

PUBLIC LAW BOARD NO. 5542

Case No. 2
Award No. 2

PARTIES TO DISPUTE:

Brotherhood of Maintenance of
Way Employees

-and-

Consolidated Rail Corporation

QUESTIONS AT ISSUE:

a) Is the agreement proposed by the Employees or the Carrier more appropriate, as contemplated by Letter No. 9, in addressing issues relating to the governmental requirement that employees who operate certain classes of vehicles obtain commercial driver's licenses?

b) If the answer to the question above is Neither, what agreement or agreement provisions is deemed by the Board to be appropriate?

FINDINGS:

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

That the parties were given due notice of the hearing;

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

That this Board has jurisdiction over the dispute involved herein.

The Federal Commercial Motor Vehicle Safety Act of 1986 mandated that any corporation whose employees operate commercial vehicles on public roads must ensure that they are qualified to operate Commercial Motor Vehicles. Commercial Motor Vehicles are generally those vehicles in excess of 26,000 pounds, gross vehicle weight, including any unit in tow with a gross vehicle weight of more than 10,000 pounds. Vehicles carrying hazardous materials and vehicles carrying 16 or more passengers are also defined as Commercial Motor Vehicles under the Federal Motor

Carrier Safety Regulations. The Federal Commercial Motor Vehicle Safety Act of 1986 required every operator of a Commercial Motor Vehicle to obtain a Commercial Driver's License (CDL).

Commercial Driver's Licenses are issued by each state. However, the states are required to follow Federal Highway Administration (FHA) rules and regulations in issuing CDL's. Drivers must pass a written examination that consists of 66 questions and they must also pass a road test in order to obtain a CDL. Drivers must be physically qualified every two (2) years.

On July 28, 1992, the Brotherhood of Maintenance of Way Employees (hereinafter referred to as the Organization or BMWE) and the Consolidated Rail Corporation (hereinafter referred to as Conrail or the Carrier) executed sixteen (16) side letters contemporaneous with a collective bargaining agreement that was also signed on July 28, 1992. Side Letter No. 9 is the subject of this dispute. Side Letter No. 9 provides as follows:

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

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

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

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

The Select Committee established pursuant to Side Letter No. 9 resolved all of the aforementioned issues save for Item 1 involving commercial drivers' licenses. On November 30, 1994, Public Law Board No. 5542 issued Award No. 1 ruling as follows:

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

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

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

In accordance with the Agreement establishing PLB 5542 the parties were obligated to attempt to reach agreement and resolve all outstanding issues involving CDL's within 60 days of the date of the Award. The parties met on January 5, 1995 to discuss these issues. Subsequent meetings followed on January 16 and March 29, 1995. On January 5, 1995 the BMW submitted a proposal to resolve issues related to CDL's. The Carrier responded to this proposal on January 16, 1995 and made a counter proposal. On March 29, 1995 the Carrier submitted a revised proposal. The parties met on March 29, 1995 but were unable to resolve their differences.

The parties have been unable to resolve the outstanding issues concerning positions which list a CDL as a requirement to hold either a regular or relief driver position. Accordingly, this Board must determine whether the Carrier's or the BMW's proposal is more appropriate. The Board also has the authority to disregard the proposal of either party and impose an independent resolution of the outstanding issues.

The parties are apart on seven (7) issues relating to the working conditions that will govern employees who will be required to obtain a Commercial Driver's License. The areas of disagreement are as follows:

1. CDL licensing fees
2. Reimbursement for CDL training
3. Access to Conrail vehicles to take CDL tests
4. CDL rate differential
5. Job classifications to which CDL qualifications will apply
6. Allocation of positions requiring a CDL
7. Grandfather clause

1. CDL licensing fees

The BMWWE proposes that the Carrier reimburse employees for all fees necessary to obtain and maintain a CDL whereas Conrail is willing to reimburse them for the difference between the normal cost of their regular driver's license and the cost of the CDL. The Organization's proposal is more appropriate than the Carrier's proposal, in the opinion of this Board, since it will reimburse those employees who might not otherwise obtain a regular driver's license the cost of obtaining a CDL. Therefore, Conrail should bear the full cost of the licensing fees necessary for employees to obtain a CDL.

2. Reimbursement for CDL training

Conrail is willing to reimburse any active or furloughed employee the cost of tuition to an accredited school after receipt of official notification of the employee's successful completion of a CDL training course subject to the maximum amounts payable under the Summary of Continuing Education Assistance Plan. The Organization is willing to accept the Carrier's proposal provided that the Continuing Education Assistance Plan is contractually binding and subject to change only through the Railway Labor Act.

Currently the maximum lifetime reimbursement under Conrail's Continuing Education Assistance Plan is \$20,000 for each employee. This is more than adequate to reimburse employees for the cost of CDL training, in the judgment of this Board. Consequently, we find the Carrier's proposal more appropriate than the Organization's.

3. Access to Conrail vehicles to take CDL tests

The BMW proposes that employees be permitted to use an appropriate Conrail vehicle to take CDL tests provided that written request to use such vehicle is made to a designated Conrail officer no less than five (5) working days prior to the CDL test. Conrail shall designate the officers to receive such requests, in writing, with a copy to the General Chairmen and copies posted at all reporting locations throughout the system.

The Organization further proposes that Conrail's failure to provide a vehicle for CDL qualification upon proper written request will result in the employee being considered CDL qualified for the purpose of job assignments until the next available CDL test for which Conrail provides a vehicle for testing purposes.

Conrail agrees that upon not less than five working days written request from an employee (active or furloughed) to a designated Conrail officer it will provide a vehicle for use by employees who are taking the CDL driving test. Conrail will designate the officers to receive such requests in writing with a copy to the General Chairmen and a copy posted at all reporting locations throughout the system. However, Conrail wants the right to postpone granting the use of a company vehicle based on the requirements of service, vehicle availability and the availability of a qualified employee to transport the vehicle to and from the examination site.

It is the opinion of this Board that the Carrier's proposal is more appropriate than the proposal advanced by the Organization. Naturally, an employee taking a CDL driving test needs an appropriate vehicle to take the test. The Carrier, of course, has the requisite vehicles and is willing to make them available to both active and furloughed employees subject to the requirements of its service.

We consider the Carrier's proposal a reasonable accommodation between the employees' need for an appropriate motor vehicle to take the CDL driving test and Conrail's necessity for these vehicles to operate its business. However, it is our opinion that if an employee is adversely affected by the unavailability of a Conrail vehicle or personnel to transport the vehicle to the examination site that employee's seniority should be adjusted when he or she obtains a CDL. With this addendum, we deem Conrail's proposal to be more appropriate than that submitted by the Organization.

4. CDL rate differential

The BMWWE proposes that employees assigned to positions which list CDL qualifications as a requirement to hold the positions, except relief drivers, be granted a rate differential of \$1.50 per hour added to their regular rate of pay. Track and B&B relief drivers would be allowed a rate differential of \$.50 per hour when not operating a vehicle and \$1.50 per hour for any day that they operate a vehicle requiring a CDL for more than two (2) hours under the BMWWE's proposal.

The Carrier is opposed to any rate differential for employees who are assigned to positions listing CDL qualifications as a requirement.

The parties have an underlying dispute over whether employees who are required to obtain a CDL are entitled to additional remuneration. Both the Organization and the Carrier have submitted a plethora of evidence and arguments in support of their respective positions. They have made very persuasive and cogent arguments to support their positions.

Based on the extensive record before us, this Board is convinced that employees are entitled to additional compensation for obtaining a CDL even though it was the Federal Government, not Conrail, that imposed this requirement on them. Although the fundamental nature of the work has not been changed by the obligation to obtain a CDL, nevertheless additional responsibility has been placed on employees by FHA regulations. For instance, employees subject to the Federal Motor Carrier Safety Regulations must inspect their vehicles before each trip and maintain a record of their duty status. They are subject to criminal penalties if they fail to maintain duty status logs for each trip.

Employees operating Commercial Motor Vehicles must also complete a vehicle inspection report at the completion of each day's work. They must be satisfied that a vehicle is safe before driving it. They must also comply with complex regulations, including those governing hazardous materials if they transport hazardous materials.

This Board is not convinced that obtaining a CDL requires additional "knowledge" or "skills" as the Organization maintains. As noted heretofore, it does increase an employee's responsibility, however, due to the extensive Federal Regulations governing operation of a Commercial Motor Vehicle. Even though that added responsibility has been externally imposed on Conrail and its employees, it justifies some additional compensation, in our view.

This Board is unable to find a rational basis for the \$1.50/hour rate differential proposed by the BMW. This would constitute about a 10% wage adjustment and give employees approximately \$16.28/hour in wages. The added responsibility imposed on operators of Commercial Motor Vehicles does not justify such an extensive wage increase, in our opinion.

It is noteworthy that on two or three rail freight carriers employees represented by the Brotherhood of Maintenance of Way Employees who operate vehicles requiring a CDL receive a differential allowance. On the Denver and Rio Grande Western Railroad Company they receive an additional \$.45/hour and on the Soo Line Railroad Company they are paid a differential of \$.30/hour. 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. Additionally, on the Illinois Central Railroad employees represented by the Brotherhood of Railroad Signalmen are reimbursed the cost of obtaining and maintaining a Class "A" CDL and receive an annual payment of \$25.00.

To this Board, the rate differential negotiated for section laborers, welders and carpenters on the Soo Line Railroad clearly and unambiguously predicates the additional \$.30/hour on the "...new and additional skills level, not normally required of laborers, welders or carpenters." Such a rate differential would be appropriate for employees on Conrail who are assigned to positions requiring a CDL, in our judgment. They shall therefore receive an additional \$.30/hour when assigned to positions requiring a Commercial Drivers License.

5. Job Classification to which CDL qualifications will apply

The BMW proposed that CDL qualifications not be applied to any foreman or assistant foreman position or to on-track machine operators. It further suggests that repairmen and welders may be required to possess a CDL if they are assigned to positions to which a truck legally requiring a CDL is regularly assigned. The Organization's proposal would not require off-track machine operators to obtain a CDL unless a CDL is legally required for the operation of the machine or a truck is regularly used by the operator to transport the machine on the highway. The BMW submits that foremen simply cannot properly discharge their supervisory safety responsibilities if they are also required to operate a Commercial Motor Vehicle.

Conrail finds the Organization's proposal overly restrictive and this Board agrees. The Carrier has convinced this Board that it is necessary for many different classes of employees to operate commercial motor vehicles. Currently, repairmen, welders, maintenance gang foremen and certain machine operators all operate vehicles requiring a CDL. In our view, the Carrier has the managerial right to assign operation of a commercial motor vehicle to classifications other than vehicle operators. This includes foremen who may serve as backup drivers in the absence of the regular driver. We find Conrail's proposal more appropriate than the Organization's and therefore adopt it.

6. Allocation of positions requiring a CDL

The Carrier's proposal would limit the number of positions requiring CDL qualifications to one and one-half (1.5) the number of vehicles assigned to production and B&B gangs. This will allow for backup drivers when there is an emergency or a vacancy. It will allow the Carrier to have sufficient qualified drivers to maintain efficient operations.

This Board finds Conrail's proposal more appropriate than the Organization's proposal which restricts relief driving duties to one classification only, namely a "trackman/relief driver." The Carrier has convinced us that it needs more than one classification to serve as relief drivers. Accordingly, the Carrier's proposal is adopted.

7. Grandfather clause

The BMW and Conrail both wish to protect employees who, through no fault of their own, are unable to obtain a CDL. However, in our judgment, Conrail's proposal is more appropriate. Under the Carrier's proposal, the senior employee would be furloughed only when he or she could not exercise seniority to a position occupied by a junior employee. It would also give the Organization the opportunity to assist in arriving at an acceptable solution to situations where an employee simply is unable to obtain a CDL through no fault of his or her own.

We find Conrail's proposal to address these unusual circumstances more appropriate than the Organization's. However, we do not believe that an employee's inability to obtain a CDL should be limited to reasons of a "medical condition or illiteracy" as proposed by Conrail. Rather, other similar circumstances should also be applicable. With this addendum, Conrail's proposal is adopted.

AWARD:

The Questions at Issue are disposed of in accordance with the aforementioned Findings.

Carrier is directed to make the within AWARD effective or or before thirty (30) days from the date hereof.

Robert M. O'Brien
Robert M. O'Brien, Neutral Member

Steven V. Powers
Steven V. Power, Organization Member

Jeffrey H. Burton
Jeffrey H. Burton, Carrier Member

Dated: 3/29/96

PUBLIC LAW BOARD NO. 5542

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

-and-

CONSOLIDATED RAIL CORPORATION

INTERPRETATION OF AWARD NO. 2

Award No. 2 of Public Law Board No. 5542 was finalized on March 29, 1996 and was implemented by the Consolidated Rail Corporation (hereinafter referred to as Conrail or the Carrier) on April 29, 1996. On May 17, 1996, the Brotherhood of Maintenance of Way Employees (hereinafter referred to as the Organization or the BMWE) requested an interpretation of Award No. 2. The Organization requested the Neutral Member of Public Law Board No. 5542 to render an interpretation of Award No. 2 on the following issues:

1. Are the \$.30 wage differential and Conrail's obligation to pay the entire CDL fee retroactive in their application or prospective only?
2. May Conrail escape payment of the \$.30 wage differential by omitting CDL qualifications from a particular position and then assigning the incumbent of that position to drive a vehicle requiring a CDL?
3. Should "Section 5" of Conrail's CDL agreement proposal dated April 22, 1995 be included in the final CDL Agreement?
4. How shall the \$.30 wage differential be applied to:
 - a) overtime
 - b) vacation pay
 - c) holiday pay

The aforementioned Request #3 was subsequently withdrawn by the BMWE. The three remaining requests for interpretation will be discussed below.

INTERPRETATION REQUEST NO. 1

The first issue upon which the BMW requests an interpretation is as follows:

Are Conrail's obligations to pay the additional \$.30/hour and the full cost of the CDL licensing fees retroactive in their application or prospective only? Assuming Conrail's obligations in this regard are retroactive, to what date are they retroactive?

Notwithstanding the Organization's contention, Side Letter No. 9 dated July 28, 1992, did not embody any CDL terms or conditions. On the contrary, Side Letter No. 9 provided for the creation of a Select Committee to consider four (4) questions including:

"Issues relating to the governmental requirement that employees who may operate certain classes of vehicles obtain commercial drivers' licenses."

Side Letter No. 9 did not grant any employees on Conrail a monetary differential for obtaining a CDL nor did it reimburse any employees the expenses they incurred in obtaining a CDL. In fact, the Organization and Conrail had a serious disagreement over both these points and they were submitted to this Board for resolution.

It must be stressed that at no time prior to May 17, 1996, when the Organization requested an interpretation of Award No. 2, was the question of the retroactivity of a CDL differential and the cost of obtaining a CDL ever mentioned. It was not raised before the Select Committee created pursuant to Side Letter No. 9 nor was it submitted to this Board for our consideration in Award No. 2.

Since the question of the retroactive application of any remuneration allowed Conrail employees for obtaining a CDL and the cost incurred in obtaining such a license was not an issue before this Board in Award No. 2, we lack jurisdiction to address this subject regardless of the merits, if any, of this claim

INTERPRETATION REQUEST NO. 2

The second issue upon which the BMWWE requests an interpretation of Award No. 2 is as follows:

May Conrail escape payment of the additional \$.30/hour by omitting CDL qualifications from a particular position and then assigning the incumbent of that position to drive a vehicle requiring a CDL?

It appears that the Organization's apprehension that Conrail may avoid compensating employees the \$.30/hour CDL differential by omitting CDL qualifications from positions then assigning the incumbent of those positions to drive a vehicle requiring a CDL are groundless.

The Carrier has agreed that it will continue to advertise and assign CDL positions when the work involves the normal operation of a requisite vehicle during the tour of duty or when the position is a required backup driver for a CDL required position. It may become necessary under special circumstances for the Carrier to utilize an employee who has a CDL to operate a covered vehicle although that employee does not occupy a CDL required position. In that case, the employee would be compensated at the higher rate in accordance with the parties' collective bargaining Agreement. Therefore, the concerns expressed by the Organization in this request for an interpretation of Award No. 2 are unfounded and thus there is no reason for this Board to address the BMWWE's interpretation request #2.

INTERPRETATION REQUEST NO. 3

The final subject upon which the BMWWE requests an interpretation of Award No. 2 is as follows:

Did the Neutral Member intend to exclude the additional \$.30/hour from the operation of the vacation, holiday and overtime rules in the Schedule Agreement? If not, how shall the additional \$.30/hour be applied to:

- a. vacation pay
- b. holiday pay
- c. overtime

Initially, it must be clearly understood that the \$.30/hour CDL allowance granted Conrail employees by Award No. 2 was not intended to become part of their regular straight time rate of pay. Rather, as Award No. 2 plainly stated, Conrail employees are

entitled to a differential of \$.30/hour to compensate them for the additional responsibility associated with a CDL. This differential was not intended to become part of their basic hourly rate of pay.

a. Vacation Pay

On Conrail, vacations are governed by Rule 36 of the Schedule Agreement with the BMW. Rule 36 incorporates by reference the National Vacation Agreement of December 17, 1941, as amended, as well as the agreed-upon interpretations of the National Vacation Agreement. Article 7 of the National Vacation Agreement provides, in pertinent part, as follows:

Allowances for each day for which an employee is entitled to a vacation with pay will be calculated on the following basis:

(a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment.

Article 7(a) was explained in the National Vacation Agreement Interpretations dated June 10, 1942 as follows:

Article 7

"Article 7(a) provides:

An employee having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment.

This contemplates that an employee having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the Carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing Carrier."

The June 10, 1942 Interpretations of the National Vacation Agreement clearly stated that employees having a regular assignment will not be any better or worse off while on vacation as to their daily compensation than if they had remained at work on their assignment. The only exceptions are for casual or unassigned overtime or pay from others than the employing carrier. The \$.30/hour CDL differential is not casual or unassigned overtime, nor is it pay from any carrier other than Conrail.

The Neutral Member of this Board agrees with the Organization that an employee holding a regular assignment requiring a CDL would be "...worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment..." if Conrail did not include the \$.30/hour CDL differential in employees' vacation pay. Consequently, in accordance with the June 10, 1942 agreed-upon interpretation to the National Vacation Agreement, which has been incorporated into Rule 36 of the Schedule Agreement with the BMW, the \$.30/hour CDL differential must be included in an employee's vacation pay.

b. Holiday pay

Paid holidays for non-operating crafts in the railroad industry were instituted in the National Agreement of August 21, 1954. The holiday provisions of that National Agreement, as amended, now appear in Rule 13 and Rule 14 of the Conrail Schedule Agreement with the BMW. Rule 14(a) provides as follows:

RULE 14 - PAID HOLIDAYS

(a) Subject to the qualifying requirements applicable to regularly assigned employees contained in paragraph (b) hereof, each regularly assigned employee shall receive eight (8) hours' pay at the straight time rate of the position to which assigned for each of the holidays enumerated in Rule 13.

Subject to the applicable qualifying requirements in paragraph (b) hereof, other than regularly assigned employees shall be eligible for the paid holidays or pay in lieu thereof, provided (1) compensation for service paid him by the Company is credited to eleven (11) or more of the thirty (30) days immediately preceding the holiday and (2) he has had a seniority date for a least sixty (60) days or has sixty (60) days of continuous active service preceding the holiday beginning with the first day of compensated service, provided employment was not terminated prior to the holiday by resignation, for cause, retirement, death, noncompliance with the union shop agreement, or disapproval of application for employment.

Rule 14(a) specifically states that regularly assigned employees shall receive eight (8) hours of pay "... at the straight time rate of the position to which assigned..." for each of the enumerated holidays. As observed heretofore, the \$.30/hour differential granted Conrail employees who are required to obtain a CDL is not included in their straight time rate of pay. Rule 14 allows regularly assigned employees "... eight (8) hours' pay at the straight time rate of the position to which assigned for each of the holidays enumerated in Rule 13..." (emphasis added). Since the \$.30/hour CDL differential is not part of the employees' straight time rate of pay it is not included in their holiday pay.

c. Overtime

Rule 11 of the Conrail Schedule Agreement provides, in pertinent part, as follows:

(a) Time worked preceding or following and continuous with a regularly assigned work period shall be computed on the actual minute basis and paid for at time and one-half rates, with double time computed on the actual minute basis after sixteen (16) continuous hours of work in any 24 hour period computed from the starting time of the employee's regular shift....

(d) Time worked in excess of forty (40) straight-time hours in any work week shall be paid at time and one-half rates except where such work is performed by an employee due to moving from one (1) assignment to another or where days off are being accumulated in accordance with the provisions of Rule 10.

Rule 11(a) provides for pay at time and one-half rates for time worked preceding or following and continuous with regular assigned work periods, with double time after sixteen (16) continuous hours of work in any 24 hour period. Rule 11(d) requires pay at time and one-half rates for time worked in excess of forty (40) straight time hours in any work week. Since an employee assigned to a position requiring a CDL does not have a straight time rate pay that includes the \$.30/hour CDL differential the \$.30/hour differential is not included in time and one-half and double time calculations under Rule 11 of the Schedule Agreement.

Respectfully submitted,

Robert M. O'Brien

Robert M. O'Brien,
Neutral Member of PLB 5542

Dated: January 27, 1997