SPECIAL BOARD OF ADJUSTMENT NO. 1087

In the Matter of the Arbitration Between: **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES (BMWE)** **and** **NATIONAL CARRIERS' CONFERENCE COMMITTEE** **and** **UNION PACIFIC RAILROAD COMPANY (UP)**	Pursuant to Article XII of the September 26, 1996 National Agreement **OPINION AND AWARD** **CASE NO. 17**

Hearing Date: February 24, 2004
Hearing Location: Chicago, Illinois

QUESTION AT ISSUE:

Did the Carrier violate the provisions of the February 7, 1965 Agreement in Mediation Case No. A-7128, as amended by Article XII of the September 26, 1996 Agreement in Mediation Case No. A-12718 when it deducted from Claimants' protective payments amounts equal to claims payments they received in connection with a negotiated settlement of a collective bargaining agreement claim involving loss of work opportunities?

I. FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter. At the neutral's request, the parties waived the Article III, Section D thirty-day limitation for issuing this decision.

II. BACKGROUND FACTS

Claimants R. Moreno, D. Boslau, D. Hector and E. Hughes are certified for protective benefits under Article I Section 1 of the February 7, 1965 Agreement, as amended. Claimants all received Feb. 7 protective payments from the Carrier for the dates August 21-24, and 31, and September 5, 7 and 11, 2000 because they were in furlough status with rights to recall under the applicable working agreement.

On October 2, 2000, the Organization submitted a claim on behalf of the Claimants alleging that Carrier violated the UP/BMWE collective bargaining agreement when it utilized Northwestern District Steel Erection employees to perform carpenter work reserved to the Claimants. The Carrier denied the claim on November 27, 2000. The matter proceeded on the property until a settlement was reached in conference on August 8, 2001. Each Claimant was allowed forty (40) hours at the straight time rate of pay for August 21, 22, 23 and 24, 2000. However, the Carrier advised the Organization that the payments would be used to offset Article I, Section 1 protective allowances previously paid to the Claimants for the month of August 2000. The Organization disagreed with the Carrier's use of time claim settlements as offsets to the Feb. 7 payments. An understanding was reached to allow the Organization to refer the matter directly to this Board.

III. PERTINENT AGREEMENT PROVISIONS

The February 7, 1965 Mediation Agreement, as amended by Article XII of the September 26, 1996 Mediation Agreement

> **Article IV, Section 1:** Subject to the provisions of Section 3 of this Article IV, protected employees who hold regularly assigned positions shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position as of the date they become

protected; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent wage increases.

Article IV, Section 5: A protected employee shall not be entitled to the benefits of this Article during any period in which he fails to work due to disability, discipline, leave of absence, military service, or other absence from the carrier's service or during any period in which he occupies a position not subject to the working agreement; nor shall a protected employee be entitled to the benefit of this Article IV during any period when furloughed because of reduction in force resulting from seasonal requirements (including lay-offs during Miners' Holiday and the Christmas Season) or because of reductions in force pursuant to Article I, Sections 3 or 4 provided, however, that employees furloughed due to seasonal requirements shall not be furloughed in any 12-month period for a greater period than they were furloughed during the 12 months preceding the date of this agreement.

IV. CONTENTIONS OF THE PARTIES

The Organization

The Organization contends that Carrier did not have the right under the Feb. 7 Agreement to utilize the settlement of Claimants' collective bargaining agreement claims as a basis upon which to recoup protective benefit payments previously made to them. There are no provisions in the Feb. 7 Agreement permitting the Carrier to recoup payments under these circumstances, the Organization points out, and the Board does not have the authority to fashion a doctrine of "equitable recoupment," notwithstanding the Carrier's contention to the contrary. Therefore, the claim must be sustained.

The Carrier

The Carrier argues that it properly adjusted the August 2000 protection allowances of the Claimants to reflect straight-time compensation paid to them as a result of a claim settlement. Article IV, Section 1 of the Feb. 7 Agreement clearly indicates that an employee is not to be placed in a worse position with regard to compensation. Such language contemplates that an employee is provided a safety net in protective

compensation. It is not intended to allow an employee to enrich himself through the use of this protection, the Carrier submits.

In this case, Claimants have received a protective allowance and now the Organization is attempting to create an economic windfall for them. Such a result is not warranted under the Feb. 7 Agreement. In the Carrier's view, had the Claimants performed the work at issue, their straight time earnings would have been used as an offset in the calculation of protection due for the month. The mere fact that they essentially received their straight time earnings as a result of a claim settlement should not change that basic fact, Carrier asserts. Thus, Carrier was correct in offsetting the time claim payments against the protective payments Claimants received. The claim should be denied.

V. DISCUSSION

At issue in this case is whether the Carrier was permitted under the Feb. 7 Agreement, as amended, to use time claim settlement payments as offsets to the protective benefits paid to the Claimants in August 2000.

The Board finds that Carrier's reliance on Article IV, Section 1 is misplaced. That provision, set forth in full above, refers to the compensation guaranteed under the Feb. 7 Agreement. It sets forth the promise that protects employees from being placed in a "worse position" with respect to compensation but it does not address the circumstances under which a protected employee becomes ineligible for the protective payments afforded under the Feb. 7 Agreement.

It is Article IV, Section 5 of the Feb. 7 Agreement that governs the outcome in this case. That provision lists with particularity the events which cause a protected

employee to lose his entitlement to the benefits afforded in the Agreement. A careful review of that provision clearly shows that settlement of a claim under a collective agreement independent of the Feb. 7 Agreement is not one of the specific items listed.

This conclusion is supported by the well-established common sense canon of contract construction known as *"expressio unius est exclusion alterius"* -- the mention of one thing implies the exclusion of another. Applying the rule in this context, it is clear that the parties explicitly limited the application of Article IV, Section 5 to the specific factual situations set forth therein. They did not include any general or inclusive terms which would permit a blanket application of the provision. Thus, the inclusion of particular circumstances in which employees can have their protective benefits deducted or offset necessarily means that the parties purposefully omitted other potential circumstances, including the one at issue in this case. We must conclude that the parties did not intend that a protected employee would become incligible for benefits based on a claim settlement under a collective bargaining agreement or presumably the parties would have included that circumstance in Article IV, Section 5. .

The application of this logic is strengthened by arbitral precedent. In Special Board of Adjustment 605, Award No. 53, the employee, who was subject to protection under the February 7 Agreement, could not hold a position in his craft through the exercise of his seniority. He obtained a position in a craft represented by a union not signatory to the Feb. 7 Agreement. Carrier refused to pay the employee the protective benefit allowance, arguing that it had satisfied its obligations under Feb. 7 because the employee had been compensated in an amount equal to or in excess of his guaranteed rate. In sustaining the claim, the Board stated:

> ...there is no qualification under the terms of the February 7 Agreement – whether the employee is compensated by the Carrier under a different bargaining agreement, receives compensation as a result of employment outside the industry, or even receives compensation under the terms of an insurance policy. As such the protected employee is entitled to compensation under the February 7 Agreement without offset.

Subsequent cases have applied this reasoning in other contexts, with similar results. In Special Board of Adjustment 605, Award No. 183, compensation earned by a protected employee while working the carrier's private dining car could not be deducted from his protected compensation. Likewise, in Special Board of Adjustment 605, Award No. 316, outside earnings could not be deducted from protective payments.

In view of the foregoing, we find that there is no contractual support for the Carrier's recoupment of protective payments previously made to the Claimants. In so finding, we are cognizant of Carrier's contention that an economic windfall will be the result. However, the Board's authority is confined to interpreting and applying the terms of the Feb. 7 Agreement to the claim at hand. We cannot rewrite the agreement on the basis that it would be more equitable. Since the settlement of a collective bargaining agreement claim is not one of the reasons enumerated in Article IV, Section 5 as the basis for offsetting a protected employee's benefits, we must sustain the claim.

AWARD

Carrier violated the provisions of the February 7, 1965 Agreement in Mediation Case No. A-7128, as amended by Article XII of the September 26, 1996 Agreement in Mediation Case No. A-12718 when it deducted from Claimants' protective payments amounts equal to claims payments they received in connection with a negotiated settlement of a collective bargaining agreement claim involving loss of work opportunities. The claim is hereby sustained.

Ann S. Kenis
Chairperson and Neutral Member

Dissenting:

Donald F. Griffin
Organization Member

A. K. Gradia
Carrier Member

R.B. Wehrli
Organization Member

John F. Hennecke
Carrier Member

Dated this day of , 2004.