NATIONAL MEDIATION BOARD, ADMINISTRATOR
SPECIAL BOARD OF ADJUSTMENT NO. 1087

In the Matter of the Arbitration

-between-

Brotherhood of Maintenance of Way Employes

-and-

National Carriers' Conference Committee

OPINION AND AWARD
Case No. 8

In accordance with the October 25, 1996 Agreement in effect between the above-named parties, the Undersigned was designated as the Chairman and Neutral Member of the referenced Board to hear and decide a dispute concerning these parties.

A hearing was held at the offices of the Organization in Washington, District of Columbia on August 16, 2001 at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to offer evidence and argument and to examine and cross-examine witnesses consistent with the Agreement that created the Board. The Arbitrator's Oath was waived.

THE QUESTION AT ISSUE

The parties failed to stipulate an issue to be resolved by the Board. The parties authorized the Board to formulate an appropriate issue. The Organization proposed the following issue:

> Did the BNSF violate Article IV, Section 1 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26,

1996 ("Feb 7th Agreement") when it reduced the protected rate of employee L. C. Christensen when he exercised seniority to a Section Foreman's position following the abolishment of his Track Inspector position?

The Carriers proposed the following issue:

Claimant was protected under Article IV Section 1, as a Track Inspector. Claimant exercised his seniority by bidding on the lower paying job of Section Foreman. Is claimant entitled to have his compensation preserved at the Track Inspector rate of pay?

On the basis of the arguments of the parties and a careful review of the entire record, the Board deems a fair statement of the issue to be:

Did the Carrier, the Burlington Northern Santa Fe, violate Article IV, Section 1 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996 by failing to preserve the protected rate of pay of the Claimant, L. C. Christensen, at the Track Inspector's rate of pay when he exercised seniority to a Section Foreman's position following the abolishment of his Track Inspector position?

BACKGROUND

The Organization filed a claim, dated July 3, 2000, on behalf of the Claimant. The Claim (FEB-00-1085) described the Claimant as a full time single rated employee who was protected at the Track Inspector rate of pay of $18.48; that the Claimant could not obtain that rate of pay; that the Claimant was at the time working as a Section Foreman with a rate of pay of $18.29; that the Claimant sought the difference in pay for the month of June 2000 between the position of Track Inspector and Section

Foreman; that the Claimant did not voluntarily accept a lower rated position that caused the loss of earnings; and that the Claimant was bumped from the higher rated Track Inspector position.

The Carrier responded in a letter, dated August 15, 2000. The Carrier indicated that the Claimant had been protected as a Track Inspector, but in the future the Claimant is protected as a Section Foreman. The Carrier specified that the Claimant had an opportunity on December 10, 1999 to displace a junior employee, A. D. Gibbs, from position 17725 as a Track Inspector, however, the Claimant bid position 18097 as a Section Foreman. The Carrier elaborated that an employee who chooses not to bump into the highest ranking position has his protection permanently lowered to the rate of pay of the lower ranking position. The Carrier noted that the Carrier had compensated the Claimant at the Section Foreman rate of pay for the month of June 2000. The Carrier therefore denied the Claim.

In a letter dated September 25, 2000, the Organization appealed the denial of the Claim. The Organization underscored that the Claimant became protected as a Track Inspector as of the effective date of the February 7 Agreement on September 26, 1996. The Organization explained that Article IV, Section 1 precluded the Claimant from being placed in a worse position concerning compensation than the Claimant's rate of compensation in his protected position of Track Inspector. The Organization added that the Carrier had abolished the Claimant's position of Track

Inspector and thereby had forced the Claimant to exercise his seniority to become a Section Foreman. The Organization denied that any junior employees had existed for the Claimant to displace from a Track Inspector position without changing the Claimant's residence. The Organization related that the Carrier had compensated the Claimant in the past for similar claims. The Organization highlights that the Carrier had initially decided to grant the disputed request before changing the decision and denying the disputed request. The Organization clarified that even if the Claimant had a duty to displace a junior employee the Claimant would not have forfeited the higher protected rate, but the higher rate would be suspended pursuant to Article "G" of the June 10, 1999 "related agreements" between the parties.

The Carrier denied the appeal of the Organization in a letter, dated December 14, 2000. The parties failed to resolve the matter during the grievance procedure. The dispute proceeded to arbitration for a final and binding determination.

In addition, the Organization pursued similar claims on behalf of the Claimant for the months of July 2000 (FEB-00-1119) and August 2000 (FEB-00-1120). The Carrier denied the claims on the same basis as the Carrier had denied the claim for June 2000. With respect to the Claim for July 2000, the Carrier pointed out that the Claimant could have displaced a junior employee, J. M. Hocker, from position 37833 as a Track Inspector on June 16, 1998 and instead served as a Foreman in position 37740 from June 15, 1998 through July 17, 1998 and then bumped into position 38097 as

a Foreman on July 20, 1998. The Organization faulted the Carrier's conclusion because the location of position 37833 in Seattle, Washington would have required the Claimant to change his residence because position 37833 was located 111 miles from the Claimant's residence in Ellensburg, Washington.

PERTINENT PROVISIONS

MEDIATION AGREEMENT
FEBRUARY 7, 1965

All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and had fifteen or more days of compensated service during 1964, will be retained in service subject to compensation as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition. Any such employees who are on furloughs of the date of this Agreement will be returned to active service before March 1, 1965, in accordance with the normal procedures provided for in existing agreements, and will thereafter be retained in compensated service as set out above, provided that no back pay will be due to such employees by reason of this Agreement. For the purpose of this Agreement, the term "active service" is defined to include all employees working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not October 1, 1964 was a work day), all extra employees on extra lists pursuant to agreements or practice who are working or are available for calls for service and are expected to respond when called, and where extra boards are not maintained, furloughed employees who respond to extra work when called, and have averaged at least 7 days work for each month furloughed during the year 1964.

MEDIATION AGREEMENT
SEPTEMBER 26, 1996

ARTICLE XII - WORKFORCE STABILIZATION

Part A

Section 1 - The February 7, 1965 Agreement

Entitlement to certain elements of job security, currently available under the February 7, 1965 Agreement (Agreement), shall be upgraded, so that employees who have at least ten continuous

years of service will be entitled to the protection.

Section 2

(a) Article I, Section 1 of the Agreement shall be amended to read as follows:

Section 1 - All employees, other than seasonal employees, who are in active service and who have or attain ten (10) or more years' of employment relationship will be retained in service subject to compensation as herein provided unless or until retired, discharged for cause, or otherwise removed by natural attrition. For the purpose of this Agreement, the term "active service" is defined to include all employees working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not the date on which such ten or more years of employment relationship is acquired was a work day). An employee who is not regularly assigned on the date the employee is otherwise eligible to achieve protected status under this Section will be deemed to be protected on the first day assigned to a regular position in accordance with existing rules of the BMWE Agreement.

ARTICLE IV - COMPENSATION DUE PROTECTED EMPLOYEES

Section 1 -

Subject to the provisions of Section 3 of this Article IV, protected employees entitled to preservation of employment who hold regularly assigned positions on October 1, 1964, shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position on October 1, 1964; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent general wage increases.

. . . .

Section 3 -

Any protected employee who in the normal exercise of his seniority bids in a job or is bumped as a result of such an employee exercising his seniority in the normal way by reason of a voluntary action, will not be entitled to have his compensation preserved as provided in Sections 1 and 2 hereof, but will be compensated at the rate of pay and conditions of the job he bids in; provided, however, if he is required to make a move or bid in a position under the terms of an implementing agreement made pursuant to Article III hereof, he will continue to be paid in accordance with Sections 1 and 2 of this Article IV.

Section 4 -

If a protected employee fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position he elects to retain, he shall thereafter be treated for purposes of this Article as occupying the position which he elects to decline.

INTERPRETATIONS

THE FOLLOWING INTERPRETATIONS OF THE PROVISIONS OF THE MEDIATION AGREEMENT DATED FEBRUARY 7, 1965 (STABILIZATION OF EMPLOYMENT AGREEMENT) HAVE BEEN AGREED UPON BY THE PARTIES TO SAID AGREEMENT AND WILL HAVE THE SAME FORCE AND EFFECT AS THE PROVISIONS OF THE AGREEMENT THAT HAVE BEEN THUS INTERPRETED.

. . . .

Section 3 -

Question No. 1: If a "protected employe" for one reason or another considers another job more desirable than the one he is holding, and therefore bids in that job even though it may carry a lower rate of pay than the job he is holding, what is the rate of his guaranteed compensation thereafter?

Answer to Question No. 1: The rate of the job he voluntarily bids in.

. . . .

Question No. 4: Does this section apply to affect the guaranteed compensation of an employe whose earnings are affected because an unprotected employe in the normal exercise of his seniority rights voluntarily or involuntarily bids in or bumps into a job?

Answer to Question No. 4: No.

POSITION OF THE ORGANIZATION

The Organization asserts that Article IV, Section covers employees subject to protection pursuant to Article I, Section 1. The Organization confirms that the Claimant had an adjusted protected wage rate of a Track Inspector of $18.48 per hour. The

Organization mentions that the parties agreed to certain Interpretations regarding the February 7, 1965 Agreement.

The Organization stresses that Article IV, Section 3 normally provides that an employee, who voluntarily bids into a position that has a lower rate of pay than the job the employee previously occupied, will receive the guaranteed compensation rate for the job the employee voluntarily bids into. The Organization clarifies that Article IV, Section 3 does not apply when an employee is forced to exercise seniority because an unprotected employee exercised seniority to displace the employee into a lower-rated position. The Organization therefore distinguishes between a voluntary exercise of seniority by a protected employee and an involuntary exercise of seniority by a protected employee. The Organization reasons that in the voluntary situation the employee's protected rate of pay can permanently suffer whereas in an involuntary or forced situation the employee's protected rate of pay cannot suffer.

The Organization disagrees with the Carrier that the Claimant's decision to bid into a Section Foreman position after the Carrier had abolished the Claimant's Track Inspector position constituted a voluntary action covered by the rate reduction provisions of Article IV, Section 3. The Organization insists that the Claimant's action was involuntary due to the abolishment of the Claimant's position. The Organization cites Question and Answer No. 4, Question and Answer No. 1, and certain arbitral authority to support this conclusion. The Organization

reiterates that the abolishment of the Track Inspector position caused the Claimant to exercise his seniority involuntarily to the Track Foreman's position.

According to the Organization, the Carrier views the exercise of seniority after a series of displacements or after the abolishment of an employee's position to be a voluntary action because the employee makes a choice about which position to occupy. The Organization contends that the exercise of seniority to retain a position obtained due to a displacement does not involve a voluntary exercise of seniority under Article IV, Section 3 or the relevant arbitral precedent. The Organization reasons that the Carrier's approach would eliminate the need for the offset provision in Article IV, Section 4. The Organization finds the offset provision in Article IV, Section 4 to be inapplicable because the Claimant would have had to change his residence to obtain a Track Inspector position in Auburn, Washington, which was 112 miles away from the Claimant's original Track Inspector position in Ellensburg, Washington.

The Organization therefore concludes that the Claimant's involuntary exercise of seniority to the Track Foreman position in Easton, Washington (which was 40 miles away from the Claimant's original Track Inspector position in Ellensburg, Washington) after the abolishment of the Claimant's Track Inspector position precluded the Carrier from reducing the Claimant's protected rate from $18.48 to $18.29 per hour. The Organization requests that the claim be sustained.

POSITION OF THE CARRIER

The Carrier asserts that the Claimant voluntarily downbid to a Section Foreman position and thereby authorized the Carrier to reduce the Claimant's protected rate on a permanent basis pursuant to Article IV, Section 3 of the February 7, 1965 Agreement as clarified by Question and Answer No. 1 of the relevant Interpretations and applicable arbitral precedent. The Carrier explains that the reason for such an approach reflects the agreement between the parties to discourage employees from voluntarily moving to lower paying positions.

The Carrier posits that the abolishment of the Claimant's position as a Track Inspector did not entitle the Claimant to avoid bumping into a position equal to his protected rate and receive the protected rate for voluntarily bidding into the lower paying position of Section Foreman. Instead, the Carrier verifies that the Claimant's protected rate became the rate of pay of the position that the Claimant voluntarily had bid into. The Carrier elaborates that the Carrier therefore had a right, consistent with relevant arbitral precedent, to reduce on a permanent basis the Claimant's protective rate of pay to the Section Foreman's rate of pay.

The Carrier disputes the basis for the Organization's appeal. The Carrier considers the Organization's argument to lack sufficient specific information about the date of the purported job abolishment and about the actual job abolishment. The Carrier recounts that the Carrier identified a Track

Inspector position occupied by a junior employee, who the Claimant could have bumped. The Carrier challenges the Organization's finding that the Claimant could not have occupied the available Track Inspector position without a change of residence. The Carrier notes that Article IV, Section 4 permits the Carrier to treat the Claimant as occupying the position that the Claimant elected to decline.

For these reasons the Carrier requests that the position of the Carrier should be sustained by authorizing the Carrier to reduce on a permanent basis the Claimant's protected rate or, in the alternative, authorize the Carrier to treat the Claimant as occupying another Track Inspector position carrying a rate of pay equal to the Track Inspector's protected rate. The Carrier urges that the claim should be denied.

OPINION

I. Introduction

This case involves language interpretation. The parties stipulated that the Organization--as the moving party--has the burden to prove its case by a fair preponderance of the credible evidence.

In analyzing the record, the Special Board of Adjustment underscores that Section II(A) of the October 25, 1996 agreement between the parties that led to the creation of this Special Board of Adjustment indicates that:

> The Board shall not have the authority to add contractual terms or to change existing agreements governing rates of pay, rules and working conditions.

The following analysis reflects these limitations on the authority of the Board.

II. The Nature of the Dispute

A careful review of the record indicates that the submission by the Organization on behalf of the Claimant includes three claims that cover June 2000 (FEB-00-1085/1-1-324.1), July 2000, (FEB-00-1119/1-1-324.2), and August 2000 (FEB-00-1120/1-1-324.3). An exhaustive review of the record, however, reveals that the record lacks certain key factual and fundamental information to resolve the present dispute between the parties.

None of the documentary evidence for these three claims specifies the precise location where the Claimant had last worked as a Track Inspector, the specific position of Track Inspector that the Claimant had occupied, the date on which the Carrier had abolished the relevant position, or the precise location where the Claimant had resided at the particular time. Such information is absolutely necessary and indispensable to resolve the contractual dispute and the accompanying arguments advanced by the parties. Without this critical information, no basis exists to analyze the record in the context of the important contractual provisions, potentially relevant Interpretations, and extensive arbitral precedent presented by the parties.

A detailed review of the various provisions addressed in detail by the parties reflects that the missing factual information constitutes the prerequisite for interpreting and for applying the contractual provisions cited by the parties. The

absence of such information about the Claimant precludes a proper analysis of the important issues relied on by the parties that potentially also have significant implications for other members of the bargaining unit and for the Carrier's representatives, who must administer and apply the provisions of the Agreement, as amended.

The extensive arbitral precedent contained in the record underscores the importance of having such factual information to reach an appropriate and sound decision. For these reasons issuing a substantive decision without such critical information would be improper, inappropriate, and irresponsible because such a determination would require undue and unreasonable speculation that could easily lead to an erroneous result. This Board therefore will refrain from the temptation to reach the merits of the present dispute.

III. Conclusion

Under these special circumstances and based on a thorough analysis of the entire record, the record omits sufficient factual information to address the merits of the Claim. The Organization perforce failed to prove its case by a fair preponderance of the credible evidence. The Award therefore shall indicate that the Claim is dismissed.

Accordingly, the Undersigned, duly designated as the referenced Board and having heard the proofs and allegations of the above-named parties, make the following AWARD:

> The record fails to prove that the Carrier, the Burlington Northern Santa Fe, violated

Article IV, Section 1 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996 by failing to preserve the protected rate of pay of the Claimant, L. C. Christensen, at the Track Inspector's rate of pay when he exercised seniority to a Section Foreman's position following the abolishment of his Track Inspector position. The Claim is dismissed.

Robert L. Douglas
Chairman and Neutral Member

Donald F. Griffin
Union Member
Concurring/Dissenting

A. K. Gradia
Carrier Member
Concurring/Dissenting

Ernest L. Torske
Union Member
Concurring/Dissenting

John F. Hennecke
Carrier Member
Concurring/Dissenting

DATED: January 22, 2002
STATE of New York)ss:
COUNTY of Nassau

I, Robert L. Douglas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.