ARBITRATION BEFORE THE BN/BMWE SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED PURSUANT TO AGREEMENT ENTERED NOVEMBER 8, 1993

ROBERT W. McALLISTER
Chairman

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

OPINION AND AWARD

APPEARANCES:

For the Carrier:	Jeffrey S. Berlin, Esq. Mark E. Martin, Esq. Richardson, Berlin & Morvillo John M. Starkovich Assistant Vice-President Labor Relations Burlington Northern Railroad Company
For the Organization:	Mark J. Schappauch Staff Assistant Brotherhood of Maintenance of Way Employes Steven V. Powers Assistant to President Brotherhood of Maintenance of Way Employes
DATE OF HEARING;	December 20, 1993
PLACE OF HEARING:	Washington, D. C.

I. BACKGROUND

In 1981, while contract negotiations were being conducted nationally through the National Carriers' Conference Committee (NCCC), the Carrier[1] negotiated locally with the Organization regarding per diem meal and lodging expenses for employees whose duties require them to live away from home.[2] The result of those negotiations was the following agreement executed September 16, 1981:

> Effective October 1, 1981, the allowances specified in the Award of Arbitration Board No. 298 (rendered September 30, 1967,) shall be adjusted as follows:
>
> 1. (a) The maximum reimbursement for actual reasonable lodging expense provided for in Article I, Section A(3) is increased from $7.00 per day to $10.50 per day.
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> (b) The meal allowances provided for in Article I, Sections B(1), B(2), and B(3) are increased from $1.75, $3.50, and $5.25 per day, respectively, to $2,50, $5.25, and $8.00 per day, respectively.
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> Rule 24(b) and Rule 33(4), (5), (6), and (7) are amended accordingly.
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> 2. (a) The meal and lodging allowances provided for in paragraphs 1(a), (b), and (c) of this agreement shall be subject to a cost-of-living adjustment October 1, 1982, and each October 1 thereafter based on the "Consumer Price Index-United States city average for urban wage earners and clerical employes - All Items - Unadjusted" (1967 - 100) as published by the Bureau of Labor Statistics, U. S. Department of Labor. Such adjustment, to the nearest cent, shall be determined by the percentage increase or decrease in August of each year as compared to the Index for the preceding August. The Index for the month of August 1981 shall be the Index base from which future adjustments will be made.

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[1]Although the Burlington Northern Railroad Company (BN), as it exists today, is the product of the merger of several railroads, the term "Carrier" shall refer collectively to only those parts of the Burlington Northern which are involved in this dispute; namely, the Colorado and Southern Railway Company (C&S), the Fort Worth and Denver Railway Company (FW&D) and the Joint Texas Division of the Chicago, Rock Island and Pacific Railroad Company (JTD).

[2]These expense allowances were originally provided for in the Award of Arbitration Board No. 298, dated September 30, 1967, (Award 298), and had been increased from time to time in National Agreements, including the November 1, 1978, National Agreement. In that Agreement, the maximum allowance was increased to $11.20 per day.

3. Rule 18(b) is changed to read as follows:

Traveling (b): Except as hereinafter provided, for employes assigned to a type of work, the nature of which regularly requires them throughout their work week to live away from home, who are not furnished outfit cars or highway trailer, the assembly point should be the point on the railroad where meals and lodging are available within a reasonable proximity thereto.

Employes assigned to extra gangs will report to the assembly point each day as directed by their supervisor. The assembly point will be at a place close to the work site and accessible by public road.

This agreement is effective October 1, 1981, and shall remain in effect until changed under the provisions of the Railway Labor Act.

The same day the parties entered into the above agreement, they signed the following side letter:

Regarding the agreements on the Colorado and Southern Railway, Fort Worth and Denver Railway and the Joint Texas Division signed at Fort Worth, Texas, today, providing for increased expense allowances under the provisions of Award 298:

We discussed the possibility of national negotiations on this subject producing expense allowances exceeding the allowances provided for in our agreements referred to above. In that event, you requested that the allowances provided for therein be increased to match the expense allowances provided in the national agreement, assuming, of course, that other provisions are comparable.

As a consequence, it is agreed that if a national agreement is reached that provides for allowances in excess of those provided for in our separate agreements, then the agreed-upxon national allowances will be substituted for the respective allowances in our agreements on the first day of the month following the effective date of the national agreement. Should such change in allowances occur subsequent to January 15, 1982, then the effective date of the cost-of-living adjustment, October 1, 1982, shall be advanced to a new date which is twelve months following the effective date of the increased expense allowances.

On the other hand, if the national agreement provides for future escalation of the allowance and the organization elects the national allowance, then the escalation attached to the national allowance would apply.

Other than the above, it is not the intent of either party to make any other changes at that time in our agreements.

This letter is attached and made a part of our agreements signed today.

Negotiations between the NCCC and the Brotherhood of Maintenance of Way Employes (BMWE) which commenced in 1988 were unable to produce an agreement, even after the Report and Recommendations of Presidential Emergency Board No. 219 (PEB 219). Consequently, Congress enacted Public Law 102-29, declaring that the Emergency Board's Report and Recommendations be binding upon the parties effective July 29, 1991. The NCCC and the BMWE subsequently recast the PEB 219 report into contract language, referring to it as the February 6, 1992, Imposed Agreement. Article V of the Imposed Agreement reads as follows:

ARTICLE V - EXPENSES AWAY FROM HOME

Section 1 - First Adjustment

Effective July 29, 1991, the allowances specified in the Award of Arbitration Board No. 298 (rendered September 30, 1967), as adjusted in various subsequent national agreements, shall be further adjusted as follows:

(a) The maximum reimbursement for actual reasonable lodging expense provided for in Article I, Section A(3) is increased from $13.75 per day to $17.00 per day;

(b) The meal allowances provided for in Article I, Section B(1), B(2), and B(3) are increased from $3.25, $6.50, and $9.75 per day, respectively, to $4.00, $8.00, and $12.00 per day, respectively, and

(c) The maximum reimbursement for actual meals and lodging costs provided for in Article II, Section B is increased from $23.50 per day to $29.00 per day.

Section 2 - Second Adjustment

Effective December 1, 1994, the daily allowances specified in paragraphs (a), (b), and (c) of Section 1 above will be further adjusted to (a) $20.25, (b) $4.75, $9.50, and $14.50, respectively, and (c) $34.75.

Section 3 - Minimum Allowances

> On carriers where expenses away from home are not determined by the allowances made pursuant to the Award of Arbitration Board No. 298, such allowances will not be less than those provided for in this Article.

By letters dated September 23, 1991, the Organization filed claims on behalf of all eligible employees seeking Away From Home Expenses of $29.00 per day pursuant to PEB 219. The Organization further requested that this allowance be adjusted on October 1, 1991, in accordance with the cost-of-living provision contained in Item 2 of the September 16, 1981, Agreement. When these claims were denied, they were appealed to the highest Carrier officer designated to handle such disputes, who also denied them.

Unable to resolve the dispute, the Organization initiated strike action against the Carrier on October 3, 1993. This strike was enjoined by the United States District Court for the Northern District of Illinois, Eastern Division. In its order, the court directed the Carrier to act in good faith in negotiating an arbitration agreement with the Organization for an expedited arbitration of the away from home allowances for employees, and to enter into such an agreement by November 8, 1993. Such an agreement was reached on November 8, 1993, thereby establishing this Special Board of Adjustment. The Carrier designated John Starkovich as the Carrier Member of the Board, and the Organization designated Steven V. Powers as the Employee Member of the Board. They, in turn, selected Robert W. McAllister as the Neutral Member and Chairman of the Board. Submissions were exchanged between the parties and to the Neutral Member and Chairman. A hearing was held on this matter in Washington, D. C., on December 20, 1993, after which the parties filed rebuttal submissions.

II. ISSUES

The November 8, 1993, arbitration agreement states the issues as follows:

This Board shall have all jurisdiction necessary to decide the claims shown on the attached list (Attachment "A") and issues as to : (a) any election requirements, (b) the $29.00 floor, and (c) the applicability of any COLA[3], all which arise from the interpretation or application of the parties' Agreements governing rates of pay, rules or working conditions. Those Agreements include Presidential Emergency Board No. 219, Article VI-J-Section 1 - Expenses Away From Home as imposed by Public Law 102-29, and the September 16, 1981, Agreements.

The Organization maintains the issues are as follows:

1. Whether BMWE was required to make an "election" between the per diem allowances mandated by PEB No. 219 and the COLA escalator provided by the September 16, 1981, Memorandums of Agreement.

2. Whether BMWE represented employees on the C&S, FW&D and JTD were entitled to receive the $29.00 minimum allowance provided by Article VI-J-Section 1 - Expenses Away From Home of the PEB No. 219 report (which later became Article V of the Imposed National Agreement.

3. Whether the employees are entitled to receive the $29.00 minimum and the COLA escalator.

The Carrier identifies two issues; namely:

1. May BWE insist on receipt of the per diem away from home expense allowance and escalation arrangement specified in the national Imposed Agreement when BMWE has failed to elect the national expense allowance as BMWE is required to do under the 1981 local agreements if the Union wants that allowance?

2. May BMWE insist that the 1981 local agreements' cost-of-living adjustment formula be pyramided on top of the Imposed Agreement's away from home expense allowance and escalation arrangement when the 1981 local agreements expressly provide that in the event a national agreement is adopted which provides for an away from home expense allowance and for its escalation then BMWE may either elect the national allowance with its escalation arrangement or, failing that, remain under the local allowance with its cost-of-living escalation arrangement?

[3]Cost of living adjustment.

The issues, as presented by each party, essentially address the central question of whether the Carrier is obligated to pay away from home expenses at the rates set out in the Imposed Agreement, and, if so, whether those rates are subject to increase pursuant to the cost-of-living adjustment provisions of the Sepember 16, 1981, local agreement. However, the statement of issue proposed by the Carrier makes certain assumptions regarding the 1981 local agreements which are at issue in this dispute.

III. POSITION OF THE ORGANIZATION

The Organization first asserts Article V of the Imposed Agreement does not require it to make an election between its terms and any allowances provided in local agreements. It notes other provisions of the Imposed Agreement (*i.e.*, Articles VI, VIII, IX, and X) contain savings clauses that require such elections. The Organization explains these clauses were sought by the various carriers through the Special Board process created by Public Law 102-29, and were not part of the original PEB 219 recommendations. The Organization also avers the 1978, 1981, and 1986 National Agreements, each of which provided for increases in the Award 298 expense allowance, were accompanied by side letters of understanding giving the employee representatives the right to elect to retain local agreements in lieu of the National Agreement. The Organization also cites the court testimony of John Starkovich, the Carrier's Vice-President of Labor Relations, that the Imposed Agreement does not contain any provision requiring the election between local and national allowances relative to away from home expenses.

Additionally, the Organization argues the language of Article V, Section 3 of the Imposed Agreement confirms that PEB 219 did not intend that an election be made. By adding this provision, the Organization says PEB 219 made it clear the minimum base allowances would be applied on every railroad in

national handling whether they were governed by Award 298 or a local agreement. The Organization also claims this language merely put into place basic minimum allowances and did not place a limit on the allowances to which an employee would be entitled under the terms of a local agreement.

Secondly, the Organization maintains the September 16, 1981, side letter had expired after the implementation of the December 11, 1981, National Agreement and has no application to this dispute. The Organization explains the September 16, 1981, Memorandum of Agreement was the consummation of a *quid pro quo* wherein the employees received seven day meal and lodging expenses with a built-in annual COLA in exchange for the Carrier receiving a favorable work site reporting rule. It notes this Agreement was reached during the pendency of national negotiations which included the discussion concerning Award 298 allowances. The Organization avers it was concerned that national negotiations might result in Award 298 allowances which were higher than those agreed to locally, thereby eliminating the value of the employees of the trade-off it had made. The side letter would have protected the Organization from this result, it says. According to the Organization, that side letter was intended to apply only to the ongoing negotiations which resulted in the December 11, 1981, National Agreement. Because the local allowances were greater than the new national allowances under Award 298 and the National Agreement did not provide for an escalation of the allowances, the Organization says it was not necessary to invoke the side letter.

The Organization next argues the employees are entitled to receive at least the increased allowances provided by PEB 219. It maintains the language of Article V of the Imposed Agreement is clear and unambiguous in that it increases the allowances in Award 298, as well as the allowance on all carriers where expenses away from home are not determined by Award 298.

The Organization cites Decisions Nos. 4 and 15 of the Contract Interpretation Committee[4] (CIC) in support of its position. Decision No. 4 reads as follows:

> Issue No. 4
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> On carriers where expenses away from home are not determined by the allowances made pursuant to the Award of Arbitration Board No. 298, was it the intention of PEB 219 to pay allowances less than the minimum weekly amounts provided by Award of Arbitration Board No. 298?
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> Answer to Issue No. 4
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> PEB 219 spoke only to increasing daily amounts of allowances for lodging and meals. PEB 219 recognized that employees represented by BMWE were entitled to substantial increases in daily allowances for meals and lodging and, accordingly, PEB 219 made specific recommendations regarding amounts and the timing of the recommended increases. PEB 219 also recommended that on carriers where expenses away from home are not determined by the allowances established pursuant to the Award of Arbitration Board No. 298, such allowances "should be not less than those suggested" by the Board. However, PEB 219 did not address the question of "minimum weekly amounts" either in its Report or in its reference to the Award of Arbitration Board 298.
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> The Neutral Member of the Committee finds that, absent the citation of specific factual circumstances involving a case where a carrier not subject to the away from home expense allowances of Arbitration Board No. 298 is allegedly paying less than the away from home allowances recommended by PEB 219, it would not be reliable for this Committee to render a binding interpretation regarding the establishment of a "minimum weekly allowance." However, it is the further opinion of the Neutral Member of this Committee that where a carrier not subject to the allowance provisions of Arbitration Board No. 298 is, by agreement or practice, paying away from home allowances on a weekly basis that the "pay per day" of such allowances should not be less than those recommended by PEB 219.

The Organization asserts it sought this interpretation to compel the Carrier to increase the maximum daily allowance from $25.87 to the $29.00 allowance recommended by the PEB. When the Carrier continued to pay the lower allowance, the Organization says it presented Issue No. 15 to the CIC.

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[4]Established pursuant to Article XVIII of the Imposed Agreement.

That Issue and Answer are as follows:

Issue No. 15

If employees are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home and a carrier does not provide lodging and/or meals, was it the intention of PEB No. 219 that all carriers, including carriers where expenses away from home are not determined by the Award of Arbitration Board No. 298 and specifically those carriers listed below,* would be required to pay not less than the daily dollar amounts for expenses away from home specified in Article VI-J-Section 1 of PEB No. 219 for each day of the calendar week?

*The carriers presently identified as paying less than the allowances recommended by PEB No. 219 include:

Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Railroad
(former Fort Worth and Denver, former Colorado and Southern, and former Joint Texas Division of the Chicago, Rock Island and Pacific Railroad Company)
Illinois Central Railroad
Norfolk and Western Railway Company

Answer to Issue No. 15

There is some substantive merit in the Organization's position that a national negotiation and an emergency board recommendation should have universal application industry-wide; and, therefore, this Committee should conclude that PEB No. 219 intended that the Award of Arbitration Board No. 298 would apply to all carriers and for all employees, insofar as daily meal and lodging allowances were concerned, "for each day of the calendar week to each employee employed in a type of service, the nature of which requires such employee throughout the work week to live away from home." However, the record evidence before this Committee, and most importantly the six (6) indented paragraphs of Recommendation J.1., Expenses Away From Home, establish that PEB No. 219 spoke only to increasing lodging and meal expenses on a "per day" basis. In these circumstances and consistent with the Neutral Member of the Committee's answer to Issue No. 4, it is the finding of the Neutral Member of the Committee that non-Arbitration Board No. 298 carriers are not required to adopt a "calendar week" calculation for purposes of meal and lodging allowances.

Based upon those answers from the CIC, the Organization concludes the per diem increases stipulated in Article V of the Imposed Agreement apply to

this Carrier and that its failure to pay such allowances after July 29, 1991, constituted a violation of the Agreement.

In addition to the rates specified in the Imposed Agreement, the Organization claims the Carrier is obligated to continue making periodic COLA adjustments pursuant to Paragraph 2 of the September 16, 1981, Agreement. According to the Organization, if it was not required to make an election under either the September 16, 1991, Agreement or the Imposed Agreement, there has been nothing else which would abrogate any of its rights under the Sepember 16, 1981, Agreement. It asserts the Imposed Agreement merely set national minimums or floors for expense payments to ensure that those covered by local agreement did not fall below national rates, without disturbing any other part of the local agreements, including any attendant *quid pro quo*. To demonstrate the reasonableness of this interpretation, the Organization notes the September 16, 1981, side letter was intended to allow the locally negotiated COLA to be applicable to the nationally negotiated rate had a higher rate been set in the 1981 National Agreement.

In the alternative, the Organiztion argues that if the 1981 side letter is still effective, the Imposed Agreement does not provide for a future escalation as envisioned in Paragraph 4 thereof. In reaching this conclusion, the Organization relies upon dictionary and text book definitions of the word "escalator," as well as the context in which the word was used. It quotes *Webster's Seventh New Collegiate Dictionary* as defining the word as "providing for a periodic proportional upward or downward adjustment (as of prices or wages)." It also cites the following comment.

> Many collective agreements contain 'escalator' clauses which provide for automatic changes in

wage rates in response to specified changes in the cost-of-living.[5]

The Organization asserts the framers of Paragraph 4 intended to use the term to be consistent with those provisions within the September 16, 1981, Agreement relative to periodic, proportional cost-of-living escalations. It argues the Carrier's usage of the term is unreasonable as it would necessarily apply to all subsequent national agreements, and if they provided for increased allowances, the third paragaph of the side letter entitles the employees to such an allowance plus the locally negotiated COLA. The Organization implies from the Carrier's argument that the COLA may be retained if any number of allowance increases are granted in national agreements, but only if they are parceled out one at a time in succeeding agreements. The Carrier would not allow the COLA to apply, the Organization continues, if only two increases were granted if they came from a single national agreement. The Organization characterizes this position as nonsensical and self-contradictory on its face.

Finally, the Organization argues that any conclusion which allows the Carrier to retain the work site reporting rule while depriving the employees of the higher away from home expense payments would be patently unreasonable and contrary to the fundamental *quid quo pro* the parties agreed to in 1981.

The Organization concludes the claims filed on September 23, 1993, should be sustained, allowing Claimants the difference between $25.87 as paid by the Carrier and $29.00 as required by Article V of the Imposed Agreement. It further asks that the claims dated October 10, 1991, be sustained to allow

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[5]Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works* (Washington, D. C.: The Bureau of National Affairs, Inc., 1987), p. 822.

Claimants the difference between $26.80 as paid by the Carrier and $30.04, which represents the Imposed Agreement allowance increased by the COLA.

IV. POSITION OF THE CARRIER

The Carrier first asserts the 1981 side letter requires the Organization to affirmatively elect the provisions of Article V of the Imposed Agreement if that is what it wants. Otherwise, the Carrier insists the provisions of the September 16, 1981, Agreement continue to apply. In making this argument, the Carrier avers the 1981 side letter is still in effect. In this regard, the Carrier says the language of the side letter is unequivocal, referring to the possible adoption of future agreements covering away from home expenses without any temporal restrictions or qualifiers. While the Carrier concedes the side letter might have been written because national negotiations were being conducted at the time, it insists the language evidences that the parties dealt with the issue of future national agreements in a broad manner. It notes there is no specific reference to the anticipated 1981 National Agreement nor is there any evidence of intent to exclude subsequent agreements.

According to the Carrier, the 1981 side letter recognized two potential occurrences. In the event a national agreement is reached that establishes a higher allowance, the Carrier states the COLA agreed to in the September 16, 1981, Agreement would apply to that higher allowance. If, however, a national agreement provides for future escalation of the allowance, the Carrier submits paragraph 4 of the side letter permits the Organization to elect either the national allowance with the escalation arrangement or the local agreement with its COLA. The Carrier denies the Organization may elect the national allowance, and then apply both the local COLA and the national escalation arrangement to the allowance.

The Carrier argues the second scenario is present in this case; the Imposed Agreement having both raised the allowance and provided for a future escalation of that allowance. The Carrier notes Section 2 of Article V esclates the $29.00 per day allowance that was effective July 29, 1991, to $34.75 per day effective December 1, 1994. It further submits this escalation was intended by PEB 219 to be a cost-of-living increase. The Carrier cites the evidence before PEB 219, particularly the Organization's request to increase the allowance each January 1 from 1990 through 1992 because the Board 298 allowances "have not kept pace with rising costs."[6] The Carrier notes the Organization supported its argument with tables comparing the allowances with the same consumer price index used by these parties in the 1981 Agreement. The only difference between what the Organization sought and what PEB 219 recommended, according to the Carrier, is that the recommendation contains a single 19.8% escalation after three years instead of several incremental annual steps.

The Carrier insists paragraph 4 of the side letter requires the Organization to make an election. It argues this election requirement is designed to ensure that the local COLA could not be layered on top of an away from home allowance fixed by a national agreement which itself already takes account of anticipated increases in living costs by providing for the future escalation of its own allowance. The Carrier maintains there is no inconsistency between this election requirement and the Imposed Agreement and that it would not offend either the national of the local agreement for the Organization to choose between them.

[6]Brotherhood of Maintenance of Way Employes, *Before the President's Emergency Board No. 219, In Re: Wages and Rules; Expenses Away From Home* (September 1990), p. 4.

Although the Carrier insists the Organization was required to elect the Imposed Agreement, if that was what it wanted, it is willing to permit the Organization to make that election now. The Carrier says it would then pay the $29.00 per day allowance retroactively to July 29, 1991, and the $34.75 daily allowance commencing on December 1, 1994. In doing so, the Carrier acknowledges it is willing to waive any argument that the Claimants would only be entitled to the increases prospectively.

The Carrier discounts the Organization's reliance upon the CIC decisions on Issues 4 and 15. It notes these decisions only address the issue of weekly allowances, which were not provided for in either the PEB 219 recommendations or the Imposed Agreement. The Carrier denies the CIC answered any question as to the interaction between the Imposed Agreement and pre-existing local arrangements respecting the payment of away from home expense allowances. On this point, the Carrier cites the district court, which held that the Organization:

> relies on the CIC's answers to Issues 4 and 15 as showing that the $29 figure is a mandatory floor. The answers to Issues 4 and 15, however, are both equivocal and are both directed to the issue of weekly guarantees. BMWE apparently did not submit specific facts as to any carrier. Also, the answers do not consider the applicability of the September 16, 1981, Letter Agreement. The answers to Issues 4 and 15 do not resolve the question of the applicability of the $29 floor of the COLA.[7]

Assuming, *arguendo,* that the 1981 side letter is no longer effective, the Carrier maintains the COLA provided in the September 16, 1981, Agreement may not be applied to away from home expense allowances provided in the Imposed Agreement. The Carrier says this point is proven by the fact that it took the side leter to make the local COLA applicable to any away from home

[7] *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employes, No. 93-C-6019* (N.D. Ill. Oct. 22, 1993,) slip op. at 21-22.

expense allowance adopted at the national level. By its terms, the Carrier continues, the 1981 Agreement's COLA provision applies solely to the expense allowance established in that Agreement. It quotes the language of paragraph 2, which specifies that only the "meal and lodging allowances provided for in paragraphs 1(a), (b), and (c) of **this agreement** shall be subject to a cost-of-living adjustment..." (Emphasis added.) It is only paragraph 3 of the side letter which extends the local COLA to certain national allowances, reasons the Carrier. If the Agreement itself did that, the Carrier concludes there would be no reason for adding this provision in the side letter. The Carrier agrees, however, that Claimants would be entitled to the Imposed Agreement allowances, without a COLA if the 1981 side letter were no longer effective.

V. OPINION

The pivotal and threshold issue of this dispute is the question of whether or not the side letter to the September 16, 1981, Agreement is still applicable. The Organization flatly rejects the notion that the 1981 side letter has any applicability in this dispute. The Organization, as indicated, believes it expired following implementation of the December 11, 1981, National Agreement. The Carrier takes the opposite view arguing that the 1981 side letter remains effective and defeats the Organization's claims herein.

It is evident that as of September 16, 1981, the parties did not know the dollar amount by which the allowances would increase in the national negotiations. It is, however, clear the September 16, 1981, Agreement established allowances specific to the parties. It is also clear the 1981 side letter provided that if the Agreement allowances were exceeded by the forthcoming national allowances, the 1981 Agreement allowances would be adjusted to equal the national allowances. It is, likewise, evident that the 1981

Agreement provided for annual cost-of-living adjustments of the allowances established under Section 1(a), (b), and (c).

Both parties have concentrated on the language contained in paragraph 3 of the 1981 side letter which we, hereinafter, repeat:

> As a consequence, it is agreed that if a national agreement is reached that provides for allowances in excess of those provided for in our separate agreements, then the agreed-upon national allowances will be substituted for the respective allowances in our agreements on the first day of the month following the effective date of the national agreement. Should such change in allowances occur subsequent to January 15, 1982, then the effective date of the cost-of-living adjustment, October 1, 1982, shall be advanced to a new date, which is twelve months following the effective date of the increased expense allowances.

The record shows the parties have had difficulty with the applicability of the above language which is demonstrated by their past respective positions that are, at best,inconsistent with their present positions. As noted, the Carrier presently argues the side letter's language evidences the parties intent to deal with the issue of future national agreements in a broad manner.Beginning in 1981 the fact is those national negotiations produced allowances which became effective January 1, 1982. That agreement also provided for an increase in the allowances effective April 1, 1983. The allowances in the 1981 National Agreement effective January 1, 1982, were less than those of the parties' September 16, 1981, Agreement. A December 11, 1981, side letter to the national agreement addressed the issue of locally negotiated allowances versus those of the National Agreement which provided in pertinent part:

> We also discussed situations where agreements have been reached, prior to this agreement, on individual railroads to increase the allowances under Article I, Section A(3), B(1), B(2), and B(3) and Article II, Section B, of the Award of Arbitration Board No. 298 and in such situations the employee representatives are to be afforded an option, to be exercised within fifteen days after the date of this agreement, to

> retain all allowances specified in such agreements or to accept all allowances specified in this agreement in lieu thereof.

On January 6, 1982, the Organization advised the Carrier that it wished to exercise its option under the December 11, 1981, side letter to the National Agreement and chose to retain all allowances contained in the local 1981 agreement plus the included cost-of-living adjustments.

It is significant to note the October 17, 1986 National Agreement produced allowances which were greater than those then in effect on the Carrier under the local agreement as adjusted by the COLA. Consequently, the Organization, pursuant to Side Letter #9 dated October 17, 1986, and identical to the December 11, 1981, side letter, notified the Carrier it would like to accept the allowance specified in the National Agreement in lieu of the local allowance.[8] The 1986 National Agreement expense allowances were in excess of the allowances of the 1981 Agreement and, as adjusted, by the cost-of-living. But the Carrier did not substitute the national allowances for the allowances in the 1981 agreements. The Carrier defends that action, asserting the national agreement had a side letter attached to it (see Charles L. Hopkins' October 17, 1986, letter to BMWE President Geoffrey N. Zeh) which required the Organization to make an election between the national allowances and existing local allowances. The Carrier argues this national side letter "superseded the inconsistent paragraph 3 of the 1981 local agreement side letter." (Emphasis added.) The Carrier also contends this language is clear and unambiguous.

It is obvious that if no local side letter existed, the election language contained in the October 17, 1986, Hopkins' side letter required local representatives to choose within fifteen days between the local allowances or

[8]On October 1, 1986, the maximum allowance under the local agreement was increased to $21.64 per day. The 1986 National Agreement provided a maximum allowance of $23.50 per day.

take the national allowances. There was no in-between. Nonetheless, applying the Carrier's theory that the 1981 side letter still applied, then the parties would be held to have anticipated national allowances in excess of the local allowances which were then to be substituted for the local allowances with the further proviso for adjusting the cost-of-living found in the 1981 Local Agreement. The Carriers claim that this provision would be superseded by the national agreement has no contractual basis. It is merely an assertion unsupported by the principles of contract construction.

The Organization places great emphasis on this obvious inconsistency in the Carrier's argument. But this attack simply serves to deflect attention from the express language of the 1981 side letter. The Carrier's actions in 1986 are no more inconsistent than the Organization's attempt to invoke the 1981 side letter in progressing the claims that led to his court mandated arbitration. Accordingly, it must be emphasized this dispute involves contract interpretation. Therefore, inconsistent actions, beliefs, arguments, and assertions cannot alter the words written on September 16, 1981.

The interpretation of disputed contract language is not undertaken in a vacuum. There are generally accepted standards for interpreting contract language.[9] A document must be construed as a whole. Words, phrases,and sections cannot be isolated and construed out of context. The principle of *expressio unius est exclusio alterius;* that is, to expressly refer to one thing implies the exclusion of all others, is commonly applied in disputes over specific versus general language. In paragraph 2 of the side letter, the parties, as indicated, begin with a general reference to national negotiations, but switch to very specific dates and duties of performance in paragraph 3. In

[9] *How Arbitration Works, supra,* pp. 342 to 365.

John Deere Harvester Works, 4 ALAA §68, 773 (Kelliher), the Arbitrator held that:

> It is a universal rule of contract interpretation that a more specific provision takes precedence over a more general provision, particularly where the specific provision follows the general provision.

This standard of interpretation dovetails with the canon that:

> A written contract is "presumed to embody the whole agreement of the parties, and terms or obligations that the parties did not include should be deemed to be deliberately excluded.[10]

Paragraph 1 of the 1981 side letter identifies which Carrier entities are covered by the 1981 side agreement. (Colorado & Southern Railway, Fort Worth and Denver Railway, and the Joint Texas Division) and the subject matter "increased expense allowances under the provisions of Award 298."

Paragraph 2 refers to discussion about the possibility of national negotiations producing expense allowances that are in excess of those negotiated in the local agreements. Paragraph 2 goes on to establish that Organization representatives asked for an increase in the local allowances to match the expense allowances in the prospective national agreement. We note and stress that reference to "the national agreement" is in the singular. Thus, any argument that the earlier reference to plural negotiations does not limit application of the side letter to the 1981 negotiations is undercut by the singular reference to a specific national agreement.

Paragraph 3 begins with the words "As a consequence." These words clearly and unambiguously refer to paragraph 2 and also, in a tangential manner to paragraph 1. The first sentence continues and spells out the understanding that if "a national agreement" (note again the singular) is reached that provides for allowances in excess of "those provided for in our

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[10] *Hoover Universal, Inc.*, 77 LA 107 (Lipson).

separate agreements," then those national allowances will be substituted for the local allowances "on the first day of the month following the national agreement. Again, the side letter's words refer to a singular national agreement. Moreover, the effecive date of substitution, by its very specific use of language, can only be viewed to be a one time occurrence. When viewed as a whole, the first sentence in paragraph 3 cannot be twisted to support a claim its application has an unlimited future application. On the contrary, its application is, as indicated above, limited to a one time substitution.

The second sentence of paragraph 3, addresses what happens if the change in allowances takes place after January 15, 1982. That is its entire purpose. In such a case, the next cost-of-living adjustment established by the 1981 Agreement as October 1, 1982, is advanced to a new date twelve months following the change in allowances (if they are in excess of the local allowances) and imposes a duty upon the Carrier. When sentence 2 of paragraph 3 is read in conjunction with sentence 1 of the same paragraph, it is clear the one time substitution of allowances defers the October 1, 1982, cost-of-living adjustment if the substitution/change occurs after January 15, 1982. Paragraph 3 simply does not contain words that could reasonably be construed as prospective beyond the 1981 round of bargaining. Rather the parties must be held to their choice of words which when read as a whole, refers to a singular national agreement that might be reached before January 15,1982 and if the national agreement allowances were substituted for the local allowance subsequent to January 15,1982, then paragraph 3 establishes a new date for the next cost-of-living adjustment.

Paragraph 4 deals with the contingency of "the national agreement," providing for future escalation of the allowance. This is precisely what happened in 1981 when the National Agreement provided for an escalation of

the allowances effective April 1, 1983. The 1981 National Agreement contained an election option, the same as in the 1986 National Agreement. The record shows the Organization chose to retain the local allowances negotiated under the 1981 Agreement. Unlike the language of the 1991 Imposed National Agreement, the 1981 and 1986 National Agreement side letters required an all or nothing election as between local allowances and those set forth in the National Agreement. This election had to be exercised within fifteen days of the date of the National Agreement side letters (1981 and 1986).

The claim by the Carrier that the 1981 side letter refers to the possibility of future, plural, national agreements is based on out of context reasoning. For example, the Carrier argues that paragraph 2 of the 1981 side letter introduces the subject of future national negotiations on the subject of expense allowances. But, as already explained, paragraph 2 contains language which referes to a singular national agreement following mention of "national negotiations." The reference to national negotiations in the plural could raise a question of intent by reason of the use of the plural. But when those two words (national negotiations) are linked to a singular event; "In that event" and is further clarified by reference to "the national agreement," the notion that paragraph 2 addresses future national agreements other than the 1981 National Agreement is not supported by sound application of the standards of contract interpretation.

Likewise, the Carrier's contention that paragraph 3 does not refer singularly to the impending 1981 National Agreement because it contains no specific reference anticipating that national agreement is an argument without substance. It ignores the document's reference to "national negotiations" (plural) in paragraph 2 that, as already explained, might result in expense allowances greater than those set forth in the local 1981

Agreements. More importantly, that argument also ignores that the side letter did not refer to plural events. On the contrary, in paragraph 2, it qualified the possibility of national negotiations resulting in higher than local expense allowances by stating "In that event." (singular)

This analysis leads to an inescapable conclusion that when the parties executed the side letter on or about September 16, 1981, the language adopted referred only to the current negotiations taking place and the prospective consummation of a national agreement that was envisioned as the national by-product of the then ongoing national negotiations. There is simply no recognized basis for interpreting the parties' expressed agreement otherwise.

Accordingly, we find the 1981 side letter had no applicability at the time the parties executed the Imposed Agreement.[11] It follows that the arguments raised over whether or not the Imposed Agreement provided for a "future escalation of the allowance" is moot since that issue derives solely from the 1981 side letter.

Given the above finding that the 1981 side letter had no effect at the time of the Imposed Agreement, it is clear that no contractual basis exists which requires the Organization to make an election between PEB No. 219 (imposed) allowances and the September 16, 1981, Memorandum of Agreement. Moreover, it follows that the employees are entitled to receive the $29.00 per day allowance provided by the Imposed Agreement.

In its pre-hearing submission, the Carrier addressed the possibility that the 1981 side letter might be found inapplicable and stated:

> Of course, if there were no 1981 local agreement side letter, it follows that BMWE would not have been required to make an election to receive the Imposed Agreement's allowance. Rather, BN agrees that in that circumstance the employees would have been

[11]February 6, 1992.

> entitlted to receive $29 per day beginning on July 29, 1991 (and then $34.75 per day beginning on December 1, 1994) by operation of the Imposed Agreement.

In making this statement, the Carrier made it clear it reserved its position that the employees would not be entitled to COLA adjustments on top of the imposed national allowances.

As stated above, the Organization argues the employees are entitled to the imposed national allowances, as well as the COLA adjustment provided in the 1981 Agreement. The Carrier maintains this COLA provision found in paragraph 2 of the 1981 Agreement, because of its clear and unambiguous language, strictly limits its application, specifying that only the "meal and lodging allowances provided for in paragraphs 1(a), (b), and (c) of this agreement shall be subject to a cost-of-living adjustment." The Carrier, in essence, claims the only allowances subject to the local COLA formula are those established in the local agreements themselves. The Carrier insists the local COLA is not intended to apply to allowances from a source outside the 1981 Agreement. The Carrier has accurately referenced the language of paragraph 2 of the 1981 Agreement. However, there is nothing in the 1981 Agreement that cancels paragraph 2 in the event the rate set forth in paragraphs 1(a), (b), and (c) are changed.

The Imposed Agreement, unlike the 1981 and 1986 national agreements and associated side letters that preceded, does not require an election between its allowances versus any local allowances. It does, however, recognize that on some carriers away from home expenses are not determined by those allowances established under Award of Arbitration Board No. 298. In that event, the Imposed Agreement then specifies: "... such allowances will not be less than those provided for in this Article."

We know as a matter of fact that the parties' 1981 Agreement provided for a lesser allowance in 1991, and we have ruled that the Imposed Agreement raised those allowances to the national level. If other local agreements provided for higher allowances than those of the Imposed Agreement, it is evident the latter would have no effect. This conclusion is inescapable given the use of the phrase "such allowances will not be less than those provided for in this Article." It seems equally evident that had the Imposed Agreement stated "such allowances shall be equal to those provided for in this Article," the result would be that any local allowances in excess of the imposed national allowances would have been lowered. This review of the language of Article V, Section 3 of the Imposed Agreement leads us to to conclude the imposed national allowances were intended as a minimum for local agreements, as opposed to a maximum.

The clear and unambigous language of Article V, Section 3 of the Imposed Agreement refers to local allowances, as found in this dispute. That subject matter is then identified and referred back to by the use of the phrase "*such allowances.*" *Section 3 then specifically directs that those local* allowances "will not be less than those provided for in this Article." This language specifically amends the lower allowances found in the 1981 Agreement and substitutes the imposed national allowances. This result is consistent with the reality that as with any other agreement under the Railway Labor Act, the 1981 Agreement is subject to amendment.

Turning to the COLA provision found in paragraph 2 of the 1981 Agreement, there is no basis to conclude it was not left intact. The Imposed Agreement does not require the Organization to make an election and, by the terms of Article V, Section 3, indicates that local agreements, such as found herein, and the Imposed Agreement would co-exist. If this were not the case,

there is no plausible explanation for the language used in Article V, Section 3. That language clearly identifies which allowances will not be less than those of the Imposed Agreement. It is undisputed the recommendations of Presidential Emergency Board No. 219, as clarified and modified by Special Board 102-29, are binding on the particpating carriers represented by the National Carriers Conference Committee as if they made the agreement themselves. The September 16, 1981, Agreement remains in full force with paragraph 1 being modified to reflect the allowances set by Article V, Section 3 of the Imposed Agreement. Therefore, we conclude that paragraph 2 of the 1981 Agreement remains in effect, and the phrase "meal and lodging allowances provided for in paragraphs 1(a), (b), and (c) of this agreement" refers to those allowances superimposed by PEB No. 219 and, in turn, by the Imposed Agreement.

VI. AWARD

Issue No. 1

The BMWE was not required to make an election pursuant to the 1981 side letter in that it is found the 1981 side letter was not in effect at the time the Imposed Agreement was executed.

Issue No. 2

BMWE represented employees are entitled to receive the $29.00 minimum allowance specified by Article V, Section 3 of the Imposed Agreement.

Issue No. 3

BMWE represented employees are entitled to receive COLA adjustments pursuant to paragraph 2 of the 1981 Agreement.

This Award is to be implemented within thirty (30) days of issuance. Back pay is to be computed and paid within ninety (90) days of the Award, if not sooner.

Robert W. McAllister Chairman

John M. Starkovich
John M. Starkovich
Carrier Member

Dissent

Steven V. Powers
Steven V. Powers
Organization Member

February 4, 1994
Date