RAILWAY LABOR ACT

SPECIAL BOARD OF ADJUSTMENT NO. 1087

Award No. 3
Case No. 3

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE WAY EMPLOYEES

and

NATIONAL CARRIERS' CONFERENCE COMMITTEE

STATEMENT OF ISSUES:

The Employees' Statement of the Issue:

Is the System Gang Production rate provided in CSXT Labor Agreement No. 12-002-6 the protected rate for employees David Ullery, Joseph Dorto and Rick Humes? If not, what shall be their protected rate?

The Carriers' Statement of the Issue:

Should the SPG-gang $1.00 per hour temporary differential payment provided under CSXT Labor Agreement No. 12-002-6 to employees assigned to positions of Foreman, Assistant Foreman and "AA" Operator for the 1996 production season be considered part of their 'normal rate of compensation' for February 7 Job Stabilization guarantee purposes even though it terminated January 1, 1997?

FINDINGS: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended; that the Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing, which was held on June 8, 1999. The Board makes the following additional findings:

1. The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carriers' employees in the Maintenance of Way craft.

2. On January 31, 1996, the Parties entered into a Memorandum Agreement, No. 12-002-96 (the "CSXT Agreement") which, among other things, provided a $1.00 per hour temporary differential to employees assigned to System Production Gang ("SPG") positions of Foremen, Assistant Foremen and "AA" Operators. Specifically, Section I of the Agreement states:

> "Employees assigned to positions of Foremen, Assistant Foremen and "AA" Operators . . . may not bid off such positions for a period of ninety (90) calendar days from the first day they performed service on such positions or be displaced from such positions for a period of one hundred eighty (180) calendar days from the first day they performed service on such positions with a $1.00 per hour differential for employees assigned to such 'excepted' positions."

3. Section 3 of the CSXT Agreement states;

"In the event an employee holding seniority on a SPG roster acquires a displacement right and but for Section 1 above would have otherwise been able to displace a junior employee assigned to an 'excepted' position on a gang, such employee will, upon application, be assigned to work on such gang as a reserve employee filling vacancies in accordance with his seniority or if no vacancy is available to select from, he will be assigned to perform other duties on the gang and will be paid the rate of the position of the junior employee holding the excepted position. He will retain this position until such time as he is displaced by another senior employee who acquires a displacement right and desires to displace the junior accepted employee, or he voluntarily bids to another position. If he is still holding his reserved position at the expiration of the end of the excepted employee's protected period, he will be allowed to displace the excepted employee and thereafter be subject to the conditions of Section I, above."

4. Section 6 of the CSXT Agreement states:

"Modifications set forth above in Sections 1 through 5 will apply only to the 1996 production season unless extended by the mutual agreement of the parties. Otherwise, the September 28,1993 Agreement will remain in effect until changed in accordance with Section 23 of the

Agreement."

5. The September 26, 1996 National Agreement amended certain sections of the February 7th Agreement, including Article IV, Section 1 of the Agreement which was amended to read as follows:

> "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 then 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."

6. The Organization asserts that on September 26, 1996, Claimants Dorto and Ullery held the regular assignments of "AA" Operator paying an hourly rate of $17.15; and that, on the same date, Claimant Humes held the regular assignment of SPG Assistant Foreman paying an hourly rate of $17.29.

7. The Organization argues that the dispute centers on what the "normal rate of compensation" is for Claimants' regularly assigned positions on the date they obtained protected status. The Organization asserts that Claimants' "normal" rate included the $1.00 differential paid under the CSXT Agreement because the differential applied to an advertised position; the rate was paid to the incumbent for all services rendered in that position; and while the rate was established in exchange for restrictions on the incumbents' ability to bid off the position or be displaced by senior employees, the rate was paid to the incumbent after the "bid and hold".

8. The Organization contends that in order for a Maintenance of Way employee to establish a protected rate under the February 7th Agreement, he or she must satisfy two conditions; first, the employee must have 10 or more years of employment with the Carrier; second, the employee must hold a regular assignment. The Organization asserts that Claimants satisfied both conditions. The Organization points out that the regular assignments of Claimants were SPG Assistant Foremen and SPG "AA" Operator. The Organization further points out that those regular assignments were paid an

hourly rate which included the $1.00 rate differential provided for in Section 1 of the CSXT Agreement.

9. The Organization contends that because the $1.00 differential rate was paid after the "bid and hold" provisions of Section 1 expired, it has become part of the "normal" rate for Claimants who hold those positions. The Organization further argues that because the Claimants were paid the higher rate when they became protected employees, the rate is not temporary and did not "sunset" with the expiration of the CSXT Agreement.

10. Citing authority, the Organization asserts that Claimants' rates of pay cannot be adjusted downward. Citing Article IV, Section 3 of the September 1996 National Agreement, the Organization argues that Claimants were "protected employees" who held regularly assigned positions and thus cannot be "placed in a worse position with respect to compensation then the normal rate of compensation for said regularly assigned position as of the date they become protected". The Organization asserts that the rate paid to the incumbents was the "normal" rate for that regular assignment; and that Claimants are entitled to be paid that rate.

11. The Carrier asserts that the $1.00 per hour temporary differential payment was a "quid pro quo" allowance paid to employees assigned to certain positions in exchange for the Carrier's right to hold such employees on those positions for a specified period of time. The carrier argues that the differential payment is outside of the definition of the phrase "normal rate of compensation" as it is used in Article IV, Section 1 of the February 7th, 1964 Job Stabilization Agreement. The Carrier asserts that the differential was never intended to become part of an employee's lifetime guaranteed rate.

12. The Carrier contends that to include the temporary differential payment into a guaranteed rate would, in practical terms, convert what the Parties agreed would be a temporary payment into a permanent differential. The Carrier points out that the CSXT Agreement explicitly states that it would be in effect only for the 1996 production season unless extended by agreement, and that the Parties never agreed to an extension of that Agreement.

13. The Carrier asserts that the "normal" rate applicable to the Claimants was $1.00 less per hour than the rate paid under the CSXT Labor Agreement because the advertised assignments were "temporary" and only valid for the duration of the CSXT Labor Agreement. The Carrier argues that the temporary wage differential set forth in that Agreement expired on January 1, 1997, at which time employees reverted to full coverage under the September 23, 1993 SPG Agreement. The Carrier points out that the September 23, 1993 SPG Agreement contains neither a differential nor a catch-and-hold provision.

14. Citing authority, the Carrier asserts that previous Board cases have ruled that the normal rate of compensation is exclusive of any differentials traditionally paid. The Carrier contends that it would be unreasonable to conclude that the Parties, having expressly agreed that the differential would expire, nonetheless intended to incorporate it into the effected lifetime guarantee.

15. Citing further authority, the Carrier asserts that holiday, overtime and premium pay have never been considered part of the "normal rate of compensation" of an employee. The Carrier argues that the February 7th Agreement was not intended to provide such employees with the windfall which the Organization seeks in this dispute. For these reasons, the Carrier urges that its question at issue be answered in the negative.

OPINION: The Board is not persuaded of the merit of the Organization's claims. The record indicates that, in executing the CSXT Agreement, the Parties expressly agreed that the $1.00 per hour differential to be paid for those employees in the positions of Foremen, Assistant Foremen and "AA" Operators would "apply only to the 1996 production season unless extended by the mutual agreement of the parties". The Organization acknowledges that the CSXT Agreement was not extended by the mutual agreement of the Parties and that it expired at the end of the 1996 production season.

Nonetheless, the Organization argues that the "normal" rate of compensation for Claimants included the $1.00 differential paid under the CSXT Agreement because the rate applied to an advertised position; the rate was paid to the incumbent for all services

rendered in that position; and while the rate was established in exchange for restrictions on the incumbents' ability to bid off the position or be displaced by senior employees, the rate was paid to the incumbent after the "bid and hold". In so arguing, the Organization claims that the Carrier is bound to pay Claimants the $1.00 temporary differential payment *ad infinitum*. The factors relied upon by the Organization, however, do not automatically convert the $1.00 temporary differential into Claimants' "normal rate of compensation".

There is no evidence in the CSXT Agreement - or anywhere else - that the Carrier, because of the existence of these conditions, agreed to incorporate the $1.00 per hour temporary differential into Claimant's permanent rate of pay. Indeed, the evidence is to the contrary. The Agreement explicitly states that the differential would expire at the end of the 1996 production season. The Board is persuaded that the $1.00 differential payment was, as the Carrier points out, a "quid pro quo" paid to employees assigned to identified positions in exchange for the Carrier's right to hold said employees in those positions for the time set forth in the CSXT Agreement. When the CSXT Agreement which modified the pay of those employees expired on January 1, 1997, the right of the employees to that temporary differential also expired.

In asserting that Claimants are entitled to the $1.00 differential, the Organization would have the Board breathe life into and extend the CSXT Agreement when, by its terms, it expired. The Board is without authority to rewrite the CSXT Agreement more to the Organization's liking and extend the temporary differential payment for Claimants' benefit. In making the Agreement, the Organization bargained for a specific exchange, and reaped the benefit of the temporary differential payment during its terms. The Organization expressly agreed that the $1.00 differential was temporary, and could only be extended by the mutual assent of the Parties. There is no evidence that the Organization sought to extend the Agreement. The Board is convinced that the Agreement expired on January 1, 1997 and that the Carrier has no obligation to pay a differential payment to Claimants beyond the period agreed to.

The Board also finds unpersuasive the Organization's reliance

on the provision in the February 7, 1965 Agreement which states that "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 became protected". For the reasons indicated above, the Board concludes that the per hour rate which included the temporary differential was simply not the "normal rate of compensation" for those positions; the normal rate of compensation for those positions was $1.00 *less* than what was paid to Claimants for work performed in those positions during the life of the CSXT Agreement. (*See The Wichita Union Terminal Railway Company and Transportation-Communication Employees Union*, SBA No. 605, Award No. 227 (November 16, 1970))(finding it "more logical to assume that the term 'normal,' [as used in the February 7th Agreement] meant to both parties that rate of compensation which an employee regularly receives for the position he occupies without regard to extra and special payments for extra and special conditions"); *see also Chicago, Burlington and Quincy Railroad Company and Transportation-Communication Employees Union*, SBA No. 605, Award No. 225 (November 16, 1970)(holding "[o]ccasional holiday work is not definable as part of the 'normal rate of compensation'".).

Atchison, Topeka and Santa Fe Railway Company and TC Division, BRAC, SBA No. 605, Award No. 323 (October 12, 1972), cited by the Organization in support of its position here, is distinguishable. There, an Agent-Telegrapher in Hemet, California was removed from service. Claimant, an Agent-Telegrapher in San Jacinto, California whose rate of pay was $3.0228 per hour, successfully bid on the open position; the Hemet position paid $3.0828 per hour. The removed employee was subsequently reinstated to his position, displacing Claimant. Claimant returned to his former position in San Jacinto only to find that, upon a joint-evaluation, the rate of pay for his position had been adjusted downward by $.13 per hour. The Carrier asserted that Claimant was not entitled to his protected rate upon his return and should be paid at the lower adjusted rate.

The Board rejected the Carrier's position and found that the downward adjustment, mutually agreed to by the parties, did not

deprive Claimant of his protected rate. The Board held that Claimant was entitled to maintenance of his guaranteed rate:

> "The downward adjustment does not thereafter deprive a former incumbent of his protected rate, whether he works at San Jacinto or is required to take any other position paying less than the guarantee".

The case simply does not support the Organization's contention that the $1.00 temporary differential paid to Claimants, under the circumstances of a temporary agreement, became their "guaranteed" rate of pay.

AWARD: The Board concludes that the System Gang Production rate provided in CSXT Labor Agreement No. 12-002-6 is not the protected rate for Claimants. The claim of the Organization is denied.

E. William Hockenberry
Chairman and Neutral Member

Donald F. Griffin
Organization Member

A. Kenneth Gradia
Carrier Member

see dissent

Ernest L. Torske
Organization Member

John F. Hennecke
Carrier Member

Dated: August 20, 1999

LABOR MEMBERS' DISSENT TO AWARD IN CASE NO. 3

We respectfully dissent from the majority's award here. Although the unique facts and circumstances in this case limit its general applicability, the Award's manifest errors compel us to state the reasons for our dissent.

The award ignores the plain language of the Feb 7th Agreement. The claimants' compensation, set by agreement, included the $1.00 per hour SPG differential. That rate applied to the claimants' regular assignments on September 26, 1996, the Carrier paid the rate for all services rendered on the position. There can be no dispute the "normal" compensation for the claimants included the SPG differential. Instead, the majority characterizes those rates as "temporary," although the Feb 7th Agreement contains no such express definition. In essence, the majority believes it would be bad policy for the claimants to receive the SPG differential after the agreement that provided it expired. According to the majority, such a result would continue the differential "*ad infinitum*."

However, that is what the plain language of the Feb 7th Agreement requires and is the exact result reached in Award No. 323 of SBA No. 605. There, the rate of position occupied by the claimant when he became protected subsequently was reduced by a method agreed by the parties. Contrary to the result here, the committee in Award No. 323 held that the claimant's protected rate was unaffected by the subsequent reduction in the rate applicable to the position on which the claimant acquired his protected rate. The majority here does attempt to dispute the rationale of that award that continued that claimant's higher rate "*ad infinitum*" as well. Instead, the majority blithely asserts that Award No. 323 "does not support" the claimants' case here. In fact, there is no practical difference between the two cases, in each case the claimants obtained a protected rate due to their incumbencies on certain positions; in each case, the contractual rate paid to that position was reduced pursuant to an agreement. The result here should have been the same as Award No. 323 – the claimants' should have the SPG differential included in their protected rates.

Finally, we note the Board determined "there is no evidence the Organization sought to extend the Agreement." There was no evidence because we proffered none, nor were the negotiating tactics of either party to the agreement an issue before the Board. The majority's observation is irrelevant and a gratuitous slap at the Union here because the majority suggests that if the Union sought to extend the differential past 1996 and the Carrier refused, the result here might have been different.