occurred in the 1990s when Carrier introduced larger trucks to sections outside of the terminals. However, the Organization asserts, Foremen and Assistant were never required to have CDLs and to operate these vehicles.

The Organization contends that the requirement that Foremen and Assistant Foremen have CDLs and drive trucks for which a CDL is required increases the knowledge, skill and responsibility associated with their positions. The Organization relies on the federal regulations relating to CDLs to demonstrate the increased knowledge, skill and responsibility that it

maintains accompanies the CDL requirement. The Organization argues that the parties on this property recognized the impact of a CDL requirement when they negotiated their August 16, 1993 Agreements which provided substantial wage increases to numerous positions requiring a CDL. Furthermore, the Organization contends, the recognition that a CDL requirement warrants a wage increase has been repeated on numerous properties in the industry and was also recognized in Public Law Board No. 5542, Award No. 2, involving the Organization and ConRail, and a June 30, 1999 award between the Organization and the Grand Trunk Western Railroad (GTW Award).

The Organization contends that, in light of the increased knowledge, skill and responsibility to be required of Foremen and Assistant Foremen, a wage increase of $1.00 per hour is justified. The Organization derives its $1.00 per hour figure from two sources. First, the Organization calculates the amount of wage increases agreed to in the August 16, 1993 Agreements and multiplies them by the percentages by which overall wage rates for those positions have increased in the intervening years. Second, the Organization points to an August 1, 2009 Agreement between the Organization and the National Railroad Passenger Corporation (Amtrak) which it maintains provided for a $1.00 per hour increase for employees in positions requiring CDLs.

Carrier contends that there has been no change in work methods because Foremen and Assistant Foremen have always driven trucks and have never received additional compensation for doing so. Carrier maintains that the parties' first systemwide Truck Driver agreement, dating from March 1, 1947, expressly provided, "Differentials in pay herein provided does not apply to foremen who may be required to operate trucks where it does not interfere with other duties." Ever since, Carrier avers, Foremen and Assistant Foremen have been required to supervise and engage in all work of their gangs. Furthermore, in Carrier's view, the operation of trucks by Foremen and Assistant Foremen is covered under Rule 5, which expressly allows employees to perform incidental tasks directly related to the service being performed without payment of additional compensation. Carrier maintains that truck operation by Foremen and Assistant Foremen is an incidental task as they only operate trucks when the regular truck driver is unavailable due to absence or hours of service issues or in cases of emergency. Carrier submits that currently more than half of the Foremen have their CDLs and urges that they are already operating trucks that require a CDL.

Carrier argues that the CDL requirement does not result in an expansion of Foremen and Assistant Foremen duties and responsibilities. Carrier urges that a CDL is a tool and not a skill. The skill involved is driving a truck safely, which is not a new skill for Foremen and Assistant Foremen. Carrier avers, "[J]ust because somebody has to study for a test for a CDL does not make them special." In Carrier's view, the addition of a test does not amount to a change in work methods. The skills and knowledge required of Foremen and Assistant Foreman have not been materially changed by the requirement that they take and pass a CDL text. Furthermore, Carrier points out, the acquisition of a CDL is at no cost to the employees as Carrier pays for the test and supplies the truck for use in taking the test.

Carrier contends that the federal CDL regulations do not result in any additional responsibility for Foremen and Assistant Foremen. Carrier argues that Foremen and Assistant Foremen, as supervisors of their gangs, have always been responsible to ensure the safety and productivity of the gang and, to this end, have always been responsible to ensure that the gang's vehicles were operated in a safe manner, were maintained in good repair, and were loaded properly so that items they were carrying would not shift. Although the CDL regulations impose certain reporting requirements, Carrier urges that these are not materially different from the paperwork that Foremen have always been required to complete.

Carrier disputes the Organization's characterization of the August 16, 1993 Agreements as a mutual recognition that the requirement of a CDL warrants an increase in wage rates. Carrier maintains that the August 16, 1993 Agreements were not a response to the federal regulations requiring CDLs for operation of certain trucks but rather were a response to a need to remedy a shortage of truck drivers and to remedy a practice whereby truck drivers would sharp-shoot the Agreement by letting their CDLs lapse until a position came open that they desired. Carrier urges that PLB 5542 Award No. 2 and the Award of PLB 6792 recognized this. Carrier maintains that simply because some properties have CDL differentials does not establish that a CDL differential is generally recognized in the industry. Carrier notes that most of these CDL differentials came about through the give and take of negotiations and it is impossible to tell what was traded off by the Organization to obtain them. Carrier urges that the Organization attempted to spread PLB 5542 Award No. 2's CDL differential to the other carriers in national handling but the attempt was rejected by PEB 229, as interpreted in the July 2, 1997 Award between the Organization and the National Carriers Conference Committee (NCCC Award). Furthermore, Carrier maintains that there are numerous properties where there is no CDL differential, including other properties within Carrier's system (such as the former Missouri Pacific and Chicago & Northwestern properties), the Kansas City Southern, the former Southern Railroad property of the Norfolk Southern, and other smaller carriers who were parties to the NCCC Award and PEB 229. Carrier concludes that this Board should not award any increase in wages for the requirement that Foremen and Assistant Foremen obtain CDLs and leave the issue, if it is to be considered at all, to future negotiations between the parties.

The Board shall consider the issues in the order in which Carrier has presented them. This is because before the Board can reach the question of what adjustment to wages, if any, should be awarded (essentially the Organization's stated issue and Carrier's third stated issue), under the October 7, 1959 Mediation Agreement, we must first determine whether there has been a change in work methods (Carrier's first stated issue) and whether any change in work methods has resulted in an expansion of Foreman and Assistant Foreman duties and responsibilities (Carrier's second stated issue).

The parties' arguments concerning whether there has been a change in work methods seem to fly past each other rather than meet. While Carrier argues that Foremen have always driven trucks and therefore there has been no change in work methods and the Organization maintains that Foremen have never been required to drive trucks at all but, in any event, have never been required to have CDLs, neither party has ventured to define the critical term from the

October 7, 1959 Mediation Agreement, "change in work methods." The parties have offered nothing by way of authorities interpreting the Agreement, bargaining history or any other tool of interpretation that might shed light on what this term means. In the absence of any such interpretive aids, we will give the term its most natural reading. In our view, a change in work methods is any significant change in the manner in which the work is accomplished.

In the proceeding before PLB 5542, the Organization proffered the August 16, 1993 Agreements with Carrier in support of its position that the requirement of obtaining a CDL warranted wage increases. In a letter to ConRail's Senior Director Labor Relations, Carrier's Assistant Director of Labor Relations, who was Carrier's principal negotiator for the August 16, 1993 Agreements, wrote:

> At no point, and as was related to the UP BMWE General Chairman throughout the negotiations and subsequently, was this agreement negotiated as a result of any requirement for an employee to have a Commercial Divers License (CDL) or to be Department of Transportation (DOT) certified. These two qualifications are not requirements which would come under the purview of the Mediation Agreement of October 7, 1959. It has always's been the Union Pacific's position that Federal Law supercedes Collective Bargaining Agreement language.
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> Rather, the purpose for the Carrier initiating talks with the BMWE UP General Chairman and negotiating rate increases were two-fold:
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> (1) to resolve a problem area the Carrier had in attracting employees to positions of truck operator (includes fuel trucks and busses) on our production gangs; and,
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> (2) to address the Carrier's purchase and placing in the field on all types of gangs larger vehicles equipped with cranes and portable hydraulic tools.[1]

The Assistant Director Labor Relations elaborated on the second reason:

> Prior to the August 16, 1993 agreements, our section forces were basically assigned with crew cab pickup trucks. Engineering Services started to purchase larger (two-ton plus trucks equipped with cranes, hydraulic tools and hyrail attachments for our section forces. Prior to this agreement, the Carrier was restricted to assigning Sectionmen Truck Operator positions to specified Terminal Gangs. With the sophistication of the vehicles and to free the Foreman up from having to drive the truck, Management sought to designate a position on a Section Force which would be the primary position responsible for the operation and maintenance of the vehicle in addition to the Foreman. Also, a couple of Managers had attempted to bulletin Sectionman Truck Operator positions on gangs which were not designated resulting in claims being submitted by the

[1]Carrier Ex. W at pp. 1-2.

Organization.

On our Bridge and Building Gangs and Steel Erections Gangs, the Carrier started purchasing vehicles that by the time they were equipped with the crane, hyrail attachments, and portable power plants and tools they were coming in at an estimated cost of $160,000 plus. In order to designate a position on a B&B or Steel Erection Gang which would have the primary responsibility for the operation of the vehicle in addition to the Foreman, the Carrier agreed to listing a position in each of the Groups of the Bridge and Building Subdepartment.

Our Track production gangs both System and Division were being assigned vehicles with a gross ton vehicle weight of over 6 tons with dual wheels, cranes and hyrail equipment, in addition to sophisticated fuel tanks. Due to the sophistication of the vehicle, our Managers and Directors were of the opinion that these vehicles were just as critical to operate as a Track Machine.[2]

Thus, it appears from the representations quoted above that, prior to the August 16, 1993 Agreements, section forces were generally assigned crew cab pickup trucks which were driven by the Foremen. The August 16, 1993 Agreements, as portrayed by Carrier's representative, were prompted by the introduction of larger more sophisticated trucks elevating the trucks' importance comparable to a track machine, as compared to the predecessor pickup trucks. The Agreements themselves appear to recognize a change in work methods. One of the Agreements indicates it was reached because "the requirements of service relative to the operation of vehicles in Maintenance of Way service have undergone significant change necessitating qualified employes . . ." Another of the Agreements indicates it was reached because "Carrier is in the process of adding to its section gangs, different trucks which may be equipped with cranes and/or hy-rail attachments in an effort to enhance the productivity and efficiency of its sections forces . . ." As chronicled in Carrier's representations and in the August 16, 1993 Agreements themselves, the introduction of larger, more sophisticated trucks in place of pickup trucks effectuated a significant change in the manner in which the work of the gangs was accomplished.[3] We

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[2] *Id.* at notes 2-4.

[3] Indeed, it appears that Carrier's representative responded to the Organization representative's position that the Agreements were a response to the requirement of a CDL, arguing that a governmental regulation would not trigger the October 7, 1959 Mediation Agreement. Implicit in Carrier representative's letter to ConRail, was that the suggestion that the Agreements responding to the introduction of the more sophisticated trucks were handled with the General Chairman "under the purview of the Mediation Agreement of October 7, 1959." We note that Article I of that Agreement provides:

> In the event a carrier decides to effect a material change in work methods involving employees covered by the rules of the collective agreement of the organization party hereto, said carrier will notify the General Chairman thereof as far in advance of the effectuation of such change as is practicable . . . If the General Chairman or his representative is available prior to the date set for effectuation of the change, the representative of the carrier and the General Chairman or his representative shall meet for the purpose of discussing the manner in which and the extent to which employees represented by the organization may be affected by such change.

In contrast to Article III(b), which applies only to supervisory employees, Article I applies to all employees. Both require a change in work methods to trigger their application. If the introduction of larger and more sophisticated

conclude that the Organization has established a change in work methods as the term is used in the October 7, 1959 Mediation Agreement.

On its face, Article III(b) is triggered if there is a change in work methods and "the contention is made by the General Chairman that there has been an expansion of duties and responsibilities of supervisory employees covered by the rules of the collective agreement . . ." Both of these elements are present in the instant case. As discussed above, the introduction of larger, more sophisticated trucks in the 1990s in place of pickup trucks effectuated a change in work methods, and the General Chairman has contended that by the addition of the requirement that Foremen and Assistant Foremen have CDLs, their duties and responsibilities have been expanded. Of course, the contention alone does not entitle those employees to an adjustment in their wage rates. The Organization must establish, not merely assert, that the change in work methods resulted in an expansion of the duties and responsibilities of the Foremen and Assistant Foremen.

Most of the arguments put forth by the parties are best analyzed under the expansion of duties and responsibilities issue. Here, the parties' disagreements are sharp. The Organization concedes that Foremen have traditionally driven pickup trucks but avers that they have never been required to do so and have never been required to possess a driver's license. Carrier avers that Foremen have always driven trucks and have always been required to have a driver's license and that Foremen who lacked a driver's license have been disqualified as Foremen. Neither side has backed its conflicting assertions with evidence. The Organization has failed to produce any evidence of even one Foreman who worked as a Foreman even though he did not have a driver's license and Carrier has failed to produce any evidence of even one Foreman who was disqualified because he did not have or because he lost his driver's license. Of course, most adults in the United States have a driver's license and, among Carrier's employees, the percentage is probably higher than the general population as most Carrier employees drive themselves to work. Thus, the absence of hard evidence is not surprising as it is very likely that the situation of a Foreman lacking a driver's license rarely, if ever, arose.

With respect to operating larger, more sophisticated trucks, the Organization urges that Foremen and Assistant Foremen, except for Truck Driver Foremen, have never been required to operate them and Truck Driver Foremen do not drive trucks but coordinate all of the Truck Drivers. Carrier maintains that Foremen and Assistant Foremen have operated larger trucks, that Truck Driver Foremen do operate these trucks and that in addition to the Truck Driver Foremen, the Foremen Material Distribution are required to have CDLs and to drive the larger trucks. Carrier urges that neither Truck Driver Foremen nor Foremen Material Distribution received higher wage rates because of their CDL requirements.

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trucks was a change in work methods triggering the conference with the General Chairman called for under Article I, it would also trigger Article III if the General Chairman contended that it expanded the duties and responsibilities of supervisory employees, i.e. Foremen. Apparently, in 1993, no such contention was raised by the General Chairman, as Foremen were not covered by the August 16, 1993 Agreements.

The critical question under the October 7, 1959 Mediation Agreement is whether the change in work methods, i.e., the introduction of larger more sophisticated trucks in the 1990s, resulted in an expansion of Foreman and Assistant Foreman duties and responsibilities. On this issue, the evidence of prior truck operation by Foremen and Assistant Foremen is sparse. The Carrier member of this Board, in Carrier's submission, has stated, based on his personal experience when he was assigned to a Section where a Sectionman-Truck Driver position was established, that the Foreman or Assistant Foreman operated the truck in the absence of the Truck Driver.[4] On the other hand, the same Carrier representative, in his letter to ConRail that was presented to PLB 5542, represented that a reason for the August 16, 1993 Agreements was to free up the Foremen from having to drive the more sophisticated trucks that were being introduced. The only other specific evidence in the record relevant to whether Foremen and Assistant Foremen commonly drive the large sophisticated trucks introduced in the 1990s and for which a CDL is required is Carrier Exhibit V, which shows that on August 21, 2009, 58% of Division Foremen and Assistant Foremen had CDLs. Carrier urges that the Board may infer that these Foremen and Assistant Foremen are operating the trucks incidental to their primary duties. The Board, however, cannot find that such an inference is justified. As the Organization has pointed out, there may be many reasons why these employees have CDLs, including that they may have previously occupied positions requiring CDLs and that they may have acquired CDLs for reasons unrelated to their railroad positions, such as the need to operate vehicles requiring a CDL in farming and ranching. The evidence is simply too sparse for the Board to conclude that Foremen and Assistant Foremen have been operating the large sophisticated trucks that were introduced in the 1990s to their gangs.

That the evidence does not establish that Foremen and Assistant Foremen have driven the large sophisticated trucks that were introduced in the 1990s merely begs the question of whether the introduction of such trucks, coupled with the to be implemented requirement that Foremen and Assistant Foreman have CDLs so they can operate those trucks, amounts to an expansion of Foremen and Assistant Foremen's duties and responsibilities. The parties sharply differ over whether the August 16, 1993 Agreements represent a recognition that the requirement of a CDL expands duties and responsibilities.

Three Boards have commented directly on the circumstances that gave rise to the August 16, 1993 Agreements. PLB 5542, Award No. 2, observed, at page 7, "On the Union Pacific Railroad, truck drivers receive a differential between $.55/hour and $.98/hour ($.20 more if the vehicle is being operated with a hy-rail attachment) although it is unclear whether they receive this differential because they are obligated to obtain a CDL.

The GTW Award commented, at pages 29-31:

> Those August 16, 1993 agreements identified specific positions that would require CDL qualifications and conditioned incumbency on holding a valid current CDL,

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[4]Carrier Submission at 6, note 12.

established grace periods and time frames within which employees should become CDL qualified, provided that the UP would assist employees in becoming qualified based on written requests, stipulated that the UP would reimburse employees for acquisition or renewal of CDL's and provided for the above-quoted pay rate increases for various newly established Truck Operator positions in the Bridge and Building and Track Departments. As Arbitrator O'Brien pointed out in PLB 5542, Award No. 2 . . ., however, it is not possible to put a precise valuation on the CDL differential component of the wage package for the new "Truck Operator" positions created in those agreements.

Bargaining for those contracts was initiated in March 1991 in anticipation of the April 1992 effective date for the DOT's uniform CDL standards and continued in that context before final closure in August 1993. In countervailing affidavits placed in evidence before PLB 5542, PEB 229 and this Arbitrator, the chief negotiator of those contracts for the UP attempted to minimize the CDL factor while his BMWE counterpart attempted to maximize the impact of CDL on the August 1993 wage rate increases. The record before me shows that throughout those bargaining talks the chief negotiators for both BMWE and UP frequently emphasized the CDL standards, among other reasons, for negotiating changes in Truck Operator requirements and wages. . . .

. . . While attribution of a discrete monetary figure to CDL is not possible, the record before me plainly demonstrates that both the UP and BMWE negotiators mutually intended that at least part of the significant rate increases over former truck operator rates was in recognition of employees obtaining, maintaining and utilizing the CDL required to drive certain vehicles.

PLB 6792 commented, at pages 6-7:

Obviously, from the divergent views of what occurred during bargaining as shown in this record, we cannot sort out from a credibility standpoint what actually transpired. But the Organization has raised the issue of bargaining history as supportive of its position. Having done so, the Organization has the burden to demonstrate more than it had a good faith belief that the final product of the rounds of bargaining resulted in a conclusion consistent with its position in this case. Instead, the Organization must show that there was a "meeting of the minds" at the bargaining table consistent with its position in this case that the Carrier conceded its managerial prerogative to require all employers who operate certain vehicles to have a CDL or other DOT certification. Given the parties' divergent positions on what transpired during bargaining over the years, we cannot find that the Organization has carried its burden. We have no doubt that the Organization believed it achieved the result it advances in this case. However, the Organization has not sufficiently shown that the Carrier was in agreement with the Organization's belief.

Our own review of the record before us, which appears to be comparable to the record before PLB 6792 and the GTW Award Board,[5] leads us to a comparable result. It is clear that the

[5]Although it is not entirely clear, the record before PLB 5542 may not have been as comprehensive.

Organization's rationale for the significant wage increases that were granted in the August 16, 1993 Agreements was its view that the requirement of a CDL necessitated expanded skills, knowledge and responsibility. Indeed, this rationale was consistent with the position the Organization has taken on many other properties. Furthermore, it is clear from, among other things, the earlier drafts of the Agreements which made specific references to significant changes including those imposed by government regulation such as the CDL, that Carrier was aware that this was a primary rationale of the Organization. However, it is also clear from the record that Carrier's concerns that the introduction of larger and more sophisticated trucks to the production gangs created a need to spread the truck operator positions beyond the terminals and free up Foremen from having to operate trucks, and that solutions had to be found for the practice of sharp shooting the Agreement and to the shortage of truck operators, were also grist for the mill of negotiations. Indeed, the preambles to the Agreements reference significant changes in the maintenance of way services and Carrier's process of adding larger, more sophisticated trucks to its section forces and the need to remove restrictions on locations where Sectionman Truck Operators may be assigned. References to the use of cranes and hy-rail attachments necessitating qualified employees also appear in the preambles to earlier drafts on which the Organization relies. Furthermore, the Agreements deal with the sharp shooting problem by freezing the seniority of employees whose CDLs lapse.

Thus, it is apparent to us that multiple concerns and rationales were before the parties when they negotiated the August 16, 1993 Agreements. Of course, for a binding agreement, the parties need only agree on the ultimate result – they need not agree on the rationale or motivation behind the result. The newly imposed CDL requirement was clearly a factor in the August 16, 1993 Agreements, but we agree with the GTW Award, that, in light of the other factors that underlay those Agreements, it is impossible to quantify a specific portion of the substantial wage increases that resulted from those Agreements and that were carried over to positions newly created by those Agreements which may be attributed to the CDL requirement.

Recognizing that the August 16, 1993 Agreements included some compensation for obtaining and maintaining a CDL, however, does not establish what the Organization must establish in the instant proceeding – that the change in work methods, i.e. the introduction of large sophisticated trucks in place of pickup trucks, resulted in an expansion of duties and responsibilities for Foremen and Assistant Foremen. One reason for the August 16, 1993 Agreements was, in light of the switch from pickup trucks to larger more sophisticated trucks, to free Foremen up from being responsible to drive the trucks. Consequently, Foremen and Assistant Foremen were not covered by the August 16, 1993 Agreements and at the time no contention was made that the change in work methods expanded their duties and responsibilities. The change in work methods arguably expands there duties and responsibilities only with the requirement endorsed by PLB 6792, that Foremen and Assistant Foremen obtain and maintain CDLs. Regardless of whether the comparable requirement for other employees warranted an adjustment to their wage rates in 1993, Carrier contends that the CDL requirement does not expand the duties and responsibilities of Foremen and Assistant Foremen. It is to that contention that we now turn.

Carrier argues that a CDL is merely a tool and a requirement that employees possess one alone does not merit a wage increase. We agree that a CDL or any other qualification standing alone would not expand a position's duties and responsibilities. However, PLB 6792 premised its holding that Carrier may require Foremen and Assistant Foremen to hold CDLs on Carrier reasonably requiring those employees to operate certain vehicles, i.e. vehicles requiring a CDL, as part of their job duties. See PLB 6792 Award at 3. Indeed, the issue as stated by Carrier, clearly linked the requirement of a CDL to the requirement that Foremen and Assistant Foreman operate vehicles requiring a CDL.[6]

Carrier maintains that the skills needed to drive vehicles requiring a CDL are essentially no different than the skills needed to drive the pickup trucks that Foremen and Assistant Foremen have always operated. Safe driving skills are safe driving skills regardless of the vehicle operated. We find Carrier's argument counterintuitive. CDLs are required to operate on public roadways any vehicle weighing more than 26,000 pounds, any vehicle carrying hazardous materials and any vehicle transporting 16 or more passengers. Certainly a person is not capable of operating a semi just because that person is capable of operating a pickup. That the federal government would mandate separate licenses for persons operating these classes of vehicles is prima facie evidence that the skills required to operate these vehicles are different from the skills required to operate vehicles for which only a driver's license is required. We conclude that the requirement that Foremen and Assistant Foremen operate vehicles necessitating a CDL resulting from the introduction of such vehicles effectuates an expansion of the Foremen and Assistant Foremen's duties.

Carrier also maintains that there has been no expansion of Foreman and Assistant Foreman duties because in their supervisory capacities they already are required to ensure that the trucks are operated safely, are maintained properly and that their loads are secured properly. Here too, Carrier's argument is counterintuitive. Foremen routinely supervise employees who perform jobs that the Foremen themselves are not qualified to perform and in their supervisory capacities, Foremen are expected to ensure that these subordinate employees operate safely. However, it is one thing to have supervisory responsibility over such functions, but quite another to be required to perform those functions and be held accountable for those functions in the first instance. We find it significant that the only two Boards to expressly address the issue, PLB 5542 and the GTW Board, agreed that operation of a vehicle for which a CDL is required carries with it an expansion of responsibilities. We find it significant that both of those Awards applied to Foremen. See PLB 5542, Award No. 2 at pp. 7-8; GTW Award at p.14. We join those two Boards and hold that the introduction of trucks requiring CDLs for their operation coupled with the requirement that Foremen and Assistant Foremen operate such vehicles effectuates an expansion in Foreman and Assistant Foreman responsibilities. In accordance with Article III of the October 7, 1959 Mediation Agreement, we conclude that the Organization has met its burden

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[6]Carrier stated the issue before PLB 65792 as, "Do existing rules and practices under the collective bargaining agreement prohibit Union Pacific from requiring foreman and assistant foreman to operate trucks as part of their duties and qualifications and thereby obligate such employees to obtain commercial drivers licenses and/or DOT certification?"

to establish that a wage adjustment is appropriate.

As stated in the GTW Award, an award adjusting wages should "best reflect[] what [the parties] would have done themselves had they been able to overcome the barriers which divided them and reached a voluntary agreement." GTW Award at page 20.[7] We recognize that the payment of CDL wage differentials is not uniform across the industry and that the Organization's attempt to expand the practice to all carriers represented by the National Carriers Conference Committee was not accepted by PEB 229, as interpreted in the NCCC Award. This, however, does not negate the Organization's showing under the October 7, 1959 Mediation Agreement that a change in work methods has now resulted in an expansion of the duties and responsibilities of Foremen and Assistant Foremen who will be required to operate vehicles requiring CDLs. Furthermore, a significant number of carriers are paying differentials for the operation of vehicles requiring CDLs, either pursuant to agreements or arbitration awards.

The Organization seeks a wage increase of $1.00 per hour for every Foreman and Assistant Foreman position bulletined with a requirement of a CDL. The Organization has failed to make the case for such an increase. There are several reasons for this failure.

First, the Organization's claim for such an increase for every Foreman and Assistant Foreman required to have a CDL is overbroad. Truck Driver Foremen and Material Distribution Foremen are required to have CDLs apart from PLB 6792's Award and presumably the parties took that requirement into account when they negotiated the wage rates for those positions. It would not be appropriate for this Board to award any wage adjustment for those positions. Moreover, this Board's authority to adjust wages derives from the October 7, 1959 Mediation Agreement. The basis for such wage adjustment is the change in work methods via the introduction of larger more sophisticated trucks and the expansion of Foreman and Assistant Foreman duties and responsibilities resulting from the requirement that they operate those trucks. It is only those Foreman and Assistant Foreman, i.e., those who will now be required to operate vehicles requiring a CDL, to which any wage adjustment we may award may apply.

Second, the Organization's reliance on the wage increases provided for in the August 16, 1993 Agreements adjusted by future wage increases is misplaced. As discussed above, the record does not allow us to quantify the portion of the wage increases in the August 16, 1993 Agreements that may be attributed to the increased responsibilities that accompany operating a vehicle requiring a CDL. Furthermore, most, perhaps all,[8] of the employees covered by the August 16, 1993 Agreements were expected to operate vehicles requiring a CDL on a daily basis. In contrast, Carrier has represented that Foremen and Assistant Foremen will be required to drive trucks only occasionally when needed because the regular operator is unavailable due to absence

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[7]In another context, I have made a similar observation about interest arbitration. *See* Malin, *Public Employees' Right to Strike: Law and Reality*, 26 U. MICH. J. L. REF. 313, 333 (1993).

[8]The record is not clear as to the extent of vehicle operation duties of the welders.

or hours of service issues and in emergencies. The Organization challenges this representation, arguing that Agreement Rule 20(k) concerning the filling of temporary vacancies precludes using Foremen and Assistant Foremen to operate trucks when the regularly-assigned operator is absent. The Organization suggests that Carrier has an ulterior motive beyond handling occasional absences and emergencies in requiring Foremen and Assistant Foremen to possess CDLs.

We agree with Carrier that Public Law Board 6302, Awards 16, 17 and 18 preclude Carrier from effectively assigning Foremen and Assistant Foremen to operate trucks full time. Beyond this, it is not appropriate for us to determine whether the occasional use of a Foreman or Assistant Foreman under hypothetical circumstances to operate a vehicle requiring a CDL would violate Rule 20(k). There is absolutely no evidence that would support an inference of an ulterior motive on Carrier's part. If, at any time, the Organization believes that a Foreman or Assistant Foreman operating a vehicle requiring a CDL violates Rule 20(k), the Organization is free to process claims under the Agreement. For present purposes, we accept Carrier's representations, coupled with the holdings of PLB 6302 and conclude that the Foremen and Assistant Foremen will not be operating vehicles requiring CDLs on a regular basis. In light of that, the probative value of the wage adjustments the parties agreed to for employees regularly operating vehicles requiring CDLs is marginal when trying to project what wage adjustment the parties would have agreed to for employees who only occasionally will have to operate such vehicles. When the marginal probative value of the August 16, 1993 wage increases is coupled with the inability to quantify what portion of those wage increases was attributed to the increased responsibilities that accompany obtaining and maintaining a CDL, the August 16, 1993 Agreements cannot make the Organization's case for a $1.00 per hour increase for Foremen and Assistant Foremen.

The Organization also relies on the August 1, 2009 Amtrak Agreement which it claims provided a wage adjustment of $1.00 for Organization-represented employees who occupy positions requiring a CDL. The August 1, 2009 Amtrak Agreement, however, also does not make the Organization's case for the requested $1.00 per hour wage increase for Foremen and Assistant Foremen. First, the Amtrak Agreement did not provide a wage increase. Rather, the Agreement provided an "incentive allowance," and expressly stated, "This allowance is separate and apart from the hourly rate of pay and is not subject to future general wage increases or cost of living adjustments."

Second, as Carrier points out, the incentive allowance was part of a much larger Agreement between the Organization and Amtrak. The Agreement included numerous rules modifications and also provided that Amtrak could use outside contractors to cut and clear trees from the vicinity of overhead wires and signal systems. We cannot tell from the record presented to us, what, if anything, the Organization may have traded off to obtain the incentive allowance. Third, when viewed in the context of the other negotiated wage adjustments and the two arbitrated wage adjustments in connection with CDLs, the Amtrak Agreement is clearly an outlier, a status which minimizes its probative value as to what the parties before us would have agreed upon as the wage adjustment had they reached agreement.

The record reflects the following agreed-on wage adjustments:

Denver & Rio Grande Western Railroad - $.45 not subject to general wage increases of cost-of-living allowances.[9]

Soo Line Railroad - $.30 per hour differential for laborers, welders or carpenters assigned to positions that include truck driving requiring DOT certification for the former Milwaukee Road property; does not apply to foremen and assistant foremen.

Indiana Harbor Belt Railroad - employees other than the regular operator assigned to operate a vehicle requiring a CDL receive an additional $.30 per hour for the entire day.

Maryland & Pennsylvania Railroad - $.30 per hour for the primary driver and $.15 per hour for all other employees required to have a CDL.

Norfolk Southern Railroad - as part of the integration of former ConRail property extended the ConRail arbitrated CDL differential to the NW-Wabash property and increased it to $.40.

CSX - as part of the integration of the former ConRail property extended the arbitrated ConRail CDL differential to the entire property.

GTW - increased the arbitrated CDL differential to $.50 in 2008.

BNSF - signed a non-referable CDL agreement in 2006.

We find it particularly significant that both of the Boards that arbitrated CDL-related wage adjustments awarded differentials of $.30 per hour. As noted previously, both Awards covered foremen. PLB 5542 observed that of the existing negotiated CDL differentials, the Soo Line agreement "clearly and unambiguously predicates the additional $.30/hour on the '. . . new and additional skills level not normally required to laborers, welders and carpenters.'" Award No. 2 at page 7. The Board adopted the $.30 per hour differential as the appropriate wage adjustment to award in the case before it. In the GTW Award, the Board surveyed the negotiated agreements and awarded a differential of $.30 per hour, "find[ing] no good reason to deviate from the $.30/hourly differential established by Award no. 2 of PLB 5542 and endorsed by most of the negotiated agreements to date."

We too are unable to find a reason to deviate from the differential of $.30 per hour awarded in the only two prior CDL differential arbitrations. An imposed differential should be relatively modest unless the Organization has made a strong case for more, something the Organization has failed to do in the case before us. Any increases in the differential should be left to the parties to resolve through future neogitations.

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[9]Carrier notes that this Agreement terminated in 1998 when the D&RGW was consolidated under the UP Agreement.

AWARD

Based on the entire record before it and for the reasons set forth above, the Board answers the Questions at Issue as follows:

As posed by the Carrier:

Question 1 - The introduction of large sophisticated trucks requiring a commercial driver's license for their operation and the requirement that Foremen and Assistant Foremen drive those trucks constitute a change in work methods.

Question 2 - yes

Question 3 - c, an intermediate rate of $.30 per hour shall apply whenever the bulletin requires that a Foreman or Assistant Foreman have a CDL.

As posed by the Organization:

c, an intermediate rate of $.30 per hour shall apply whenever the bulletin requires that a Foreman or Assistant Foreman have a CDL.

Martin H. Malin, Chairman

D. A. Ring
Carrier Member

S. V. Powers
Employee Member

Dated at Chicago, Illinois, December 7, 2009