In the Matter of Arbitration

Public Law Board No. 6641
Issues: Displacement & Assignment

National Railroad Passenger Corporation
(Amtrak)

vs

Brotherhood of Maintenance of Way Employees

Award Issued: January 18, 2004

Suntrup Arbitration Services
Winnetka, Illinois

PLB 6641

In the Matter of Arbitration

Brotherhood of Maintenance of Way Employees	)	
	)	
	)	
vs	)	**Issue(s): Displacement & Assignment**
	)	
National Railroad Passenger Corporation (Amtrak)	)	
	)	

Introduction

On February 10, 2003 representatives from the Brotherhood of Maintenance of Way Employees (BMWE) and the National Railroad Passenger Corporation (Amtrak) signed an agreement to arbitrate a contract interpretation dispute.

This dispute had its genesis in a letter written to Amtrak's labor and employment department by outside counsel to BMWE on June 3, 2002. In that letter counsel stated that it was the belief of the BMWE that Amtrak was improperly applying certain provisions of the parties' labor Agreement to members of the craft who were subject to one-for-one training. The latter is a type of training enumerated on this property in what is known as the 2000 *Thorton* Consent Decree. The subject-matter of the Decree, including the provision dealing with one-for-one training, was mutually negotiated by the parties under the supervision of the courts. At issue are the displacement and assignment rights of the one-for-one trainees. Related to the union's concern with the alleged violation of its labor Agreement are considerations involving a sidebar agreement known as the parties' 1977 Training Agreement, as subsequently amended and updated.

Absent settlement of the parties' differences over these matters the BMWE's general chairman of the union's Pennsylvania Federation filed a formal grievance with Amtrak's director of labor relations on February 19, 2003. This grievance was denied, then handled on property in the proper manner under Section 3 of the Railway Labor Act and the labor Agreement. Since the grievance could not be resolved the parties agreed to bring the matter to arbitration. The parties' arbitration agreement was subsequently designated by the National Mediation Board (NMB) as Public Law Board (PLB) No. 6641.

On May 28, 2003 the instant arbitrator was advised by the parties to PLB 6641 that he had been chosen by them to arbitrate their dispute, as outlined in Attachment A to the arbitration agreement, copy of which was forwarded to the arbitrator.

An arbitration hearing was held in Philadelphia on August 26, 2003. In view of the arbitrator's schedule in the fourth quarter of the 2003 calendar year he requested, and the parties agreed, to waive the standard time-line provisions found in Section 7 of their arbitration agreement for issuing a.final and binding Award on the matter now before this Board. The arbitrator would like to thank the parties for their courtesies and consideration in this regard.

Questions at Issue

Appendix A of the arbitration agreement states the following:

> Does Amtrak violate Rules 1, 4, 18 and/or 22 of the collective bargaining Agreement dated May 19, 1976 (as amended and updated April 1, 1999) when it:
>
> (a) refused to allow senior employees to displace junior employees from positions when the junior employee is subject to one-for-one training

under the *Thorton* Consent Decree; or

(b) requires an employee who has completed one-for-one training under the *Thorton* Consent Decree on a position to remain on that position for 180 days (unless said employee is able to bid to an equal or higher rated position)?

Background

Although the parties request that the arbitrator interpret the seniority provisions of their collective bargaining Agreement (CBA) as this relates to employees subject to one-for-one training, there are really three documents that the parties reference repeatedly in their arguments in this case, and which have a bearing on the resolution of the grievance at bar.

These three documents are the CBA; the parties' 1977 Training Agreement; and the Consent Decree cited in the foregoing. Applicable portions of all of these documents are cited here for the record.[1] This forum has no authority to interpret the Consent Decree.[2] Nevertheless, that Decree does reference certain issues which have led the parties to subsequently disagree over the interpretation and application of their CBA and the Training Agreement, the latter of which is a special agreement attached to the former. This forum does have authority to provide the parties with a resolution of their disagreements over the

---

[1]Copies of these documents are found as exhibits along with the Briefs by the parties to this case. For the sake of brevity, when an exhibit under scrutiny is duplicated by the parties only one party's exhibit will be cited with the other's included by reference.

[2]Carrier's Exhibit 1. United States District Court for the District of Columbia. James Thornton, *et al.* Plaintiffs v. National Railroad Passenger Corporation ("Amtrak"), Defendant. Civil Action No. 98CV0890(EGS)(Order signed: June 21, 2000). See III, (B.) inter alia. The Carrier's observations on this point are well taken i.e. "The interpretation of the Consent Decree is specifically limited to the U.S. District Court Judge overseeing the Consent Decree" (Carrier's Submission @ pp. 9-10).

application of their CBA and Training Agreement.

The General Labor Agreement[3]

Rule 1 - Assignment to Positions

In the assignment of employees to positions under this Agreement, qualifications being sufficient, seniority shall govern.

The word "seniority" as used in this Rule 1 means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster.

Rule 2 - Qualifications for Positions (Cross Training)

.....

(d) When on-the-job training opportunities to operate Maintenance of Way machinery occur in a gang, employees within that gang who request such training in writing to the General Foreman or higher level supervisor of that gang shall be given the opportunity in seniority order. Such employees shall first be given the opportunity to qualify on AMT-1 and AMT-2 rules, as appropriate, and then if so qualified, the opportunity to train with a qualified machine operator as requirements of service permit.

Should an employee so covered fail to make sufficient progress and/or qualify, he will be removed from such training and will be ineligible for consideration for future on-the-job training on the involved and similar machinery for a period of one year. If the employee so removed disputes his removal, the employee, or his representative may file a protest pursuant to Rule 75 with the appropriate Assistant Chief Engineer. Any other disputes under this Section (d) may also be progressed pursuant to Rule 75.

Rule 4 - Temporary Positions and Vacancies - Method of Filling

(a) A position or vacancy may be filled temporarily pending assignment. When the new positions or vacancies occur the senior available employees will be given the preference, whether working in a lower rated position or in the same grade or class pending advertisement and award.

---

[3]BMWE Exhibit 1. Agreement between Amtrak and the Brotherhood of Maintenance of Way Employees, May 19, 1976, Updated April 1, 1999.

(b) An employee so assigned may be displaced by a senior employee working in a lower rated position or in the same grade or class, provided displacement is made prior to the starting time of the assigned tour of duty, by notice to the Foreman or other officer in charge. The latter employee will not be subject to similar displacement from such temporary assignment by a senior employee unless such employee is exercising seniority in accordance with Rule 18.

(c) Employees temporarily assigned in accordance with the foregoing will be governed by the starting time, headquarters, tour of duty and rate of pay of the position so filled.

The provisions of this paragraph (c) apply only when positions are filled by Amtrak in accordance with paragraph (1) of this Rule 4, and when an employee in the exercise of seniority displaces a junior employee.

The provisions of this paragraph (c) do not apply to employees assigned by Amtrak to fill vacancies or new positions pending assignment after they have expressed a desire not to be so assigned.

(d) Temporary vacancies which are not advertised will be filled in like manner.

(e) The word "senior" as used in this Rule 4 means the senior qualified employee on the roster involved and then on any seniority roster in the same sub-department, and then on any seniority roster.

Rule 18 - Reduction in Force - Retaining Rank on Roster

(a) When the force is reduced, employees affected shall have the right, within ten (10) days after the effective date of such reduction, to elect to take furlough or to exercise seniority to displace junior employees in accordance with the following provisions of this Rule.

An employee displaced in reduction of force who elects to exercise seniority may exercise seniority onto any position for which he is qualified by bid or displacement without loss of seniority. The requirement to exercise in class is deleted.

(b) The Carrier may force assign the junior qualified employee in a working zone as defined in Rule 14 who is working in a lower class on the same shift to a vacancy in the same working zone which has gone no bid. A qualified employee is considered an employee who is qualified on the position to be

filled and who has established seniority in the class of that position. Force assignment shall be made in writing to the affected employee and a copy of such written notice shall be promptly furnished the General Chairman. An employee who refuses to fill such assignment will forfeit seniority in the class of the position refused and all higher classes on the same seniority roster.

(1) The Carrier will not force assign an employee to a position in a work zone if another employee in the work zone possesses the necessary qualifications for the position although not having established seniority and has made application for such position.

(2) Temporary vacancies will not be filled by the force assignment procedure.

(3) Employees will not be force assigned to vacant positions for which they have no seniority.

(4) Employees not working in gangs covered by Rules 89-90 at the time furloughed will not be forced to cover positions in gangs established pursuant to those rules.

(c) If a vacancy cannot be filled in accordance with (b) above the appropriate Assistant Chief Engineer, or his representative will promptly meet with the appropriate General Chairman or his representative to determine how to fill the vacancy. However, the time required to fill the vacancy shall not be more than ten (10) days or the Carrier may assign the junior qualified employee in the working zone in a lower class.

(d) It is not the desire of Amtrak and the Organization to reduce the total compensation of an employee force assigned under this rule. Upon written request by an employee force assigned under this rule, or his representative as designated in Rule 83 to the Division Engineer, with copy to the General Chairman, these respective officers, or their representatives, shall promptly meet for the purpose of determining if there are mutually agreeable ways to minimize any loss in total compensation.

(e) A position filled by force assignment under this Rule shall continue to be advertised in accordance with the provisions of Rule 3 until filled through normal advertisement and assignment process or abolished. The incumbent of such position shall be allowed a displacement in accordance with this rule should the position to which the incumbent was force assigned be subsequently

awarded to another employee in accordance with Rule 3.

(f) An employee furloughed as the result of reduction of force, desiring to be recalled to active service shall file his name and address, as well as subsequent notices(s) of change, in writing with the officer(s) designed by the Carrier. The employee will prepare three (3) copies of such notice and/or change notice(s), retaining one copy and filing two (2) copies with the officer referred to. One copy of such notice will be forwarded by Amtrak to the General Chairman.

In the event an employee fails to file notice as set forth above, Amtrak may request, by certified mail to the employee's address of record, that the employee file such notice. Failure to comply with such request may result in the application of Rule 21-A.

Amtrak shall not be subject to financial liability for failure to recall employees who do not file their name and address as required above.

The requirement for filing name and address will not apply to an employee who exercises seniority in reduction of force to another position covered by this Agreement.

Rule 22 - Returning to Duty After Leave of Absence

An employee returning to duty after leave of absence, vacation, sickness, disability or suspension shall, within five (5) days, after reporting as ready for duty, return to his former position, exercise seniority to any position advertised during his absence, or may displace any junior employee promoted to a position under this Agreement during his absence, subject to Rule 2(a).

If, during the time an employee is off duty account leave of absence, vacation, sickness, disability or suspension, his former position is abolished or filled by a senior employee in the exercise of seniority, he may exercise seniority as outlined in Rule 18.

Employees displaced from their regular positions by the return of an employee from leave of absence, vacation, sickness, disability or suspension, shall exercise seniority as outlined in Rule 18.

The 1977 Training Agreement[4]

1. The Carrier will establish training programs for the following classes of employees:

   (a) Track foremen
   (b) Track foremen Trainees
   (c) Track Welders/Structural Welders
   (d) Machine/Equipment Operators
   (e) B&B Foremen
   (f) B&B Foreman Trainees
   (g) Maintenance of Way Repairmen

.....

(6)(b) Those employees who successfully complete the training shall be awarded the positions covered by the training. Employees awarded the positions shall stay on the position for a period of 6 months except when bidding to a higher rated position. The senior employee who completes the training shall be awarded the position. Seniority shall begin on the date of the award for employees who successfully complete the training and are awarded the position.

(6)(c) Employees who successfully complete the training who are not awarded positions may be assigned to positions that go to (no qualified bidders) that are in the same work zone for the positions for which the training was initially posted in revcerse seniority order. Such employees stand for assignment to such positions for a period of six months and must remain on the position for six months unless bidding to a higher rated position. An employee so assigned may be released by agreement between the General Chairman and the Assistant Chief Engineer in cases of hardship. No employee may be so assigned more than once for each training course completed under the provisions of this training agreement.

The *Thorton* Consent Decree

IV (A.)(6.) - Relationship to CBA

Until it is determined which, if any, of the provisions herein shall be incorporated into

---

[4]BMWE Exhibit 2. Memorandum of Agreement between National Railroad Passenger Corporation and Its Employees in the Maintenance of Way Department Represented by the Brotherhood of Maintenance of Way Employees (August 26, 1977 updated through June 27, 1992).

the CBA pursuant to Part V, the provisions herein shall control over and supersede the provisions in the CBA to the extent of conflicts between them. To the extent that the CBA creates rights and obligations not addressed herein, those provisions shall continue in full force and effect.

IV (C.)(5.)(a) - One-for-One Training Opportunities

If no qualified employee bids for a Position, and there are no employees subject to assignment under the training agreement, the Position shall be automatically converted into a one-for-one opportunity, and shall be awarded to the BMWE applicant with first seniority in the class in which the assignment is made, and thereafter, in lower classes respectively in the order in which they appear on the seniority roster. The Position shall be posted in accordance with Rule 3 and 14 of the CBA (or the analogous provision of the CA). If there is no applicant in the applicable roster, then eligibility shall be determined according to the date applicants entered service in a Position. Such senior applicant shall be trained for up to thirty days, at the end of which period he or she may, where appropriate, be required to taken an examination to demonstrate his or her qualifications.

If an employee in a Position who receives one-for-one training lacks a roster date in such classification, and subsequent to the training the employee passes the test (or retest), if forty days pass and Amtrak has not rested the employee, the employee's roster date shall be the date that Amtrak awarded the training Position. An employee who fails a test (and retest unless such right is waived by the employee) shall be treated in accordance with Rule 6 or the CA (or analogous provision of the CA), and the Position shall be reposted.

Certain positions shall be exempt from one-for-one training. These Positions are: foreman, welders, MW repairmen, electricians, B&B mechanics, plumbers, cranes and the following general construction equipment Position: operators of backhoes, bulldozers, front-end loaders, bob cats, load graders, and similar construction equipment.

Discussion

The Organization argues that this dispute is "...over the interpretation and application

of provisions of three separate agreements to which Amtrak and the BMWE are party...".[5]

The Organization observes that Rules 1, 4, 18 and 22 of the CBA are typical rules found in labor agreements in the industry that permit employees to safeguard their seniority in a "...wide variety of circumstances through 'bidding' and 'bumping' procedures...". The Organization observes that the Training Agreement of 1977 sets forth the terms and conditions for employees to do classroom training for the job classifications outlined in Section 1 of that Agreement as cited in the foregoing.

The Organization walks the arbitrator through the CBA rules at stake in this case. The arbitrator will cite only the following, brief commentary by the BMWE on these matters for the record since the language of the rules is clear and unambiguous. It speaks for itself, and the CBA seniority rules themselves are not subject to disputed interpretation in this case although they do tend to be complex and involved which is a characteristic of labor Agreement seniority provisions between this craft and Carriers in this industry. This is primarily, if not only, due to the fact that the work done by members of the craft represented by the BMWE is geographically dispersed. Rule 1 of the CBA is what the BMWE calls a "...fundamental seniority rule...", which, when read in conjunction with Rule 3 of the CBA , which deals with the advertisement and assignment of positions, provides that "...when positions are advertised for applications, the senior applicant with sufficient qualifications shall be assigned...". Rule 4 instructs the parties on how to fill temporary positions or certain

---

[5]All quotes in this section are taken from the Organization's Submission and its correspondence with the Carrier while handling the case on property. For the sake of brevity and to avoid redundancy no additional specific cites will be noted here.

vacancies pending assignment. Rule 18 deals with the exercise of seniority "...following force reductions and recognizes the broad right of a senior employee to exercise seniority onto any position for which he qualifies without limitation...". And Rule 22 "...allows employees returning to duty after leave of absence, vacation, sickness, disability or suspension to exercise their seniority to claim positions held by junior employees..." given qualifications and specifications outlined in that same rule. The latter include such matters as whether a position was advertised during a returning employee's absence and so forth.

Outside of these four Rules, the only other rule of the CBA that has a bearing on this case, according to the BMWE, is what it calls the cross-training rule found at Rule 2(d). This CBA provision, according to the BMWE, provides for "...ad hoc on-the-job training opportunities..." as opposed to the more formal classroom training courses outlined in the Training Agreement. The BMWE finds Rule 2(d) significant for the purposes of this case because as a type of one-for-one training rule it somewhat approximates what the Consent Decree deals with in its own one-for-one provision at Section IV(C.)(5.)(b.)(6). But, according to the BMWE, "...during the term of the Consent Decree, Rule 2(d) has been superseded..." by the Decree's own cross-training provision which is found at Section IV (C.)(5.)(b.)(7).

The union observes that the Training Agreement that the parties signed in 1977 and then amended at various times thereafter established formal classroom training courses for different job classifications. That Agreement also addressed the "...bulletining of training courses, the selection of applicants, class hours, and pay of employees in training...". The

Agreement also provided for "...certain limitations on the seniority rights of employees who successfully completed the training courses...". According to the BMWE these latter limitations do not apply to one-for-one training as outlined in the Consent Decree and the Consent Decree does not say that this is the case.

According to the BMWE the 2000 Consent Decree "...identifies seven separate types of training...".The Decree deals with types of training opportunities in Section IV.(C.)(5.)(b.). This Section states that Amtrak and the BMWE shall continue their program of training under the Training Agreement. But it also states that there is a new approach that Amtrak must take to fill a position if there are no "...employees subject to assignment under the training agreement..." and it is the following. The "...position shall be automatically converted into a one-for-one training opportunity...". This is a new approach that the Carrier is to take in order to fill positions that are filled under neither the CBA nor the Training Agreement. This is not "ad hoc" cross-training, according to the BMWE. Rather, this is how an advertised position is to be filled by the Carrier absent candidates under the CBA or the Training Agreement.

The one-for-one training approach cannot be used for all positions by the Carrier. There are exclusions specifically stated in the Consent Decree. These exclusions where one-on-one training cannot be used include training on such positions as foremen, welders, B&B mechanics and so on. But the one-for-one provision does not exclude machine and equipment operators. The BMWE does not deny that those training for such latter assignments are also listed in Section 1(d.) of the Training Agreement.

Although machine and equipment operators are listed under the Training Agreement, and are not excluded from one-for-one training by the Consent Decree, the issue then becomes: are one-for-one trainees, after having completed their training under the Consent Decree, not eligible for the seniority exceptions found in the Training Agreement? It is at this point that the parties part ways. Amtrak answers this question in the affirmative. BMWE answers it in the negative.

When the Organization discovered that Amtrak was treating trainees who completed one-for-one training, for seniority purposes, as if they were successful trainees of the jointly negotiated Training Agreement procedures, it took umbrage which subsequently led to this case.

According to the BMWE there are no restrictions found in the Consent Decree that invalidate the intent of the seniority rules of the CBA. Those restrictions are only found in the Training Agreement and only apply to employees who have trained under this latter Agreement.

According to the BMWE both it and the Carrier admit that the Consent Decree is silent on holding employees on positions after one-for-one training is completed and it is also silent on limiting seniority rights in connection to positions related to one-for-one training. According to the BMWE the Carrier attempts to use this silence to its advantage. But this is an erroneous position for three reasons according to the BMWE. First of all, the Consent Decree makes Training Agreement and one-on-one employees mutually exclusive because the latter procedure is used only when no employees are subject to assignment under the Training

Agreement. Secondly, one-for-one training is not enumerated as a "slot" under the Consent Decree section dealing with the Training Agreement and ought not be dealt with as if it is. One-for-one training, and training under the Training Agreement, are different types of training, according to the BMWE, otherwise the Decree would not have dealt with one-for-one in a separate section as is the case. One-for-one training is quite different than the type of classroom training and so on contemplated under the Training Agreement. Had the parties wished one-for-one training to be included under the Training Agreement the parties could have negotiated that into the document that became the Consent Decree. They did not, according to the BMWE, do that.

If there is an analogy, according to BMWE, it would be that one-for-one training contemplated by the Consent Decree is somewhat analogous to the on-the-job cross training found in the CBA's Rule 2(d) cited earlier. And the "...CBA does not impose any limitations on seniority rights for employees who received on-the-job training..." under Rule 2(d). The BMWE observes that there are instances when qualifications on seniority are found in the Consent Decree but it does not apply to the relationship between one-for-one training and the Training Agreement. For example, the Consent Decree explicitly placed seniority qualifications for those obtaining CDLs. It states that Amtrak's operations under contract with the Massachusetts Bay Transit Authority will fall under the Training Agreement for the duration of the Decree. Finally, according to the BMWE, since there is no Consent Decree language to support Amtrak's position the Carrier uses bargaining history to support its position. Such should have no validity, according to BMWE, since it is bargaining

agreement language and not bargaining history that is under scrutiny here. Furthermore, Amtrak's reference to bargaining history violates the parole-evidence rule and it also violates a confidentiality agreement between the parties while bargaining was in process over the terms of the document that became the Consent Decree.

In short, the BMWE argues that the "...clear and unambiguous language of Rules 1, 4, 18 and 22, coupled with the equally clear and unambiguous language of Section IV (C.((5.)(B)(6) of the Consent Decree, are dispositive of this dispute...".

Argument by the Carrier is that the Consent Decree created a "...new training program referred to as 'one-for-one' training opportunities...". Under this new program on-the-job training techniques are used for unqualified senior employees to fill positions when there are no qualified applicants under the CBA for advertised vacancies in certain positions, and when there are no qualified employees to be trained for the positions under the Training Agreement. Under the one-for-one program a senior unqualified employees is assigned to the position and provided training for up to 30 days as so stated in the Decree. The one-for-one program is not classroom training for machinery and equipment operators, the Carrier argues, but it is hands-on training in the field under the auspices of a qualified equipment instructor.

According to the Carrier, Amtrak has "...applied the terms and conditions of the 1977...Training Agreement as amended..." to one-for-one trainees from the time it first started using one-for-one training after the issuance of the Consent Decree. In other words, it has applied the modified seniority provisions of the Training Agreement to one-for-one training since July of 2000. Although a question was raised about the manner in which the

Carrier was handling one-for-one employees as this relates to the exercise of seniority at an earlier point in time on property, the union did not formally raise this issue with the Carrier until June of 2002 when counsel for the union wrote to the Carrier's labor and employment deputy counsel that the Consent Decree provision dealing with one-for-one training "...at no time...restrict(s) bumping during the training period, (nor does it) provide for a 180-day forced assignment period, or state that one-for-one training falls under the Training Agreement...".[6] The Carrier disagreed with that assertion from the day it was formally brought to its attention. As noted this then led to the formal filing of a grievance by the BMWE which subsequently led to the instant arbitration.

According to the Carrier one-for-one is a training program. The Training Agreement deals with a training program. Therefore, one-for-one training ought to fall under the aegis of the Training Agreement. The Carrier also argues that it knew that it was expanding training opportunities when it negotiated one-for-one training into the language of the document which became the Consent Decree and that it did so only "...provided (that) there (would be) a return on the training investment...".[7] On this point the Carrier states that if the BMWE's position on the issue before this forum were to be accepted, then this would be tantamount to allowing "...employees to move from training program to training program without limitation

---

[6]BMWE Exhibit 4. The two attorneys involved in the first written, formal exchange over whether one-for-one trained employees were covered by the seniority provisions of the Training Agreement or not were both signers to the original Consent Decree. Signed copy found in BMWE Exhibit 1.

[7]All quotes in this section are taken from the Carrier's Submission and its correspondence with the Organization while handling the case on property. For the sake of brevity and to avoid redundancy no additional specific cites will be noted here.

and without allowing Amtrak to derive any benefit from the training investment as contemplated by the (seniority) restrictions contained in the Training Agreement". According to the company it never agreed to such "...unrestrained training opportunities..." which would, in its estimation, amount to "...converting the company from a railroad into a training facility...".

The Carrier argues that since the Training Agreement does not exclude one-for-one training then this type of training falls under that agreement. The Carrier views one-for-one training as but an "expedited" set of training procedures coming under the coverage of the Training Agreement. The Carrier admits that training under the Training Agreement normally takes place away from the work site. But it argues that this does not have to be the case and there is nothing in the 1977 Training Agreement that says that training cannot take place on site. And this is precisely what happens with one-for-one training. The Carrier also admits that a fair number of classifications are exempt from one-for-one training under the Decree and that they would not fall, in either case, under the Training Agreement. But this does not mean, according to the Carrier, that there are not some positions, such as machine and equipment operators, that do not fall under the Training Agreement's purview.

Turning to the Consent Decree the Carrier's argument is quite simple. It admits that there is nothing in the Decree that explicitly states that one-for-one trainees come under the protection of the sidebar agreement. Likewise, however, it argues that the "...Consent Decree similarly does not state that the 'one-for-one' training is exempt from the application of the Training Agreement...".The Carrier then examines the 7 sections of the Consent Decree that

deal with training and it concludes as follows. The Decree is "...organized to list those programs where there are no specific agreement provisions or restrictions (Operating Rules and Physical Characteristics), those where there are...restrictions...specifically expressed (Commercial Drivers' Licenses), those where there are specific agreement provisions governing the type of training (Training Agreement Slots, Electric Traction Training) and the new 'one-for-one' training with its modification of the Training Agreement bid/award process, and finally restrictions on existing training provisions of the Agreement." After its review of the Decree's training provisions, the Carrier concludes exactly the opposite of what the BMWE does about the relationship between one-for-one training and the Training Agreement. The Carrier states that the "...organization of the training section of the Consent Decree supports (Amtrak's) position that 'one-for-one' training is properly considered as a new training program under the existing 1977 Training Agreement...".

Findings

This is a highly unusual case. It addresses a number of issues not commonly found in arbitration forums. These include the need for clarification of the arbitrator's authority since the CBA that the arbitrator is asked to interpret interfaces with a document that has a specialized legal status --- negotiated by the parties but superseded by a Consent Decree of the courts --- which is a document that complements and interfaces with the CBA. Secondly, after studying the record of this case the arbitrator is far from convinced that the parties themselves have sufficiently resolved --- or at least their arguments do not dwell on this --- the nature and status of their CBA itself. These are weighty matters not normally dealt with

in most arbitration cases.

The arbitrator will discuss these and a number of other background issues prefatory to framing a ruling on the narrow issue at bar which is whether one-for-one trainees under the Consent Decree are covered by the seniority limitations found in the parties' Training Agreement. That narrow issue has no particularly easy solution.

First of all, this is an idiosyncratic case because it implies dual-jurisdictional considerations. This forum has the authority under Section 3 of the Railway Labor Act to interpret labor agreements "...as written...". Since the parties chose, which they did not have to do, to conduct this forum under the auspices of the National Mediation Board (NMB) which designated it with a PLB numeration, the scope and jurisdiction of this forum is unquestionable.[8] But the parties also cite numerous times in their arguments in this case the *Thorton* Consent Decree. The latter is a mediated agreement, voluntarily entered into by Amtrak to avoid certain inconveniences result of a set of claims filed against it under federal law in 1998 by interested parties, which included the BMWE. The Consent Decree is an "...agreement in principle..." reached by Amtrak and the representatives for the plaintiffs "...the terms of which are incorporated in and superseded by (the) Consent Decree...". The Consent Decree remains in effect for a certain period of time..." unless extended or terminated earlier..." pursuant to terms of the Decree. The duration of time involved

---

[8]As the parties well know, the Railway Labor Act (RLA) is a highly permissive labor law and it allows parties to labor disputes to fashion remedies, including arbitration agreements, without resort to the NMB. In the instant case the parties chose not to stray too far from the administrative umbrella of the NMB.

encompasses the instant dispute within that window period or at least the arbitrator has not been advised otherwise. The court itself retains jurisdiction over the Decree, to wit:

> "...the Court has jurisdiction over the Parties and the subject-matter of this action, and the venue is proper. This Court shall retain jurisdiction of this action for the duration of the Decree solely for the purposes of entering all orders, judgments and Decrees authorized hereunder that may be necessary to implement and enforce the relief provided herein...".[9]

One of the subject-matters raised by the Decree deals with one-for-one training of members of the craft if an advertised position cannot be filled by resort to normal procedures found in the CBA or by the procedures found in the parties' Training Agreement which is a special agreement under their CBA as will be emphasized below. The instant forum has no authority to expropriate the jurisdiction of the court as outlined above and it has no intention of doing so. This forum can use the directives found in the Consent Decree, however, as it would use any other information available within the limits of arbitral authority and precedent, to provide interpretations of the parties' CBA and any of its sidebars. This is what it has been asked to do and this is what it intends to do.

Secondly, while it is true that we have three documents to deal with in this case we basically only have one CBA and one Consent Decree. The BMWE states, in its arguments before this forum, that the instant dispute to be resolved is over the interpretation and application of "...three separate agreements...". This forum counsels caution in order that we know exactly what we are talking about by this statement. The Training Agreement is not a true, separate collective bargaining agreement as normally understood in law and practice in

---

[9]Consent Decree @ 3. (B.). See BMWE Exhibit 3.

the railroad industry. The Training Agreement is a sidebar agreement. It is a special agreement, as the phrase is used. The parties do state in Section 8 of the Training Agreement itself that it is considered by the parties to be a "separate agreement". That language has to be understood in context. The Training Agreement is a special agreement that is a sidebar to the CBA which is applicable to Amtrak (NEC) since this union represents track and track maintenance employees also on other railroads. The specific Training Agreement in question here does not, obviously, apply to those other railroads. The Training Agreement's status is the same as any attached Letter of Understanding common to general labor Agreements in this industry. The Training Agreement is just a little longer and a little more complicated than most Letters of Understanding.[10] But a close reading of the Training Agreement shows, which is no surprise, that it draws its substance in a variety of contractually covered areas from the general CBA (NEC) as this relates to rates of pay, vacancies and so on. These are not unimportant considerations since the Consent Decree states at IV (A.)(6) the relationship between that Decree and the CBA. Implied in that provision is the relationship between the Decree and the Training Agreement as but a sidebar to the CBA.

A review of the specific arguments proffered by the parties leads the arbitrator to the following conclusions.

First of all, introducing considerations related to ad hoc training as found in the CBA at Rule 2(d) does not appreciably add clarity to the issue in this case. The Consent Decree

---

[10]This union has been known, however, to have negotiated longer and more complicated ones such as the Seniority District Consolidation Agreement off the BNSF (1999).

did not appear to totally supersede the type of training addressed in Rule 2(d), as the union argues it does, but it did certainly places severe limitations on using this approach in the Decree's section dealing with cross-training. The ad hoc training available to employees under Rule 2(d) of the CBA as well as cross-training available to employees under the Decree are both vastly different than one-for-one training since neither of the former deal with advertised positions. This case does deal with advertised positions, training for those positions, and the important issue of the seniority rights and limitations of successful trainees.

Secondly, both parties to this case present fairly elaborate arguments on the issue of silence in the CBA, its sidebar and in the Consent Decree as this impinges on the narrow issue here before the arbitrator. Interpreting the meaning of silence in labor Agreements is a tricky business. Aristotle tells us that men have to wait until they are 50 before they are wise. Arbitrators younger than that also probably ought not meddle with the issue of silence in labor Agreements. The fact is that silence in contracts is significant. If a contract states, for example, nothing about sub-contracting and an employer endeavors to subcontract unit members' work the resolution of a grievance over such actions that goes to arbitration must squarely deal with the issue of silence in the contract. In those cases evidence in the record on prior practice is usually quite useful for the arbitrator in framing an Award. The analogy with that kind of case and what the arbitrator has before him in this case appears to be fairly strong. Both sides admit that there is no language in the labor Agreement nor its sidebar to specifically resolve the seniority status of one-for-one successful trainees as outlined in the Consent Decree. On the other hand, the only prior practice with one-for-one on this property

goes back to 2000 when the Carrier assumed that one-for-one successful trainees fell under the CBA sidebar seniority provisions and there is information that the BMWE contested this practice as soon as, it appears, it had reliable information about it. Thus there is no practice that had not been contested from square one. The instant case deals, therefore, with absence of language and no prior practice with any reasonable evidentiary status. In those cases the arbitrator has no choice but to go to the language of the appropriate labor Agreement itself for guidance. This is what must be done in this case.

Thirdly, the Training Agreement itself does more than just deal with procedural matters in order to match members of the craft with the needs of the Carrier as this relates to specific job skills. Because it does is why we have this case. For reasons that the parties to the original negotiations themselves best understood when they negotiated the 1977 sidebar, they addressed in Section 6(b) of the Training Agreement a matter that had little or nothing to do with training per se but which had to do with the seniority rights and limitations of those who successfully completed training under the procedures outlined by that Agreement. No one has stated this in this case, and maybe no one knows since the parties to this case doubtfully were around in 1977 to have negotiated the original sidebar, but most probably the reasoning behind Section 6(b), when it was inserted into the sidebar agreement, was comparable to the "return on investment" argument used by the Carrier in the instant case. After the training was finished the Carrier wanted to utilize the skills of the employees who were trained. It could keep the senior trained employee on the position for six months, or it could assign less senior successful trainees to open positions for six months unless there were

hardship issues that would be dealt with mutually by representatives of the union and the company. But it was also somewhat of a two edged sword. Once trained the successful, senior trainee also could not be bumped from the position in question for six months unless there were greener pastures on some other higher rated position that the trainee might covet. To achieve these placement objectives of successful trainees under the sidebar agreement the parties had to bend the seniority provisions of the CBA. They agreed to do so. This important Section 6(b) of the Training Agreement implies, in effect, that the seniority matters dealt with in Rules 1 and 4 and Rules 18 and 22 of the CBA are subject to qualifications. Those who finish training under the Training Agreement are given a special status. The Carrier wants employees trained under the one-for-one procedures outlined in the Consent Decree to have the same status.

One-for-one training found in the Consent Decree is something that does not exist under the CBA. It is a new training program for BMWE represented machine and equipment operators on this property. There are no provisions under the CBA, as outlined in the sidebar Training Agreement, for such type of training for bulletined positions which does not include the following: joint input of applicants by the Carrier and the union; resolution of complaints by both parties if a potential candidate is overlooked; 40 hour per week classroom instruction; pro rata pay for attending classes (since there are no classes specified in the Consent Decree); provisions for necessary lodging and transportation by the Carrier, and so on.

Before the Carrier goes to one-for-one training in order to fill a bulletined machine or

equipment operator position the Consent Decree says the following. A bulletined position will first be offered to a "...qualified employee...' under the seniority rules of the CBA. Seniority rights are respected in full. This is how positions are normally filled anyway. If that does not work, then the Carrier is to go to the sidebar agreement attached to the CBA which is the Training Agreement. That agreement will also be respected in full. If these two standard approaches to filling the position on this property, in accordance with the standing CBA and its sidebar, do not provide the qualified candidate needed the Consent Decree then provides an alternative approach. The Consent Decree does more than permit, it instructs, the Carrier to abandon, so to speak, either of these approaches that have existed on this property since at least 1977 (with amendments) and apply a new training approach which is one-for-one training. The rest of the language of the negotiated Consent Decree does no more than assist the Carrier in finding a one-for-one training candidate for the advertised position in accordance with available candidates on the various rosters and so on. To be eligible for assignment to the advertised position the trainee will be trained for 30 days and/or with a variant of that time-frame may be required to/can take an examination.

The Board has searched the record of this case and the only language that states that one-for-one training should take place in the first place is the phrase in the Consent Decree that states that if there are no applicants for an advertised position, and/or if none can be found under the sidebar agreement, then "...the Position shall be automatically converted into a one-for-one training opportunity...". The sum total of the Carrier's case basically centers on this phrase. Obviously, that phrase makes no reference to the sidebar agreement. On the other

hand, the arbitrator is unable to find anything in the language of the sidebar agreement that allows training candidates under that Agreement to engage in one-for-one training as a substitute for the training therein specified in considerable detail. A fortiori, therefore, it is unclear how one could conclude, or deduce, that one-for-one trainees are covered by any provisions of the sidebar agreement including, of course, the seniority exceptions. Such conclusion dealing with the impact of the Consent Decree @ Section IV (C.)(5.)(b.)(6) on the sidebar agreement is consistent with the relationship between the Consent Decree and the CBA as a whole of which the sidebar is but part. Albeit is cited in the foregoing it worthwhile to cite here again the pertinent language of the Decree @ Section IV (A.)(6.):

> "...To the extent that the CBA creates rights and obligations not addressed herein, those provisions shall continue in full force and effect...".

The CBA does create rights and obligations for employees falling under the sidebar to the CBA. Those rights and obligations deal inter alia with the unique seniority provisions found in the sidebar. Those rights and obligations are not addressed in the Consent Decree. It is totally silent on these matters. Therefore, those provisions shall continue in full force and effect and are not amended by the Consent Decree as the Carrier argues is the case. The Consent Decree @ Section IV (A.)(6.) also states, as noted earlier:

> "...Until it is determined which, if any, of the provisions herein shall be incorporated into the CBA pursuant to Part V, the provisions herein shall control over the supersede the provisions in the CBA to the extent of conflicts between them..."

There is no conflict between the CBA and the Consent Decree on the matter of training as it relates to the narrow issue before the arbitrator in this case. The CBA deals with rights of employees to use their seniority to bid on bulletined positions under Rules 1, 4, 18 and 22

and so on, and with the procedures for filling those positions under the provisions of the CBA's sidebar agreement with its sui generis version of seniority rights for successful trainees. The Consent Decree deals with one-for-one training for only certain craft jobs when neither of the two procedures under the CBA outlined above can, for whatever reasons, be implemented. None of these procedures conflict with each other. They are simply different, truly orthogonal, procedures used for filling bulletined positions. The language used by the parties in negotiating the CBA and its sidebar, on the one hand, and the document that became the Consent Decree, on the other, warrants no other reasonable interpretation. The Consent Decree @ Section IV (A.)(6.) deals with the relationship between the Decree and the CBA. As noted, this language also deals with the relationship between the Decree and the sidebar Training Agreement which is an integral part of the CBA.

At no point does the CBA in its general or special form state that if no candidates can be found for a bulletined position in accordance with the provisions found in either the CBA or its sidebar that some other method for finding candidates, and some other educational set of procedures can then be substituted, such as one-for-one training, and that successful trainees then fall under the sidebar's unique seniority provisions. One-for-one training for bulletined positions has a life of its own under the Consent Decree. That method of filling bulletined positions by means of the training procedures outlined therein is not related to the training procedures outlined in the CBA's sidebar. There is no language establishing that

relationship.[11] There could have been. But there is none. The parties could have filed a Section 6 under the RLA, which can be done at any time, while they were in negotiations that led to the Decree, and they could have amended the sidebar to the CBA to have included under its umbrella one-for-one training. There is no evidence that this had been done.

The motives of the parties in their arguments in this case are clear enough. The union wants the seniority provisions of the CBA general agreement preserved subject only to the sidebar provisions of the special agreement.. The Carrier is extremely forthright in stating its motives: it does not want to turn into a training agency without getting some return on training investment which it believes is what might happen under the one-for-one format if the latter is not brought under the coverage of the CBA's sidebar seniority provisions. With respect to the latter, it is unclear to this forum if the Carrier is turning into a training agency as an unintended side effect of the one-for-one procedures that the parties negotiated and which the courts are overseeing in the Decree. That is an empirical (and economic) matter that the Carrier understands better than the arbitrator. It does appear, as far as can be determined, that counsel for the Carrier had an intent consistent with arguments offered in this case, as this related to training, while negotiating the provisions of what became the

---

[11]Both sides to this case go through analyses of the 7 sections of the Consent Decree, in their Briefs, in an attempt to show that the manner in which those sections are drawn up and so forth permits conclusions about the relationship between one-for-one training and the CBA's sidebar. The arbitrator has scrutinized these analyses and the sections of the Consent Decree closely. He concludes that the parties' arguments centering on the structure, or outline, of the sections in question in the Consent Decree are no substitute for explicit language establishing a relationship between one-for-one training and the CBA's sidebar provisions on seniority. Such language is not found in the CBA which is of primary concern to this forum. The arbitrator observes that such language also does not exist in the Consent Decree.

Consent Decree, which might not have been translated into language in the final product. This forum respects that intent and it is mindful of the Carrier's concerns. If one-for-one training is a cost factor --- for the company does argue return on investment --- the BMWE ought also to be mindful of this since the viability of the railroad obviously benefits all parties to the relationship.

On the other hand, the authority and jurisdiction of this forum does not extend to fashioning rulings on unfulfilled desires and objectives harbored by parties at the bargaining table even when they surface under conditions as idiosyncratic as those involved in this case. Arbitrators do not engage in the reading of people's minds. An arbitrator's function is only to interpret the language of labor agreements as written.

The Carrier may indeed view itself as being subject to certain economic inconveniences, as noted, if the one-for-one procedures do not fall under the umbrella of the seniority exceptions of the sidebar agreement to the CBA. Unfortunately that may be true. But this forum is unable to do anything about that one way or the other. The problem of unintended effects is not totally novel to cases that go to arbitration as the instant arbitrator observed several years ago in another ruling on another railroad property when language negotiated by the parties in that case had unintended consequences for the Carrier also.[12]

Upon the record taken as a whole the arbitrator must rule that it is the position of the BMWE, and not that of Amtrak, that must be sustained here. The BMWE is moving party. It

---

[12]See, for example, BMWE Exhibit 11. Seniority District Consolidation Issue, Burlington Northern Santa Fe vs Brotherhood of Maintenance of Way Employees (Suntrup: 1999).

PLB 6641

has the burden of proof. That burden has been reasonably met in this case.

Ruling

In view of the record before him the arbitrator rules as follows. Amtrak is violating the parties' CBA when (a) it refuses to allow senior employees to displace junior employees from positions when the junior employee is subject to one-for-one training under the *Thornton* Consent Decree. Amtrak is also violating the parties' CBA when (b) it requires employees who have completed one-for-one training under the *Thornton* Consent Decree on a position to remain on that position for 180 days, unless said employee is able to bid to an equal or higher rated position. Further ruling is that the Carrier cease and desist treating employees subject to one-for-one training under the *Thornton* Consent Decree as if they fall under the seniority exceptions of the parties' sidebar agreement to the CBA which is the Training Agreement.

Award

The Award rendered in this case is in accordance with the Ruling. Implementation of this Award shall be within thirty (30) days of its date. The Board retains jurisdiction over this Award until it is implemented.

Edward L. Suntrup, Arbitrator

Richard F. Palmer, Carrier Member
Amtrak

Jed Dodd, Employee Member
BMWE

Dated: 1-18-04

Winnetka, Illinois