NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT No. 1091

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION and ELGIN, JOLIET AND EASTERN RAILWAY COMPANY DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY	Case Nos. 1-4 Award No. 1

Martin H. Malin, Chairman & Neutral Member
Joel M. Parker, Employee Member
John F. Ingham, Carrier Member

Hearing Date: June 2, 1997

Issue No. 1:

"Under the terms of Side Letter #2 of the 1995 standby agreements on the EJ&E and DM&IR, how should the subsequent September 9, 1996 National Agreements be applied? If adjustments are determined to be due, how should such adjustments be calculated?"

Issue No. 2:

"Are clerks on the EJ&E and DM&IR entitled to a wage adjustment in lieu of the wage restoration provided for under Article IX - National Salary Plan - of the September 9, 1996 National Agreement, under the terms of the parties' respective local wage agreements?"

Issue No. 3:

"Are journeymen carmen on the DM&IR and EJ&E entitled to the lump sum differential payment provided for in Side Letter No.5 to the September 9, 1996 National Agreement under the terms of the parties' respective local wage agreements?"

Issue No. 4:

"Are the DM&IR and EJ&E entitled to the health and welfare offsets against the July 1, 1996 and July 1, 1998 general wage increases provided for in the national agreements of September 9, 1996, under the terms of the parties' respective local wage agreements?"

FINDINGS:

Special Board of Adjustment No. 1091, upon the whole record and all of the evidence, finds and holds that Employees and Carriers are employees and carriers within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the disputes herein; and, that the parties to the disputes were given due notice of the hearing thereon and did participate therein.

On November 1, 1994, the Organization served Section 6 notices on Carriers for all crafts and requested that Carriers waive local conferences and refer the matters to national negotiations. Carriers refused and negotiations proceeded locally.

On the national level, the Organization sought general wage increases of 4 percent per year effective on July 1 of each year 1995 - 1999. The Organization's goals were based on its agreement with the Illinois Central Railroad which provided for GWIs of 3 percent on July 1, 1995, 3 percent on July 1, 1996, 4 percent on July 1, 1997, 3 percent on July 1, 1998 and 4 percent on July 1, 1999. The IC agreement also provided for a bonus of $1,000.00. The National Carriers' Conference Committee sought an agreement patterned on its agreement with the United Transportation Union. The UTU agreement provided for rolling a $.09 COLA into the basic rate on November 30, 1995, a 3.5 percent GWI on December 1, 1995, a 1 percent lump sum signing bonus on the date of the agreement, a 3 percent lump sum payment on July 1, 1996, a 3.5 percent GWI on July 1, 1997, a 3.5 percent lump sum payment on July 1, 1998, and a 3.5 percent GWI on July 1, 1999.

Local negotiations proceeded not only for Carriers in the instant dispute, but also for their sister railroads, all of whom are subsidiaries of Transtar, Inc. In March 1995, the Lake Terminal Railroad Company was the first of the sister companies to reach agreement with the Organization. The LT agreement provided for GWIs of 3 percent effective January 1 of each year, 1995-1999. It also provided for a $750.00 signing bonus. Article VII(c) of the LT agreement provided:

> The signing bonus and wage adjustments provided for in this Agreement shall, at a later date, be adjusted either upward or downward to equal any signing or other bonus or bonuses and wage adjustments that are agreed upon in the next agreement negotiated by the Organization, party hereto, and the National Carriers' Conference Committee, commonly known as the "national agreement", in settlement of Section 6 Notices served by the Organization on or about November 1, 1994 and by

the carriers participating in such national handling on or about November 1, 1994. In the event such national agreement does not contain signing, or other lump sum, bonus or wage adjustments equal to or greater than the amounts set forth in this Agreement, such excess monies shall be repaid to the Company. If it should be necessary to recoup any money under this provision, the Carrier shall recoup the money involved so as to not place a substantial burden on the employes affected. In the event such national agreement contains signing, or other lump sum, bonus and wage adjustments greater than the amounts set forth in this Agreement, the amounts of any underpayments shall be paid to the employees covered by this agreement within sixty days after the national agreement referred to herein has been ratified. It is the intention of the parties that this provision shall be applied so that employes covered by this agreement shall be placed in no better, nor worse, position with regard to signing, or other lump sum, bonus and wage adjustments than they would have been had they been covered by, and party to, the national agreement.

The LT agreement became a model adopted by the other sister carriers and the Organization. Between June and November 1995 the Organization and the Carriers involved in the instant dispute reached a series of agreements covering all crafts. The agreements provided for $750.00 signing bonuses and 3 percent GWIs effective each January 1 from 1995 - 1999. Each agreement was subject to a Side Letter #2 which provided:

> This will confirm our understanding that the signing bonus and wage increases provided for in this agreement will be adjusted to equal the amount of the signing bonus, if any, and wage increases provided for in the next national agreement (as defined in Side Letter #1) and the effective dates changed to conform thereto. Any wage increases provided for in this agreement which are scheduled to take effect after the expiration of the moratorium in the next national agreement will be eliminated.
>
> Our intent is to place the employees you represent in the same position with respect to their signing bonus and general wage increases, during the period of the next national agreement, as they would have been had they been covered by the national agreement.
>
> The parties recognize the complexities of this matter and will meet within 30 days after the national agreement is ratified to resolve the method for making the adjustments provided for herein and handling any overpayments or underpayments.

Impasse in national negotiations and a threatened strike ultimately led to the appointment of Presidential Emergency Board 228. On June 23, 1996, PEB 228 issued its report. It concluded that the UTU pattern was more appropriate to follow than the IC agreement. It adopted the UTU series of GWIs and lump sum payments.

PEB 228, however, realized that the UTU achieved two significant benefits that were tied to many of its employees being compensated on the basis of miles rather than hours which could not be available to TCU represented employees. These were the retention of the 130 mile day and the application of general wage increases to overmiles. To equalize the packages, PEB 228 recommended restoring a prior 11 percent reduction in the overall clerks wage rates under the National Salary Plan (NSP) and increasing the carmen's skill differentials retroactive to January 1, 1995.

Negotiations following issuance of PEB 228's recommendations led to agreement. The National Agreements provided for two 1.75 percent GWIs instead of the 1996 and 1998 lump sum payments recommended by PEB 228. It also provided for a restoration of 7 percent, rather than the entire 11 percent reduction under the NSP, and for a lump sum payment to carmen based on the retroactive skill differential increase, without continuing the increase prospectively. In addition, the National Agreements contained offsets against the GWIs for 1996 and 1998 for a portion of health insurance premium increases. The National Agreements were ratified and signed on September 9, 1996.

On August 7, 1996, the TCU Allied Services Division Regional Representative and EJ&E Director of Labor Relations - West signed a letter agreement. The agreement provided:

> This will confirm our agreement to adjust the rates of pay for all of the employees you represent (Clerks, Telegraphers and Allied Services Division employees), effective August 1, 1996, to reflect the wage increases provided for in the TCU tentative national agreement, to avoid any further overpayment to these employees.
>
> . . . . .
>
> Assuming the tentative national agreement is ratified, the carrier will then determine how much each employee has been overpaid through July 31, 1996, based on what they have received under their respective local agreement, as compared to what they would be due under the national agreement. Once that is done we can meet to resolve the method of recouping the overpayments.

On September 24, 1996, the TCU Allied Services Division President wrote to the EJ&E Director of Labor Relations - West, advising that the Regional Representative lacked authority to sign the August letter agreement. He further contended that the letter did not properly determine the cost and value of the national agreement and demanded that the prior wage rates be restored. On September 30, 1996, the Allied Services division President again wrote, clarifying that the Organization's position was that the National Agreement was worth more than the local agreement when the 7 percent clerks' NSP restoration was factored in.

In mid-February 1997, the EJ&E announced that it would begin recouping overpayments from the employees at a rate of $50.00 per pay period in March. The Organization protested and Carrier eventually agreed to refrain from recouping overpayments until July.

With respect to Issue No. 1, The Organization maintains that the only overpayment that Carriers are entitled to recoup is the $350.00 difference between the bonus under the Local Agreements and the bonus under the National Agreements. The Organization argues that Side Letter #2 required that the wage rates be adjusted as of the date of the National Agreement, but did not provide for recoupment of interim wage increases. The Organization contends that any other interpretation would produce an absurd result. According to the Organization, its stated goals in national bargaining were to follow the pattern of the IC agreement. If it achieved its goals, it would have obtained a first GWI on July 1, 1995. Thus, by agreeing to a January 1, 1995 GWI in the Local Agreements, the parties agreed to a result that guaranteed that the employees would end up owing Carriers money even if the Organization achieved its national bargaining goals. The Organization urges that the parties could not have intended such a result.

The Organization contends further that Side Letter #2 specifies the parties' intent to place the employees in the position they would have been in had they been covered by the National Agreements "during the period of the next national agreement." In the Organization's view, the "period of the next national agreement," began with its ratification on September 9, 1996. Thus, the GWIs were to be amended prospectively but there was to be no recoupment for prior GWIs as they fell outside the period of the National Agreement.

The Organization disputes the significance of the August 1996 letter agreement. The Organization contends that the Regional Representative had no authority to enter into the agreement. Furthermore, in the Organization's view, the agreement only covered prospective adjustment of wage rates, but left recoupment for future consideration.

At the time the letter agreement was made, the Organization maintains, the parties did not know the total worth of the National Agreements.

Carriers contend that Side Letter #2 makes clear that the parties agreed to adopt the signing bonuses and wage adjustments to be provided in the National Agreements. Carrier urges that the express language of Side Letter #2 includes an agreement to adjust not only the wage rates once the National Agreements were concluded, but also to adjust the effective dates of the wage increases. Furthermore, in Carrier's view, the language of Side Letter #2 clearly refers to the need to handle any overpayments (or underpayments) that might be made to the employees.

Carriers contend that the Local Agreements were modeled on the Lake Terminal Agreement which clearly provided for Carriers to recoup overpayments made as a result of GWIs that exceeded those provided for in the National Agreements. Carriers maintain that they were the parties most at risk in this arrangement because they had no control over the national negotiations. The Organization, on the other hand, was a party to the national negotiations and could exercise a degree of control over the outcome.

Carriers contend that its position finds further support in the August letter agreement. Carriers maintain that the Regional Representative was the person who negotiated three of the Local Agreements and that he realized that Carriers had a right to recoup overpaid GWIs. Carriers ask, why would he have approached the EJ&E in August in an effort to stop the overpayments, if not to minimize what he knew would be substantial employee recoupment liability.

Side Letter #2 certainly was not written as clearly as it could have been. After careful consideration and full reflection, the Board concludes that Carriers' interpretation is a far less strained reading of Side Letter #2 than the Organization's.

The Organization interprets Side Letter #2 to read to the effect that the parties would adopt prospectively the GWIs provided for under the National Agreements and prospectively change the effective dates to conform thereto. The parties also would adopt the signing bonus, if any, contained in the National Agreements and, if said bonus was less than the bonus provided for in the Local Agreements, Carriers would be entitled to recoup the difference.

Unfortunately, for the Organization, its interpretation is at odds with the express language of Side Letter #2 in several respects. First, the first paragraph of Side Letter #2 calls for adjusting the wage increases to equal the amount of wage increases in the National Agreements and for changing the effective dates to conform to the National Agreements. Nowhere is the change in effective dates expressly qualified to apply to prospective wage increases only. The implication is that it applies to all wage increases, including those that took effect prior to ratification of the National Agreement.

Second, the third paragraph of Side Letter #2 recognizes that the parties will need to meet to discuss the handling of "any overpayments." If the only overpayments that the parties had anticipated were bonus overpayments, it would have been a simple matter for them to have specified a need to meet to discuss handling of bonus overpayments. Instead, the use of the term, "any overpayments," on its face and in the context of the prior reference to adjustments in wage increases, indicates that the parties anticipated a need to discuss handing overpayments in wages.

Third, the middle paragraph of Side Letter #2 specifies the parties' intent to place the employees in the same position with respect to wage increases and bonus payments as they would have been in had they been covered by the National Agreements. We are not persuaded by the Organization's argument that the words, "during the period of the next national agreement" referred only to the period following the agreements' ratification. The parties knew that one matter at issue in the national negotiations was the degree of retroactivity, if any, in GWIs. It is clear that the period of the next national agreement is far broader than the period from the date of ratification through the moratorium period provided for in the agreement. We hold that, with respect to wage increases, the period of the next national agreement extends back to the expiration of the moratorium of the prior national agreement, i.e. January 1, 1995.

At first glance, the Organization's contention that Carriers' interpretation produces an absurd result of having the employees owe money from day one, even if the Organization achieved its goals in national bargaining, has considerable force. Much of that force, however, is lost when Side Letter #2 is considered in the context of its development.

The parties agree that the LT Agreement served as the model for the subsequent Local Agreements. That agreement recognized the possibility that the employees would have to repay money to the carrier and provided: "If it should be necessary to recoup any money under this provision, the Carrier shall recoup the money involved so as to not place a substantial burden on the employes affected." Side Letter #1 to the LT Agreement provided that Carrier would recoup overpayments by reducing future wage increases and bonuses.

Thus, the result on the LT was to frontload the ultimate overall pay increase. Such a result was not absurd, but, from the Organization's perspective, was quite sensible.

When the parties adopted the LT model, however, they did not adopt the express agreements for handling recoupment of overpayments or payment of underpayments. Instead, they agreed to meet within thirty days following ratification of the National Agreements to discuss how to handle overpayments or underpayments. However, the LT Agreement makes clear in Article VII(c): "In the event such national agreement does not contain signing, or other lump sum, bonus or wage adjustments equal to or greater than the amounts set forth in this Agreement, such excess monies shall be repaid to the Company." In other words, the clear language of the model for the Local Agreements between Carriers and the Organization verifies what is implied in the language of Side Letter #2, that Carrier's ability to recoup is not limited to overpayments of bonuses, but includes overpayments of GWIs.

Accordingly, we adopt Carrier's basic interpretation of Side Letter #2. This interpretation, however, is subject to our answers to Issues 2, 3, and 4.

With respect to Issue Nos. 2 and 3, the Organization contends that the 7 percent restoration to the clerks NSP and the lump sum payment based on carmen skill differentials were wage increases within the meaning of Side Letter #2. The Organization maintains that PEB 228 clearly recommended restoration of the 11 percent deduction in the NSP and the increase in skill differentials for carmen to equalize its recommended economic package with the UTU agreement. The equalization was made necessary by the UTU agreement's retention of the 130 mile day and application of GWIs to overmiles. These matters clearly were wages, in the Organization's view.

The Organization contends that its handling of these matters in negotiations that followed PEB 228's recommendations further shows that these matters were wages. Specifically, the Organization observes, it traded 4 percent of the NSP restoration and the prospective part of the skill differentials for two 1.75 percent GWIs. It could have traded more or it could have traded less. The point, according to the Organization, is that these matters clearly involved wages and are to be considered applicable to the Local Agreements under Side Letter #2.

The Organization recognizes that Carriers did not adopt the NSP, but contends that if Carriers had taken part in the national negotiations, a separate arrangement would have been negotiated for Carriers' employees. The Organization urges that it is entitled to set off the economic value of the 7 percent restoration against any recoupment that Carriers claim.

The Organization further contends that the carmen do receive skill differentials on Carriers and therefore, they are entitled to the lump sum bonus based on the skill differential increases contained in the National Agreement. They urge that this amount also must be set off against any of Carriers' claims to recoupment from the carmen.

Carriers contend that Side Letter #2 expressly adopted only GWIs and bonus payments. It did not adopt the general National Agreement package. Carriers urge that the 7 percent NSP restoration and the lump sum skill differential payments were not adopted under Side Letter #2. In any event, Carriers maintain, these matters do not apply to them because they had not adopted the NSP and their Agreements did not provide for skill differentials.

Carriers' contention that they only adopted a narrow portion of the National Agreements limited to matters expressly termed general wage increases and bonus payments is not borne out by the terms of the Local Agreements. The parties expressly adopted cost of living provisions, 401(k) contributions, vacations and holidays from the National Agreements. Indeed, there is not a single economic matter in the Local Agreements that was not pegged to the National Agreements.

Furthermore, we agree with the Organization that the context in which the 7 percent restoration to the NSP and the skill differentials for the carmen indicate that they are part of the wage increases provided for in the National Agreements. The NSP was part of the 1991 Imposed Agreement which resulted from the recommendations of PEB 219. PEB 219 recommended that the recommendations of the Wage Study Commission to consolidate hundreds of existing clerk rates into fifteen wage grades be adopted and that the total clerical payroll for each carrier on the day prior to the consolidation should be reduced by 17 percent and then spread across the new rates. In negotiations following PEB 219's recommendations, carriers and the Organization agreed to reduce the payrolls by 11 percent before spreading the amount across the new rates. As a result of the new rates, employees rated in the higher new grades received wage increases. Employees rated in the lower wage rates would have suffered wage cuts, but they avoided the reductions by receiving Employee Maintenance Rates (EMRs).

PEB 228 recognized that merely adopting the GWIs and lump sum payments from the UTU agreement did not produce an economic package that was equivalent to the UTU agreement. This was because the UTU agreement retained the 130 mile day and applied general wage increases to overmiles. PEB 228 recommended restoring the 11 percent reduction in total payroll to the NSP as a method of equalizing the TCU package with the UTU agreement.

The tie between the NSP restoration and wages is seen even more clearly when we consider what TCU did with PEB 228's recommendation. It negotiated with the carriers to reduce the restoration to 7 percent and instead to get two 1.75 percent GWIs. In addition, those employees subject to the NSP who were not on EMRs received further wage increases as a result of the 7 percent restoration. Thus, we conclude that the 7 percent restoration was a part of wage increases and is subject to Side Letter #2.

Similarly, the increased skill differentials recommended by PEB 229 were also designed to equalize the TCU package with the UTU agreement. TCU traded the prospective portion of that increase for the two 1.75 percent GWIs. Skill differentials are a part of wages and we agree with the Organization that the lump sums representing the retroactive portion of the recommended increase in skill differentials are also encompassed within Side Letter #2's provisions for wage increases.

The purpose of Side Letter #2 was to ensure that the employees would be in the same position with respect to wage increases as if they had been covered by the National Agreements. Thus, the question remains, how would the employees have been treated if they had been subject to the National Agreements.

It is clear that Carriers' clerks would not have benefitted from the 7 percent restoration because that applied only to employees subject to the NSP. Carriers were not a part of the 1991 national negotiations and, in their local negotiations, agreed not to adopt the NSP. Indeed, among the carriers that were party to the 1991 and 1996 National Agreements, only four actually fully implemented the NSP. The employees of these four carriers received the greatest benefit from the 7 percent restoration.

Several other carriers who were parties to the 1991 and 1996 National Agreements implemented the NSP only for new hires. Because, except for the Burlington Northern, these carriers had very few new hires, their employees received very little benefit from the 7 percent restoration. Some small carriers who were parties to the 1996 National Agreements never implemented the NSP at all. Their employees received no benefit from the 7 percent restoration. The Organization's speculation that if Carriers had been parties to the national negotiations it would have negotiated a special arrangement for Carriers' employees is inconsistent with the negotiations as they related to those carriers who were not party to the NSP or who did not implement the NSP fully. The speculation is based on bald assertion and wishful thinking.

In trading off part of the recommended NSP wage rate restoration for GWIs, the Organization was trading wage adjustments that benefitted some of the employees for wage adjustments that benefitted all employees. It properly exercised its authority and discretion as exclusive representative for all employees in determining the extent to which it would pursue such a tradeoff. If Carriers had been parties to the 1996 National Agreements, their employees would have been bound by the same tradeoffs as the employees of the other carriers were. Carriers' employees would have received the benefits of the two 1.75 percent GWIs but would have received no benefits from the adjustments to the NSP. Accordingly, we answer Issue No. 2 in the negative.

Carriers contend that the lump sum carmen skill differential payments must be treated the same way as the 7 percent NSP wage rate restoration. The skill differentials originated in the 1991 National Agreement which provided for a joint skill adjustment study committee. The committee's recommendations resulted in a 1993 letter agreement providing for skill differentials. Because Carriers were not parties to the 1991 Agreement or the 1993 letter agreement, they contend that even if they had been parties to the 1996 National Agreement they would not have been covered by the lump sum skill differential payments.

Carriers' argument misreads Side Letter #5. Side Letter #5 provided for a lump sum payment to, "A journeyman who was paid a differential described in paragraph 1 of the October 13, 1983 Letter Agreement . . . ." Its coverage is broader than those journeymen paid a differential pursuant to the 1993 letter agreement. It covers any journeyman paid a skill differential described in the letter agreement. Although Carriers were not parties to the 1993 letter agreement they did pay skill differentials to the journeymen described in the letter agreement. Accordingly, we conclude that if Carriers had been parties to the 1996 National Agreements, journeymen carmen would have been entitled to the lump sum differential payments in accordance with Side Letter #5. We answer Issue No. 3 in the affirmative.

Issue No. 4 affects DMIR clerks, carmen and ore dock employees and EJ&E clerks, all of whom are covered by the Steel Road Health Plan. The Organization concedes that the EJ&E is entitled to the offset for EJ&E carmen, patrolmen and telegraphers who are covered by the National Health Plan.

The Organization contends that the Health and Welfare provision of the DMIR Agreements contained no reference to cost offsets and the EJ&E Clerks Agreement contained no Health and Welfare language at all. In contrast, the EJ&E Carmen, Patrolmen and Telegraphers Agreements expressly provided that the parties would adopt any changes to the National Health Plan contained in the National Agreement, including any employee cost-sharing provisions. In the Organization's view, these language differences make it clear that the parties did not intend to adopt employee cost sharing for employees covered by the Steel Road Health Plan.

The Organization rejects Carriers' contention that, because the cost sharing produced offsets against GWIs, Carriers must get similar offsets to place the employees in the same position with respect to wage increases as they would have been in if they had been covered by the National Agreement. The Organization maintains that health and welfare cost sharing was an issue that was entirely independent of wage increases. According to the Organization, the only reason the cost sharing was offset against GWIs was to enable employees to pay their share of the premiums on a pre-tax basis.

Carriers contend that, because the health insurance cost sharing was offset against GWIs, it must get the same offsets under Side Letter #2. Carriers further contend that the intent to provide for health insurance offsets is made clear in Article III of the Local Agreements which adopted any changes in the National Agreement concerning COLA provisions, including any caps and offsets. Carrier observes that the 1991 National Agreements provided for health insurance cost sharing as an offset against COLA payments and that the parties anticipated that such cost sharing would be handled similarly in the 1996 National Agreement. That the cost sharing ended up as an offset against GWIs instead should not change the result.

As with the first three issues, our resolution of the fourth issue focuses on the parties' language when read literally and in context.

Carriers could have covered themselves by negotiating for language expressly agreeing to be bound by whatever cost sharing arrangements agreed to in national bargaining. It did so with respect to those EJ&E crafts covered by the National Health Plan. It failed to do so for the DMIR crafts and the EJ&E clerks. Thus, there is no general presumption that Carriers are entitled to have the cost sharing arrangements agreed to in the National Health Plan applied to the Steel Road Health Plan.

However, that does not necessarily render the health insurance cost sharing provision irrelevant. For example, Article III of the parties' Agreements specifically adopted any offsets that might be contained in the COLA provisions of the National Agreements. Thus, if the National Agreement had followed the 1991 pattern and offset the cost sharing against COLA lump sum payments, the plain language of Article III would have given Carriers the benefit of the cost sharing.

Instead, the cost sharing was offset against two of the GWIs. Specifically, Article I, Section 3 of the National Agreements provided:

> Effective July 1, 1996, all hourly, daily, weekly and monthly rates of pay in effect on June 30, 1996 for employees covered by this Agreement shall be increased by one and three-quarters (1-3/4) percent applied in the same manner as provided for in Section 1 hereof and applied so as to give effect to this increase irrespective of the method of payment, except that for the 12-month period beginning July 1, 1996, such rates shall be so increased by that percentage which is equal to the excess of (i) one and three-quarters (1-3/4) percent (expressed in cents per hour) over (ii) the lesser of (x) one-half of the amount described in clause (1) above and (y) the cents per hour produced by dividing $76.68 by the average composite straight-time equivalent hours that are subject to wage increases for the latest year for which statistics are available. . . .

Article I, Section 5 provided:

> Effective July 1, 1998, all hourly, daily, weekly and monthly rates of pay in effect on June 30, 1998 for employees covered by this Agreement shall be increased by one and three-quarters (1-3/4) percent applied in the same manner as provided for in Section 1 hereof and applied so as to give effect to this increase irrespective of the method of payment, except that for the 12-month period beginning July 1, 1998, such rates shall be so increased by that percentage which is equal to the excess of (i) one and three-quarters (1-3/4) percent (expressed in cents per hour) over (ii) the lesser of (x) one-half of the amount described in clause (1) above and (y) the cents per hour produced by the following computation: one-quarter of the amount, if any, by which the carriers' payment rate for 1998 for foreign-to-occupation health benefits exceeds such rate for 1995, multiplied by one and one half, and then divided by the average composite straight-time equivalent hours that are subject to wage increases for the latest year for which statistics are available. . . .

Thus, the employee health insurance cost sharing was built into the definitions of the GWIs that the parties in the Local Agreements agreed to adopt. It may well be, as the Organization asserts, that this was done to enable employees to pay their share of the premiums with pre-tax dollars. However, we cannot agree with the Organization that the method of payment makes no difference. If the National Agreements had provided for each employee to write a check to cover his share of the premiums, or even if it had provided for it as a separate payroll deduction, Carriers would not be entitled to similar treatment because the standby agreements did not expressly adopt the cost sharing provisions for employees covered by the Steel Road Health Plan. However, by writing the cost sharing into the definition of the GWIs themselves, the National Agreements affected the very wage increases that the Local Agreements provided would be adopted.

We regard the resolution of this issue as analogous to the resolution of Issue No. 3. In Issue No. 3, it was clear that Side Letter #5 did not limit its application to carmen covered by the 1993 Letter Agreement. Rather, it applied to carmen paid a differential described in the 1993 Letter Agreement. This category was broader than those who were party to the Letter Agreement and included Carriers.

Similarly, the National Agreements' provisions for GWIs did not distinguish between employees subject to the National Health Plan and those who were subject to a different plan. It applied the same GWIs, as defined in the Agreements, to all employees. If Carriers had been parties to the National Agreements, the employees would have received GWIs calculated in the same manner as everyone else and those would have included the cost sharing offsets. Accordingly, we will answer Issue No. 4 in the affirmative.

AWARD

Issue No. 1 is answered as follows: Under the terms of Side Letter #2, Carrier is entitled to recoup the difference between the wages and signing bonus actually paid to EJ&E and DMIR employees and the wages and signing bonus those employees would have received under the National Agreements for the period beginning January 1, 1995 and ending with the adjustment of wages to conform to the National Agreements.

Issue No. 2 is answered in the negative.

Issue No. 3 is answered in the affirmative.

Issue No. 4 is answered in the affirmative.

Martin H. Malin, Chairman

7/21/97

J.F. Ingham,
Carrier Member

J.M. Parker,
Employee Member

Dated at Chicago, Illinois, June 11, 1997.

SBA 1091

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT No. 1091

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

and

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

INTERPRETATION TO AWARD NO. 1

Martin H. Malin, Chairman & Neutral Member
Joel M. Parker, Employee Member
John F. Ingham, Carrier Member

Case No. 1 posed the following question to this Board:

Issue No. 1:

> "Under the terms of Side Letter #2 of the 1995 standby agreements on the EJ&E and DM&IR, how should the subsequent September 9, 1996 National Agreements be applied? If adjustments are determined to be due, how should such adjustments be calculated?"

In our award, we answered Issue No. 1 as follows:

> "Under the terms of Side Letter #2, Carrier is entitled to recoup the difference between the wages and signing bonus actually paid to EJ&E and DMIR employees and the wages and signing bonus those employees would have received under the National Agreements for the period beginning January 1, 1995 and ending with the adjustment of wages to conform to the National Agreements."

The Organization has requested an interpretation of this aspect of Award No. 1. Specifically, the Organization asks the Board to determine how Carriers are to recoup the amounts provided in our award. Carriers have indicated their intent to recoup $65.00 per paycheck until they have recovered the entire overpayment from each employee. The Organization proposes that Carriers recoup $40.00 per paycheck, in accordance with a proposal that had been made in an effort to settle this dispute during handling on the property. Carriers have agreed to recoup $40.00 per paycheck pending issuance of this Interpretation.

The maximum amount that any employee might owe is $2,400.00. Few if any employees actually owe that amount. A rough estimate of the average amount owed is $1,800.00. Recouping $65.00 per paycheck enables Carriers to recover the maximum $2,400.00 by the end of 1998. Recouping $40.00 per paycheck enables Carriers to recover $1,440.00 per employee by the end of 1998 and the $2,400.00 maximum by the end of 1999.

The Organization contends that a key element of our reasoning in Award No. 1 was our finding that the Agreement at issue was modeled on a similar agreement involving the Lake Terminal Railroad Company, a sister company of Carriers. The LT agreement expressly provided that recoupment should be made from future wage increases. The Organization observes that our award relied on this provision of the LT agreement to rationalize what otherwise would have been a result that guaranteed that employees would owe the Carriers money even if the Organization had succeeded in achieving its national bargaining goals.

Carriers respond that the instant Agreements did not contain the side letter that the LT agreement contained limiting recoupment to deductions against future wage increases. Instead, the instant Agreements provided for the parties to meet within thirty days following ratification of the National Agreements to discuss the method of recoupment of overpayments. The parties did meet and were unable to reach agreement. Carriers urge that their proposal to recoup $65.00 per paycheck is reasonable, especially considering how long Carriers have deferred recoupment to date. To hold otherwise, in Carriers' view, would be to hold Carriers to a term of the LT agreement to which they did not assent.

The Organization further contends that settlement discussions produced proposals whereby Carriers would begin recouping $40.00 per paycheck in July 1997. Carriers were willing to follow that recoupment schedule, but the Organization ultimately rejected the settlement proposal. The Organization urges that Carriers were satisfied with a $40.00 per paycheck recoupment and are now seeking a faster recoupment schedule to punish the Organization for taking the case to arbitration. Carriers respond that they were willing to recoup at the rate of $40.00 per paycheck if that would settle the entire dispute. The Organization rejected that settlement proposal and chose to go to arbitration. Carriers maintain that they should not now be held to a settlement offer that the Organization rejected.

The Board agrees with Carriers that their proposal to recoup $65.00 per paycheck does not amount to punishment of the Organization for exercising its right to go to arbitration. The Organization was faced with a choice resulting from the settlement proposal. It could accept the proposal or seek a more favorable outcome, and risk a less favorable one, in arbitration. Carrier's willingness to recoup at the rate of $40.00 per paycheck in exchange for avoiding the uncertainties and expense of arbitration does not provide a basis for resurrecting that offer once Carriers have been forced to go through the arbitration process.

We recognize that Carriers were not parties to Side Letter No. 1 to the Lt agreement. Instead, they agreed to meet with the Organization within thirty days following ratification of the National Agreements to discuss the method of recouping any overpayments. The agreement to meet and discuss, however, did not arise in a vacuum. Rather it arose as part of an agreement that generally was modeled on the LT agreement. The LT side letter provided the parties' agreed-on method of balancing the hardship to employees of having to repay the carrier against the carrier's interest in recovering its money in a reasonable period of time. The meetings called for in the EJ&E and DMIR Agreements contemplated discussions focused on a similar balancing process. Because the parties have not been able to agree on how the balance should be struck, they have turned to this Board to resolve the matter.

We recognize that Carriers have deferred collecting the overpayments for a considerable period of time. However, the difference to Carriers between recouping $40.00 per paycheck and $65.00 per paycheck is relatively small. At $40.00 per paycheck, Carriers will have recouped $1,440.00 per employee by the end of 1998. There are few, if any, employees who owe the theoretical maximum of $2,400.00. Using the rough estimate of an average overpayment of $1,800.00, it is apparent that Carrier will have recouped most of what was owed to them by the end of 1998. Furthermore, a significant number of employees probably owe less than $1,800.00, especially those carmen who we held are entitled to lump sum skill differential payments. Therefore, although precise figures were not provided to the Board, we are reasonably confident that recoupment at $40.00 per paycheck will result in only a small amount of the overpayment recoupment being deferred into 1999.

On the other hand, recoupment at $65.00 per paycheck does pose a hardship to the employees. The $65.00 recoupment will result in a decrease in take home pay for all affected employees. Although the decrease is relatively small, we find that its impact on individual employees is likely to be greater than the impact on Carriers of deferring a small portion of the recoupment into 1999. Furthermore, although Carriers object that they have given the employees an interest free loan for several years now and will continue to do so until they have fully recouped the overpayments, Carriers effectively agreed to give the employees an interest free loan when they agreed to follow the LT model of front loading the general wage increases.

Accordingly, we will award that Carriers may recoup at the rate of $40.00 per paycheck. We do so not because Carriers previously offered such a recoupment rate in an effort to settle the dispute. Nor do we do so because it mirrors the LT side letter. Rather, we make this award because it strikes a better balance than Carriers' proposal between Carriers' interests in speedy recoupment and the Organization's interest in minimizing the effects of such recoupment on the employees. We note that the Organization does not dispute Carriers' ability to recoup any retiring employee's unpaid balance at the time of retirement. Such a provision will be included in our award.

AWARD

Carriers may recoup the overpayments at the rate of $40.00 per paycheck, provided that this enables Carriers to complete the recoupment by the end of December 1999. Carrier may recoup the outstanding balance from any employee who retires prior to full recoupment at the time of retirement.

Martin H. Malin, Chairman

J.F. Ingham,
Carrier Member

J.M. Parker,
Employee Member

Dated at Chicago, Illinois, July 28, 1997.