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. 12

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 Carriers in Washington, District of Columbia on November 29, 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:

> Was the Carrier (Duluth Missabe and Iron Range Railway Company) permitted, pursuant to Article I, Section 3 of the agreement in

Mediation Case No. A-7128, dated February 7, 1965, as amended by the Agreement dated April 25, 1997, to furlough protected employees B. Moehlenbrock, T. Van Vlyman, D. Israelson and R. Tanski without according them compensation as provided in the Agreement?

The Carrier proposed the following issues:

1. Was Carrier correct when it furloughed Claimants in January and February, 2001, based on its decline-in-business calculations (Article I, Section 3 of the JSA, as amended), without regard to the number of protected employees who were not working at that time due to disability, discipline, leave of absence, military service or other absence from service?

2. With respect to the claim of Gordon, is Carrier correct that Claimant, in addition to being subject to furlough pursuant to Article I, Section 3 (decline in business), may be furloughed at any time during the calendar year, without regard to Article I, Section 3 of the JSA, because he is a "seasonal employee", and, further, that protective benefits, if any, which might be due him under the JSA are calculated for seasonal employees on an annual basis only?

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:

Was the Carrier (Duluth Missabe and Iron Range Railway Company) permitted, pursuant to Article I, Section 3 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by the Agreement dated April 25, 1997, to furlough without compensation the Claimants--protected employees B. Moehlenbrock, T. Van Vlyman, D. Israelson and R. Tanski--based on the Carrier's decline-in-business calculation, which excluded from being furloughed the protected employees who were not working in January and February,

2001 due to disability, discipline, leave of absence, military service or other absence from service? If not, what shall be the remedy?

BACKGROUND

The parties negotiated certain local amendments to the September 26, 1996 Agreement, which had amended the February 7, 1965 Agreement. The Local Agreement included certain changes relating to the effect on the workforce of a decline in the Carrier's business.

The Organization's job protection claims for the Claimants indicated, in pertinent part, that:

> . . . for January [2001], the Carrier had the right to furlough 11 fully protected people. With the people off due to sickness or injury and discipline, you satisfied the 11 that you could lay off.

(Organization Exhibit 3.)

The Carrier denied the claims and explained, in pertinent part, that:

> The Agreement permits a reduction of currently working "protected" employees based on reductions in business levels. This was well documented and correctly accomplished. There is absolutely no support in our Agreement or practice for your contention that those who are otherwise out of service should be counted as part of any decline-in-business force reduction.

(Organization Exhibit 4.) The record reflects that the parties exchanged similar filings for claims concerning February 2001. The parties failed to resolve the matters during the preliminary steps of the grievance procedure. The dispute proceeded to arbitration for a final and binding determination.

PERTINENT PROVISIONS

LOCAL AGREEMENT

Article I, 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 workday). 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 I, Section 2:

Effective January 1, 1998, seasonal employees who rendered compensated service during each of the years 1995, 1996, and 1997, who otherwise meet the definition of "protected" employees under Section 1, will be offered employment in 1998 and in future years at least equivalent to what they performed in 1997, unless or until retired, discharged for cause, or otherwise removed by natural attrition.

Article I, Section 3:

In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating revenue and net revenue ton miles in any calendar month compared with the average of the same month for the preceding ten years, a reduction in forces in the craft represented by the organization signatory hereto may be made at any time during the said month below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by 2. Advance notice of any such force reduction shall be given as required by the current schedule agreement of the organization signatory hereto. Upon restoration of a carrier's business following any such force reduction, employees entitled to preservation of employment must be recalled in accordance with the same formula within 15 calendar days."

FEBRUARY 7, 1965 MEDIATION AGREEMENT

ARTICLE II - USE AND ASSIGNMENT OF EMPLOYEES AND LOSS OF PROTECTION

Section 1 -

An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement.

ARTICLE IV - COMPENSATION DUE PROTECTED EMPLOYEES

Section 5 -

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

POSITION OF THE ORGANIZATION

The Organization asserts that the disputed protected employees--the employees temporarily out of service due to sickness, injury, leave of absence, or discipline--continue to be entitled to preservation of employment under Article I, Section 1 of the Local Agreement even though the Carrier had the right to suspend temporarily the payment of benefits to such employees.

The Organization reasons that the base for calculating the decline in business formula must include the disputed protected employees. The Organization maintains that the Carrier had an obligation to count the disputed protected employees in the calculation of the decline in business formula; erred by excluding the disputed protected employees; and further erred by furloughing the Claimants.

It is the position of the Organization that the disputed protected employees retained protected status (entitled to preservation of employment) even though their right to benefits became suspended while they were temporarily out of service due to sickness, injury, leave of absence, or discipline. The Organization regards Article II, Section 1 of the Local Agreement as providing the sole basis for an employee to lose protected status and points out that none of the Claimants experienced the Article II, Section 1 triggering events.

The Organization pinpoints that Article I, Section 1 sets forth the basis for employees to achieve protected status and defines "active service" to include employees working or holding an assignment. The Organization continues that a carrier must retain in service, subject to compensation, an employee who is protected under Section 1 until the employee retires, the Carrier discharges the employee, or natural attrition causes the removal of the employee. The Organization elaborates that a protected employee lacks a guarantee to have a job in active service. The Organization explains that a furloughed employee, who continues

to receive benefits, is retained in service subject to compensation. The Organization stresses that an employee protected by Article I, Section 1 retains a right to income stabilization and benefits until such an employee becomes unprotected or protected but ineligible for benefits. The Organization emphasizes that a protected employee is entitled to preservation of employment and may be furloughed subject to compensation. The Organization comments that no protected employee has a right to preservation of employment if preservation of employment means retained in active service. The Organization clarifies that interpreting preservation of employment to embrace retained in active service would eliminate the meaning of the decline in business formula. The Organization discerns that the Carrier's right to furlough Section 1 protected employees means that an employee who is entitled to preservation of employment is synonymous with an employee who is subject to protection. The Organization argues that the disputed protected employees did not lose their protected status because a loss of protected status only may occur if certain specified disqualifying events occur. The Organization confirms that absences caused by sickness, leave of absence, or disciplinary suspension do not constitute such disqualifying events. The Organization observes that Article IV, Section 5 provides the sole exemptions for the Carrier to avoid providing income stabilization to protected employees. The Organization specifies that Article I, Section 3 does not affect an employee's protected

status and does not add an additional exemption for the Carrier to avoid providing income stabilization to protected employees. The Organization portrays Article I, Section 3 as enabling the Carrier to obtain limited relief from the compensatory obligations that arise under Article I, Section 1 without operating independently of Article IV, Section 5 or Article II.

The Organization reiterates that the Carrier already had exercised the Article IV, Section 5 exemptions to deny income stabilization benefits--for reasons unrelated to the decline in business--to the eleven disputed protected employees and, therefore, the Carrier lacked a right to obtain additional improper exemptions by extending the decline in business formula to the Claimants. The Organization describes that the eleven disputed protected employees retained their protected status so the Carrier should have included the eleven disputed protected employees in the base of protected employees for the calculation of the decline in business formula. The Organization cites the omission from the Local Agreement of any basis to deduct the disputed protected employees from being included in the calculation of the base of protected employees for the calculation of the decline in business formula. The Organization relates that no further exemption exists for the Carrier to extend the decline in business exemption beyond the eleven disputed protected employees because to do so would enable the Carrier to have 22 protected employees on an uncompensated furlough. The Organization views the Carrier's argument to be

inconsistent with certain arbitral precedent because, unlike some other agreements, no explicit exclusion exists in the Local Agreement for employees whose protective status has been suspended. The Organization distinguishes certain arbitral decisions cited by the Carrier as irrelevant because none of the decisions concluded that an employee, who had become ineligible for protective benefits, ceased being a protected employee. Based on all of these arguments, the Organization therefore requests that the claims be sustained.

POSITION OF THE CARRIER

The Carrier asserts that the agreement omits any language that permits employees, who are not at work due to illness or injury, to be included in the number of employees that the Carrier may have a right to furlough pursuant to the decline in business formula. The Carrier maintains that no precedent exists to support the position of the Organization and that the Organization therefore failed to meet its burden of proof in the present matter. The Carrier faults the Organization for failing to provide the necessary proof of its claim during the on-property handling of the matter.

The Carrier stresses that the events that triggered the decline-in-business provisions that led to the present dispute occurred in the same way as that had led the Carrier and other carriers to apply the decline-in-business provisions on other occasions. The Carrier questions the Organization's sudden attempt to change the Carrier's understanding of the consistent

application by the parties of the decline-in-business formula in Article I, Section 3, which the Carrier considers to have remain unchanged since 1965. The Carrier emphasizes that the Carrier made the necessary calculations, determined without any disagreement by the Organization that the Carrier could furlough eleven employees, and furloughed eleven active protected employees according to the relevant plain language of the Agreement and the past practice that had existed for 35 years. The Carrier underscores that the original and amended versions of Article I, Section 1 confine protective benefits to employees in active service and that active service requires employees to be working. The Carrier understands the concept of active service to be part of the initial method for employees to be eligible to qualify for protected status and to be inherent in the recall requirement of employees after the restoration of a carrier's level of business after a decline in business. The Carrier reasons that an obligation for the Carrier to restore employees would lack logic if such protected employees were not working before the original application of the decline-in-business formula because of a disability, an injury, the imposition of discipline, or being on a leave of absence. The Carrier adds that the relative seniority of inactive employees lacks relevance to the initial furlough of employees and perforce lacks relevance to the order of restoring employees. The Carrier cites the references to protected employees in Article I, Section 5 as verifying that the calculation of the base in the decline-in-

business formula only includes active employees. In addition to the Interpretation for Article I, Section 1 in Question No. 4 and for Article IV, Section 5 in Question No. 1, the Carrier refers to Article IV, Section 5 to substantiate that only active employees may qualify for compensation as protected employees.

The Carrier relies on certain arbitral precedent to establish that employees must maintain active status to be entitled to protective benefits. The Carrier recounts that such employees have their protective benefits suspended while on a physical disability, a disciplinary suspension, a medical disability, or while working in a craft not subject to the Job Stabilization Agreement; such employees have their protected status restored after the end of the circumstances that had caused the protective benefits to be suspended. The Carrier points out that the Carrier presented these arguments and related authority to the Organization during the handling of the dispute, however, the Organization failed to refute any of the grounds advanced by the Carrier to justify the Carrier's position.

With respect to the reference in Article I, Section 3 to "the number of employees entitled to preservation of employment," the Carrier contends that the duty of the carriers to preserve the employment of protected employees only extends to employees who are actually able to perform service. The Carrier highlights that the Organization's theory would have caused the Organization to file job protection payment claims for every employee on away from work due to an illness, an injury, or discipline for each

month that the decline-in-business formula did not authorize the Carrier to furlough any employees. The Carrier notes that the Organization failed to file such claims in the past.

The Carrier criticizes the Organization for trying to negate the purpose of the decline-in-business formula by preventing the Carrier from obtaining permissible financial relief during adverse periods. The Carrier elaborates that the Organization's approach would produce an absurd result. The Carrier continues that the Organization never presented such an argument in the past and that the Carrier's approach conforms to the approach on the property, throughout the entire industry, and with other crafts. The Carrier points out that the Organization never refuted the Carrier's description of the prior approach to the matter.

Although the Carrier initially advanced certain arguments concerning the original claim that involved the treatment of seasonal employees, during the hearing the Carrier requested that the matter be deferred pending the outcome of the non-seasonal claim.

For these reasons the Carrier requests that the position of the Carrier should be sustained. The Carrier urges that the claims 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 Meaning of Article I, Section 3

A careful review of the record indicates that Article I, Section 3, as amended by the parties in the local Agreement dated April 25, 1997, contains the critical language that triggered the present dispute. Article I, Section 3 provides a formula to determine the circumstances that permit the Carrier to make a reduction in forces due to a decline in business. The formula for the possible reduction in forces refers to "the number of employees entitled to preservation of employment" as a key component to calculate the reduction in forces that a Carrier has an entitlement to make.

The present dispute reflects that the parties disagree about the meaning of the two clauses concerning the number of "employees entitled to preservation of employment." The Organization argues that the clauses include the disputed

employees in the group of furloughed employees and the Carrier argues that the clauses exclude the disputed employees from the group of furloughed employees.

Although Article I, Section 3 permits a reduction in forces to occur "at any time" during the month, the actual calculation must occur at a precise time based on the financial, business, and workforce facts that exist at that precise time. In doing so, the number of "employees entitled to preservation of employment" also must reflect the specific facts and circumstances that exist at that precise time.

Article I, Section 3 necessarily addresses three distinct points in time: 1) the number of employees entitled to preservation of employment at the time of the initial calculation; 2) the number of employees affected by an authorized reduction in force; and 3) the employees entitled to preservation of employment based on a recall in those instances when the Carrier's initial entitlement to a reduction in force changes because of a restoration of the Carrier's business.

As a result of the uniform structure of Article I, Section 3, consistent principles must apply to determine the "employees entitled to preservation of employment" at the time of the initial calculation and at the time of the subsequent calculation when the Carrier's initial entitlement to a reduction in force changes because of a restoration of the Carrier's business. The record fails to provide any basis to conclude that Article I, Section 3 anticipates, envisions, or expects the mandatory recall

of employees who at the time are temporarily out of service due to sickness, injury, leave of absence, or discipline. In particular, a recall enables employees on furlough to return to actual work whereas the status of being temporarily out of service due to sickness, injury, leave of absence, or discipline necessarily precludes such employees from returning to actual work. The only interpretation of the record that recognizes the inability of the Carrier to make a mandatory recall of employees who are temporarily out of service due to sickness, injury, leave of absence, or discipline and produces a uniform and consistent approach throughout the entire process of administering, applying and interpreting Article I, Section 3 requires the exclusion of the disputed employees from the identification of the employees to be furloughed.

The record contains references to certain arbitral precedent from 1969 to 1973 from Special Board of Adjustment 605. The Carrier cites Award No. 30 (March 7, 1969) (Rohman, Arb.); Award No. 108 June 24, 1969) (Zumas, Arb.); Award No. 159 (November 17, 1969) (Rohman, Arb.); and Award No. 362 (June 28, 1973) (Rohman, Arb.). A painstaking review of these earlier decisions reflects a consistent view that protected employees who are not actively at work because of an injury, disability, the imposition of discipline are temporarily treated differently for purposes of certain benefits than when they are actively working. In recognizing this approach, the arbitrators have exercised restraint and have refrained from imposing their personal views

of the equities of the particular situation. Instead, the consistent theme of these earlier decisions underscores the preeminence of the relevant agreements and the special status that results in the context of an injury, disability, or the imposition of discipline. This special status also is consistent with the recognition of such special status in Article IV, Section 5 of the Agreement.

The Organization also has cited two decisions by System Board of Adjustment No. 605 to support its position that the absence of explicit language in Article I, Section 3 to exclude the disputed employees from the group of furloughed employees indicates that the Carrier lacked the right to exclude the disputed employees from the determination of the employees to be furloughed pursuant to the decline-in-business formula. The first case--between the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes and The Atchison, Topeka and Santa Fe Railway Company--involved the decline-in-business provision in a local Agreement that had explicitly specified "excluding those whose protective status has been suspended" from the furlough arising from calculation of the reduction in the number of protected employees. The System Board addressed the specific dispute: how to calculate the decline-in-business formula when certain employees had voluntarily filed a notice that had limited their recall rights. The System Board found that the mere filing of a notice that had limited the recall rights of certain employees did not automatically mean

that the protective status for the employees had been suspended. As a result, the System Board clarified that the Carrier may deduct the employees when calculating the reduction in the number of protected employees based on the decline-in-business formula in the specific instances when the suspension in benefits actually occurs. Award No. 445 at 2-3 (July 29, 1987) (LaRocco, Arb.)

The Organization also relied on a decision by System Board of Adjustment No. 605 that involved the Transportation-Communications International Union and the Norfolk Portsmouth Belt Line Railroad Company in which the parties executed a local Agreement that had amended the decline-in-business provision by explicitly "excluding those whose protective status has been suspended" from the calculation of the reduction in the number of protected employees. The System Board found that the carrier had not violated the decline-in-business provision "by excluding those protected employees who, as a result of applying the decline in business formula during the previous months, were no longer entitled to receive protective benefits." The System Board addressed special language in the local Agreement that linked the reduction of protected employees to the provisions of Article I, Section 3, as amended by the parties. In reviewing the record, the System Board also differentiated between a forfeiture of protective status and a suspension of protective benefits. (Award No. 495 at 3-5 (September 29, 1992) (LaRocco, Arb.).)

Notwithstanding the special language that appeared in these two cases referred to by the Organization, the two decisions fail to be dispositive of the present dispute. Of primary importance, the two cases involved different organizations and different carriers. Furthermore, neither decision contains the identical language of the disputed Local Agreement in the present dispute. These two isolated decisions failed to consider the meaning of the clause "employees entitled to preservation of employment" standing alone. Although the presence of additional contract language in the two decisions raises an understandable concern about the impact of such language, the record fails to support the inference that the Organization seeks to draw: that the presence of additional language in the two cases means that the absence of such language in the present Local Agreement confirms, validates, and verifies the Organization's interpretation of the Local Agreement. The Organization's argument about the significance of the absence of such language fails to address how the Carrier could recall the disputed employees, who are at least temporarily out of service due to sickness, injury, leave of absence, or discipline. As such employees cannot perform any work while they are still in such status, the argument that the Carrier still has an obligation to recall such employees lacks persuasiveness under the circumstances that occur with respect to the determination of the employees to be furloughed pursuant to the application of the calculation of the decline-in-business formula. In the absence of other specific clarifying language in

the local Agreement, any other interpretation would create an inherent conflict in the specific language in Article I, Section 3 and would conflict with the theme that exists in the relevant arbitral precedent included in the record.

III. The Application of Article I, Section 3

The Carrier continued to lack the ability to recall the disputed employees--who continued to remain not working due to disability, discipline, leave of absence, military service or other absence from service--if the Carrier's initial entitlement to a reduction in force had changed because of a restoration of the Carrier's business. Although perhaps temporary, such an impossibility existed when the employees were unable to work because of disability, discipline, leave of absence, military service or other absence from service.

This impossibility to have recalled the disputed employees requires a finding that Article I, Section 3 also permitted the Carrier to exclude the disputed employees from the initial identification of the furloughed employees as a result of the calculation of the decline-in-business formula. This determination recognizes that a change in the status of a particular employee, who had not been at work for a period of time due to disability, discipline, leave of absence, military service or other absence from service, could occur and, upon a return to work, the employee would return to the active and operative status of being an employee entitled to preservation of employment. At such a time, Article I, Section 3 would require

the Carrier to include such an employee in the determination of the furloughed employees pursuant to the calculation of the Article I, Section 3 formula. This approach is consistent with Article II, Section 1 of the Agreement, which primarily addresses the actual loss of protection and does not address the suspension of benefits except in the context of the reinstatement of a an employee who had been dismissed for cause.

In summary, the record omits any persuasive evidence that the carriers, the organizations, the neutral referees, or any other relevant group over a significant period of time concluded that Article I, Section 3 requires employees, such as the disputed employees, to be included as part of the group of furloughed protected employees in implementing the calculation of the decline-in-business formula. Any change to this arrangement is a matter for collective bargaining, not arbitration.

IV. Conclusion

Under these special circumstances and based on a thorough analysis of the entire record, the Organization failed to prove by a fair preponderance of the credible evidence that the Carrier was not permitted, pursuant to Article I, Section 3 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by the Agreement dated April 25, 1997, to furlough without compensation the Claimants--protected employees B. Moehlenbrock, T. Van Vlyman, D. Israelson and R. Tanski--based on the Carrier's decline-in-business calculation, which excluded from being furloughed the protected employees who were not

working in January and February, 2001 due to disability, discipline, leave of absence, military service or other absence from service. The Award shall indicate that the Claim is denied.

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 Carrier (Duluth Missabe and Iron Range Railway Company) was permitted, pursuant to Article I, Section 3 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by the Agreement dated April 25, 1997, to furlough without compensation the Claimants--protected employees B. Moehlenbrock, T. Van Vlyman, D. Israelson and R. Tanski--based on the Carrier's decline-in-business calculation, which excluded from being furloughed the protected employees who were not working in January and February, 2001 due to disability, discipline, leave of absence, military service or other absence from service. The Claim is denied.

Robert L. Douglas
Chairman and Neutral Member

Donald F. Griffin
Union Member
Concurring/Dissenting

A. K. Gradia
Carrier Member
Concurring/Dissenting

R. B. Wehrli
Union Member
Concurring/Dissenting

John F. Hennecke
Carrier Member
Concurring/Dissenting

DATED: April 24, 2003
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.