

SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute:	)	Case No. 24
	)	Award No. 24
BROTHERHOOD OF MAINTENANCE OF	)	
WAY EMPLOYES DIVISION,	)	
INTERNATIONAL BROTHERHOOD OF	)	
TEAMSTERS,	)	
	)	
Organization,	)	
	)	
and	)	
	)	
BURLINGTON NORTHERN SANTA FE	)	
RAILWAY COMPANY.	)	OPINION AND AWARD
	)	
Carrier.	)	
	)	

Hearing Date: April 6, 2006
Hearing Location: Sacramento, CA
Date of Award: January 17, 2007

BOARD MEMBERS

Organization Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

EMPLOYEES STATEMENT OF THE CLAIM

Did multi-rate protected employees B.D. Vandergriend, D.R. Hiatt, R.F. Stronger, R.E. Huss, H C. Muchow, R.A. Fenhaus, D.H. Banks, and F.R. Roberts reduce their annual protected "multi-rate" wage guarantee when they voluntarily exercised seniority to bulletin positions carrying a lower rate of pay than the one they vacated? If not, must the Carrier pay the claims submitted for the calendar year 2000?

CARRIER'S QUESTION AT ISSUE

Did BNSF violate the February 7, 1965 Job Stabilization Agreement, as amended, by reducing the protected rate of compensation, established pursuant to Article I, Section 1 and Article IV, Section 1 (and the November 24, 1965 Areed-Upon [sic] Interpretations), to multi-rated employees who voluntarily bid from a higher-rated position to a lower-rated position as provided in Article IV, Section 3?

OPINION OF THE BOARD

This Board, after hearing upon the who record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in a National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

This dispute centers on whether the protected rates of multi-rated protected employees are adjusted when a multi-rated protected employee voluntarily bids to a lower rated position and, if so, how does the adjustment operate. Stated differently, the issue is whether multi-rated protected employees are subject to Article IV, Section 3 of the February 7, 1965 Job Stabilization Agreement, as amended, and, if they are, how does Article IV, Section 3 apply to them?

Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement provided:

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.

Back in 1965, the parties recognized that if an employee routinely occupied several regularly assigned positions having different pay rates, it was inequitable to assign that employee a protected rate based on the position the employee held on October 1, 1964. On that date, the employee may have been occupying one of the higher-rated positions or one of the lower-rated positions. In either instance, setting protection exclusively based on the rate of the position the employee held on October 1, 1964, was unfair to the employee or the railroad. In essence, the

parties realized that a multi-rated employee did not have a single regularly assigned position from which a protected rate could be fairly calculated.

As a result, Question and Answer No. 3 of the agreed-upon interpretations to Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement stated:

Question No. 3: What is the compensation guarantee of an employee who on October 1, 1964 held a regularly assigned position and who normally works a portion of the year in a lower-rated classification and the rest of the year in a higher-rated, classification.

Answer to Question No. 3: Such an employee is guaranteed in future years the compensation of the lower-rated classification for the number of months he worked in such classification in 1964 and the compensation of the higher-rated classification for the number of months he worked in such classification in 1964.

Employees subject to Question and Answer No. 3 acquired two or more protected rates based on the number of months that they worked in various regularly assigned positions during 1964. As will be discussed later in this Opinion, the establishment of such multiple monthly levels of protection necessitates examining an employee's actual compensation over a calendar year to ascertain whether the employee is due protective benefits.

Article IV, Section 3 of the February 7, 1965 Job Stabilization Agreement stated:

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.

Agreed-upon Question and Answer No. 1 under Article IV, Section 3 read:

Question No. 1: If a "protected employee" for one reason or another considers another job more desirable than the one he is holding, and he 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.

When the parties updated and revised the February 7, 1965 Job Stabilization Agreement in the September 26, 1996 Mediation Agreement, they submitted a dispute to this Board concerning the establishment of protected rates for multi-rated employees.¹ [See Question No. 3 presented to *Special Board of Adjustment No. 1087, Award No. 1.*] In *Award No. 1*, this Board held that the work history of the employee during the three years immediately preceding the calendar year in which the employee attains protected status determines whether the employee is a multi-rated protected employee or a non-multi-rated protected employee. The Board then ruled that the protected rate for a multi-rated employee is computed based on the employee's work history in the calendar year preceding the year the employee attains protected status so that a multi-rated employee ends up with a protected rate for each month of a year. Since the Board also determined that a multi-rated employee need not perform the work in the same position during the same month that the employee attained a particular protected rate, the employee's entitlement to protective benefits must be analyzed on an annual, as opposed to a monthly, basis.

¹ In the September 26, 1996 Mediation Agreement, the parties amended Article IV, Section 1 of the Job Stabilization Agreement to delete the 1964 date. Article IV, Section 3 was not changed. Amended Article IV, Section 1 reads:

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

If a multi-rated protected employee had, during the year establishing the employee's protection, worked as a Section Foreman in March and worked in other positions during the other eleven months, the employee need not work as a Section Foreman in March of each successive year.

In this case, the eight Claimants are all multi-rated protected employees. At some point following their attainment of protected status, each of the eight Claimants voluntarily bid to a lower-rated position than the position that the Claimant occupied. Relying on Article IV, Section 3 of the February 7, 1965 Job Stabilization Agreement, the Carrier reduced each Claimants' guarantee for some or all months. The following Table illustrates each Claimant's original multi-rated protection, the Claimant's voluntary bid down and the Carrier's adjustment to the protected rate.

Claimant	Original Multi-Rate Protection	Voluntary Bid Down	Carrier's Adjustment to Multi-Rate Protection
B D Vandergrind	6 mos @ Group 5 Machine Op. 2 mos @ Group 3 Machine Op. 1 mo. @ Section Foreman 1 mo. @ Truck Driver	5/31/98 From: Section Foreman To: Sectionman	12 mos @ Sectionman
D R Hiatt	5 mos @ Section Foreman 7 mos @ General Foreman	3/15/00 From: Foreman To: Group 3/4 Machine Op. ²	12 mos @ Group 3/4 Machine Op
R F Stronger	12 mos @ Welder Helper	5/15/97 From: Welder Helper To: Sectionman	12 mos @ Section man
R E Huss	4 mos @ Section Foreman 8 mos @ Group 3/4 Machine Op	2/28/97 From: Foreman To: Group 3/4 Machine Op.	12 mos @ Group 3/4 Machine Op
R A Fenhaus	10 mos. @ Group 3/4 Machine Op 2 mos @ Group 2 Machine Op	6/30/99 From: Group 2 Machine Op To: Group 3/4 Machine Op.	12 mos @ Group 3/4 Machine Op
H C Muchow	11 mos. @ Truck Driver 1 mo @ Section Foreman	9/30/00 From: Truck Driver To: Sectionman	12 mos @ Sectionman
D H Banks	7 mos. @ Sectionman 4 mos. @ Group 2 Machine Op. 1 mo. @ Truck Driver	2/15/98 From: Group 2 Machine Op To: Truck Driver	7 mos @ Sectionman 5 mos @ Truck Driver

² The Carrier submits that Claimant D.R. Hiatt also voluntarily bid down from Foreman to Sectionman on March 15, 1998.

Claimant	Original Multi-Rate Protection	Voluntary Bid Down	Carrier's Adjustment to Multi-Rate Protection
F.R. Roberts	8 mos @ Track Inspector 3 mos @ General Foreman 1 mo. @ Section Foreman	3/31/99 From: Foreman To: Sectionman	12 mos. @ Sectionman

The Organization grieved the Carrier's adjustment to Claimants' protected rates.

Several of the Claimants engaged in multiple moves between and among positions during the calendar year that they voluntarily bid down to lower-rated positions. Claimant Muchow, apparently, went back to a Truck Driver position on October 9, 2000 and remained on that position for the remainder of the year. Claimant Banks reverted to a Group 2 Machine Operator position on March 9, 1998. Claimant Roberts, on or about April 26, 1999, bid back to a Foreman position. Claimant Vandergriend was back on a Foreman position on or about October 31, 1998. Claimant Hiatt evidently went to a Foreman position from the Group 3/4 Machine Operator position on April 27, 2000. On the other hand, Claimant Huss evidently stayed on the Group 3/4 Machine Operator position for the remainder of 1997. Claimant Fenhaus remained on a Group 3/4 Machine Operator position for the rest of 1999.

As stated at the onset herein, the issue concerns whether the Carrier could adjust the protected rates of the Claimants pursuant to Article IV, Section 3 and, if so, were the Carrier's adjustments proper?

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Neither Article I, Section 1 nor Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, references multi-rated employees or employees protected by multiple guarantees varying by month. Before *Award No. 1 of Special Board of Adjustment*

No. 1087, the sole mention of multi-rated employees was one agreed-upon question and answer, that is, Question and Answer No. 3 to Article IV, Section 1.

Award No. 1 of this Board ruled that a multi-rated employee has only an annual claim for protective benefits. In addition, *Award No. 1* clearly adjudged that a multi-rated employee is not bound to work on any given position during any particular month. Moreover, the term "regularly assigned position" in Article IV, Section 1 is not synonymous with the word "job" in Article IV, Section 3. Therefore, multi-rated employees are not susceptible to being placed within the scope of Article IV, Section 3.

More significantly, multi-rated employees are not subject to Article IV, Section 3 because the annualized guarantee was established by exercises of seniority to a variety of positions. During the year that was used to determine their guarantees, the multi-rated employees exercised their seniority, both voluntarily and involuntarily, from position to position, up and down on the wage scale. Claimants may have voluntarily bid to a lower-rated position during the year used to determine their protection and that rate now comprises the employee's multi-rated protected guarantee for one or more months. They should be able to engage in the same activity in any subsequent year. The Carrier's position ignores the special status of multi-rated employees. What a multi-rated employee does on a particular day is irrelevant to a claim for protective benefits. Therefore, both agreed-upon Question and Answer No. 3, as well as the holding of *Award No. 1*, contemplated that multi-rated employees would continue to move from job to job and thus, not be subject to Article IV, Section 3.

The Carrier mistreated some of the multi-rated Claimants when it reduced their guarantees merely because they voluntarily moved to lower-rated positions for just a few days. While these voluntary bids may have consequences regarding the amount of compensation the multi-rated employees are entitled to receive based on their annual claims, the movements cannot possibly cause a permanent reduction in their protected rates. Indeed, the Carrier's position is inconsistent. Even after it reduced the protected rates for seven Claimants down to a single rate for 12 months, it continued to label them multi-rated employees.

Alternatively, Article IV, Section 3 cannot rationally apply to a Claimant who voluntarily bids to a lower position than the one he held so long as the lower-rated position comprises one protective rate among all the protective rates for that Claimant. Many of the Claimants herein bid for jobs having pay rates that were equal to or greater than one of their monthly multiple guarantees.

In sum, Claimants are immune from having their protected rates permanently reduced albeit, the compensation due some Claimants may be partially offset as a result of voluntary bids to lower-rated positions.

B. The Carrier's Position

Multi-rated protected employees establish guarantees based on the formula in the agreed-upon Question and Answer No. 3 to Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement. These multi-rated employees are not Article IV, Section 2 seasonal employees and thus, they fall within the ambit of Article IV, Section 3. Question and Answer No. 1 to Article IV, Section 3 plainly announces that employees who voluntarily bid to a lower-rated

position suffer a permanent reduction to their guarantees according to the rate of the jobs to which they voluntarily bid. Claimants herein, after 1996, voluntarily bid to lower-rated jobs. In accord with Article IV, Section 3, the Carrier reduced their protected rates to the rates of the positions to which they voluntarily bid, for all months where the original protected rates were higher than the rates of the positions to which they bid.

If the Board adopts the Organization's interpretation herein, multi-rated employees would be free to bid to any job that they wanted without any change in their protected rates, which is specifically forbidden by Question and Answer No. 1 to Article IV, Section 3. The Job Stabilization Agreement, as amended, grants employees generous benefits and, in exchange, the employees must voluntarily exercise their seniority to maintain pay rates at or above their protected guarantees.

The Organization improvidently wants to convert multi-rated employees into seasonal employees. However, *Award No. 1 of Special Board of Adjustment No. 1087* clearly held that the multi-rated protected employees were employees covered by Article IV, Section 1, as opposed to Article IV, Section 2. If their protected guarantee is established under Article IV, Section 1, then multi-rated employees are presumptively subject to Article IV, Section 3. Thus, *Award No. 15, of Special Board of Adjustment No. 1087* is irrelevant to this dispute. It is true, that like seasonal employees, multi-rated protected employees have their protected benefits calculated and paid at the end of the calendar year but this does not diminish their obligation to exercise their seniority to positions at or in excess of their guarantee to avoid incurring a reduction to their guarantees.

It is also true, as the Organization states, that the protection (for some months) for the multi-rated employees was likely based on voluntary seniority moves. Some monthly protected rates were likely predicated on involuntary seniority moves. Nevertheless, the establishment of the protected guarantees is immaterial to what a protected employee must do after becoming protected to preserve the employee's original protective rates.

To reiterate, in exchange for the generous protective benefits, a multi-rated employee, protected at the Foreman's rate, cannot voluntarily move to a Sectionman position and maintain guarantees for one or more months at the Foreman level. The February 7, 1965 Job Stabilization Agreement, as amended, protects employees from adverse actions created by the Carrier as opposed to adverse actions created by the employees. It is absurd that a multi-rated protected employee, who has 11 months protection at the Foreman rate and one month of protection at the Group 2 Machine Operator rate could sit in a Sectionman position for 12 months and still receive the difference in pay between the Foreman's rate and the Sectionman's rate for 11 months of the year and the difference in pay between the Group 2 Machine Operator rate and the Sectionman rate for one month of the year.

In sum, the Carrier properly reduced the guarantees of all Claimants due to their voluntary bids from higher-rated positions to lower-rated positions.

III. DISCUSSION

The initial question before this Board is whether the multi-rated protected employees are subject to Article IV, Section 3 of the February 7, 1965 Job Stabilization Agreement, as amended. For the reasons cited below, we conclude that the multi-rated protected employees are not

immune from a possible permanent reduction in their protective guarantees pursuant to Article IV, Section 3.

First, some multi-rated employees undoubtedly bid down during the year used to establish their monthly guarantees so that the guarantee for some months may have been the result of a voluntary exercise in seniority to a lower-rated position. However, it is equally plausible that a non-multi-rated employee could have voluntarily bid down to a lower-rated regularly assigned position prior to the date used to fix the non-multi-rated employee's protected rate. Therefore, there is not any logical reason for creating a distinction between multi-rated employees and non-multi-rated employees merely because the former may have voluntarily bid down during the year used to establish their protection.

Second, insulating multi-rated employees from the operation of Article IV, Section 3 would confer preferred status on the multi-rated employees and place non-multi-rated employees in an inferior status. Under the Organization's interpretation, a multi-rated employee could voluntarily bid down to a very low rated position (a position having a rate lower than any of the employee's protective rates) and, at the end of the year, collect the difference between his multiple, monthly protective guarantees and his annual compensation. On the other hand, a non-multi-rated employee would have his protective rate permanently reduced and would collect no protective benefits.

Third, the genesis of multi-rated employees is agreed-upon Question and Answer No. 3, to Article IV, Section 1. At the same time, the parties agreed to Question and Answer No. 1 under Article IV, Section 3. The latter is unequivocal. Question and Answer No. 1 clearly states that an

employee's protection shall be reduced when the employee voluntarily bids to a position with a lower rate than the position that the employee holds. Having just created the special category of multi-rated employees, the parties could have easily written an exception in Question and Answer No. 1. The absence of any exception is strong evidence that the parties did not intend to immunize multi-rated employees from Article IV, Section 3.

Fourth, the opening clause of Article IV, Section 1 plainly provides that the terms of Article IV, Section 3 apply to all employees covered by Section 1. As stated earlier, multi-rated employees are Article IV, Section 1 employees.

The answer to the threshold issue is that Article IV, Section 3 applies to multi-rated protected employees.

In *Award No. 1*, this Board could not foresee the ramifications of devising a complex formula for determining whether an employee was multi-rated and, if so, the multiple protected rates for that employee. The Board was undoubtedly trying to fairly and reasonably implement the intent and spirit of Question and Answer No. 3 to Article IV, Section 1. *Award No. 1* gives us little guidance other than, due to the nature of establishing protection for multi-rated employees, the application of Article IV, Section 3 cannot precisely emulate what happens to non-multi-rated employees. The goal of this Board is, to the extent feasible, replicate what happens to non-multi-rated employees with certain modifications necessitated by both the manner in which multi-rated employees establish their protection and the fact that their entitlement to protective benefits is determined annually. Where it can be safely determined that a multi-rated employee is in a situation identical to a non-multi-rated employee, both employees must be treated the same. In

some situations, the nature of the establishment of the protection and the annual analysis necessitates that the multi-rated employees be treated in a separate and distinct fashion with regard to the application of Article IV, Section 3.

Rather than engaging in an intricate discussion of each of the eight Claimants, the Board will provide the parties with guidelines for applying Article IV, Section 3 to multi-rated employees.

Let's say a Hypothetical Multi-Rated Employee (HME) has original protection as follows:

1. Four months at a \$20 an hour position;
2. Three months at a \$18 an hour position; and,
3. Five months at a \$16 an hour position.

NOTE: For purposes of determining possible forfeiture of protection under the February 7 Agreement, and in line with the concepts contained in *SBA 1087 Award No. 1*, Question 3, the majority of a calendar month a multi-rated employee worked at a particular rate will be used to identify the position the employee was assigned to for the entire calendar month, unless, of course, the employee is not retained in service a majority of the calendar month. Likewise, this same principle will be followed in identifying a position involving one of the protected employee's multi-rates that a junior employee(s) held for the calendar month.

Scenario A: At any time during the year, the HME voluntarily bids for, and is awarded, a \$15 an hour position and, at the time of this assignment, the HME holds a position with a rate more than \$15 an hour. The protected rate for the HME becomes 12 months at \$15 per hour. Under this scenario, the HME is treated exactly the same as a non-multi-rated employee with regard to the operation of Article IV, Section 3.

- Scenario B: During the first two months of the year, the HME works a \$20 an hour position. On March 1, the HME voluntarily bids down to a \$16 an hour position. The HME holds the \$16 per hour position for four months. The HME then voluntarily bids for a \$20 an hour position and holds this position for the remainder of the year. The voluntary bid down does not have any effect on HME's monthly, multiple protection levels. His protection remains four months at \$20; three months at \$18; and, five months at \$16 because, he did not voluntarily work for more than five months in a \$16 an hour position or for more than three months in the \$18 an hour position at the expense of being able to work in a \$20 an hour position.
- Scenario C: During the first three months of the year, the HME works a \$20 an hour position. On April 1, the HME voluntarily bids down to a \$18 an hour position. He stays in the \$18 an hour position for the remainder of the year. If it can be demonstrated that, but for the voluntary bid down, the HME would have been able to hold a \$20 an hour position during one more month of the year (it does not matter which month), then his \$20 protected rate for one month is permanently reduced to \$18 an hour. The HME would end up with protected rates of three months at \$20 an hour; four months at \$18 an hour; and, five months at \$16 an hour.
- Scenario D: During the first five months of the year, the HME works a \$22 an hour position. On June 1, the HME voluntarily bids down to a \$16 an hour position and stays there for the remainder of the year. If it can be demonstrated that, but for the voluntary bid down, the HME would have been able to hold an \$18 an hour position during any one of the last seven months of the year, then one month of the HME's protection is reduced from \$18 an hour to \$16 an hour. The HME's protected rate would become four months at \$20 an hour; two months at \$18 an hour; and, six months at \$16 an hour.
- Scenario E: The HME works the first three months of the year at a \$18 an hour position. On April 1, the HME voluntarily bids down to a \$16 an hour position. He holds this position until November 1, when he voluntarily bids to a \$20 an hour position and remains there during the last two months of the year. If it can be demonstrated that, but for the voluntary bid down, the employee would have been able to hold a \$20 an hour position during any two months that he held the \$16 an hour position, two months of his \$20 an hour protected rate is reduced to \$16 an hour. Stated differently, the fact that the HME may have been able to occupy a \$20 an hour position during the three months that the HME held the \$18 an hour position cannot

be held against him. Rather, it would have to be demonstrated from the records, that he would have been able to hold a \$20 an hour position while he was holding the \$16 an hour position to which the HME voluntarily bid down. If this can be substantiated, then the HME's protection is two months at \$20 per hour; three months at \$18 per hour; and, seven months at \$16 per hour.

The Board realizes that there are other possible scenarios. Instead of trying to predict every conceivable factual situation, this Board is confident that the parties will be able to use the preceding scenarios to resolve not only the eight claims herein but, also, most all other claims. If the parties have any dispute or questions about the application of our decision herein, this Board retains jurisdiction over this controversy.

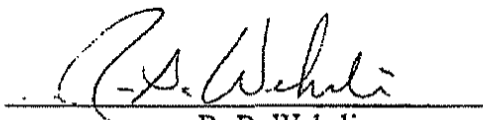
The Board ends its discussion with an observation. The Board recognizes that the application of its decision herein to some Claimants will be quite easy while the application to other Claimants will be somewhat awkward and complex. The parties are, of course, free to negotiate a simpler method. We are only adjudicating this dispute to give full force and effect to Question and Answer No. 3 to Article IV, Section 1; Question and Answer No. 1 to Article IV, Section 3; and, *Award No. 1 of Special Board of Adjustment No. 1087*.

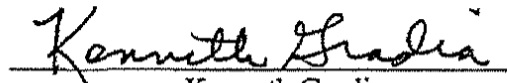
AWARD AND ORDER

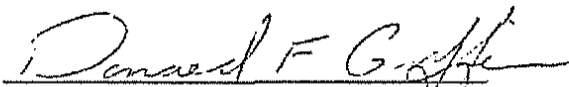
- (1) The Employee's Statement of the Claim is sustained, in part, and denied, in part, in accord with this Opinion and Award;
- (2) The Answers to the Carrier's Question at Issue is Yes, in part, and No, in part, in accord with this Opinion and Award; and,

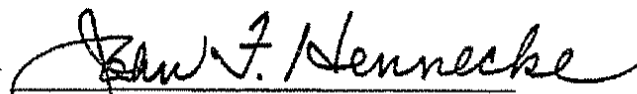
- (3) This Board retains jurisdiction over the specific claims submitted for adjustment here should either party have a question or dispute regarding the amount of compensation due a named Claimant or the methodology used to determine the compensation due a named Claimant.

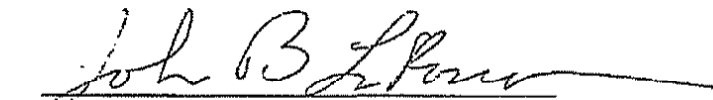
Dated: January 17, 2007


R. B. Wehrli
Union Member


Kenneth Gradia
Carrier Member


Donald F. Griffin
Union Member


John Hennecke
Carrier Member


John B. LaRocco
Neutral Member