
CONSOLIDATED RAIL CORPORATION
PHILADELPHIA, PA
AND
BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES

ARBITRATION OPINION & DECISION
SPECIAL BOARD OF ADJUSTMENT 1099
COST OF LIVING ADJUSTMENT/
ARNOLD M. ZACK, ARBITRATOR
DATE OF DECISION: 2/3/98

On January 13, 1998, I held a hearing at the offices of the National Mediation Board to hear the following dispute. Jedd Dodd and Steven V. Powers represented the Union. Jeffrey H. Burton, Patrick Hanlon, Donald J. Munro, and Ralph Moore represented the Carrier. Prior to the hearing the parties had submitted and exchanged briefs and reply briefs.

THE ISSUE

The parties agreed upon the issue to be decided as follows:

1. How are the cost of living adjustments to the CDL differential on January 1, 1997 and January 1, 1999 provided for in Addendum No. 29 of the September 26, 1996 Mediation Agreement to be computed?
 2. Pursuant to the method of computation determined in Question No. 1 above, what is the amount, if any, of the cost of living adjustment to the CDL differential effective January 1, 1997?
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BACKGROUND

Article II, Part B of the so-called imposed Agreement of July 29, 1991 established a formula for computing the cost of living adjustment which was set forth in Part B, Section I (e) as follows:

"The number of points change in the BLS CPI during a measurement period, as limited by paragraph (d) will be converted into cents on the basis of one cent equals 0.3 full points. (By "0.3 full points", it is intended that any remainder of 0.1 point or 0.2 point of change after the conversion will be counted.)..."

The formula was adopted in the July 28, 1992 Agreement between BMW and Conrail and the September 26, 1996 National Agreement.

A number of issues remaining unresolved at the time of the July 28, 1992 agreement were addressed in Side Letter No. 9 including the provision granting a wage differential to employees assigned to positions requiring a Commercial Drivers License. The matter was referred to Public Law Board 5542, chaired by Robert O'Brien, which ruled in March 1996 that employees assigned to positions requiring a CDL shall

"receive an additional \$.30/hour when assigned to positions requiring a Commercial Drivers License".

On May 16, 1996, Presidential Emergency Board 229 was established to resolve matters in dispute following the Section 6 notices served on November 1, 1994. PEB 229, chaired by David P. Twomey, recommended the following COLA adjustment.

"(8) A guaranteed COLA due on December 31, 1999 to be rolled into the basic rate. The COLA will be based on two measurement periods (March 1995 to March 1996, and March 1997 to March 1998), and will be calculated based on 0.3 cents for every point increase in the CP1-W, with a guaranteed lock and cap (i.e., the COLA formula will be applied to no less than a 4% increase and no more than a 6% increase in the CP1-W)."

On the issue of the Unions request for a 20 cent increase in the CDL differential, the Board recommended as follows:

"In view of the recent award of the CDL differential, the Board does not recommend an increase in the differential at this time. However, the Board recommends limited cost of living adjustments, applying a formula similar to that applied to wage recommendations, to the existing CDL differential on January 1, 1997 and January 1, 1999. The only change from the formula applied to the wage recommendations is that the formula will use a single measurement period. The measurement period for the first adjustment will be from March 1995 to March 1996, and the second adjustment will be from March 1997 to March 1998. The Board recommends withdrawal of the Organization's proposal that the differential be extended to FHWA issues."

Following the issuance of the PEB 229 report, the BMW and all the carriers, including Conrail I, negotiated a National Mediation Agreement dated September 26, 1996 including adoption of the above quoted COLA formula from the 1991 Imposed Agreement and adoption of the above quoted Addendum No. 29.

Under the parties agreement, the first adjustment in the 30-cent CDL differential was due January 1, 1997. Both sides agreed that the National Agreement's formula for cost of living adjustments to wages results in a cost of living allowance of 21 cents for the average hourly wage of \$16.25. In a letter dated January 3, 1997, Conrail advised the BMW that it had calculated the CDL COLA as follows:

"Using the formula provided under Article II, Cost of Living Payments, Part C, Section L, the Carrier has determined the Consumer Price Index for Urban Wage Earnings and Clerical Workers (Revised Series) (CP1-W to be 12.6 points for the measurement period. Following the formula provided in Part C, Section 1, this equates to a 1.29% increase in the cost-of-living adjustment. The 30 cents (\$.30) per hour CDL differential is therefore increased to 30.39 cents-per-hour. While no monetary payment is, therefore, due on January 1, 1997, the Carrier shall use \$30.39 as the new base for future COLA CDL adjustments."

The BMWWE challenged the employers calculation of the adjustment in the CDL differential and the issue was progressed to this Special Board of Adjustment.

POSITION OF THE UNION

First, the Union contends that the clear unambiguous language of Addendum No. 29 and Article 2, Part C, Section 1 of the September 26, 1996 Mediation Agreement requires payment of COLA to those entitled to CDL differential of 21 cents per hour effective January 1, 1997. It notes that Item 29 requires the application of "a formula similar to that applied to the wage recommendations", and that the "only change" in that application is to use a single measurement period. That application, it continues, would deduct the March 1995 CP1 of 443.0 from the March 1996 CP1 of 455.6 for an increase of 12.6 or 2.8% which is less than the Section 1(d)1 cap of 60%. The 50% of increase limitation in Section 1(d)(ii) would result in a 6.3% increase which when divided by the .3 of the formula requires payment of 21 full cents per hour. BMWWE submits that the "plain language" principle is particularly compelling in this case where the bargainers were exceptionally sophisticated and capable.

Second, the Union contends that the parties past practice buttresses its position noting that the two wage adjustments that were invoked under COLA prior to the issuance of PEB 229 and at the time of the bargaining over the Mediation Agreement were computed in precisely the same manner.

Third, the Union contends that there is no contractual historic or economic justification for converting the cents per hour yield of the COLA formula or cited it into a percentage increase. It notes that there is nothing in the formula or its history calling for conversion of the cents per hour yield into a percent of the average hourly rate for all BMWWE represented employees and that the carrier keeps shifting that average to differing amounts of \$16.00 and above. It challenges the carriers percentage conversion by pointing out that Addendum Item No. 29 stipulates that the "only change" in the formula is to be the single measurement period barring any and all other

changes. Additionally, it points out that the point formulas have a long history in the rail industry and have always been applied across the board in cents per hour.

Fourth, the Union asserts that the BMW computation clearly conforms to the contract language and is neither excessive nor irrational and is my authority to change or to add to in any way. It argues that the amount generated by the COLA is less than the Union had been seeking for its differential, is not the first COLA to exceed the rate of inflation, and is not out of line when compared to the CDL differentials negotiated on other lines.

POSITION OF THE CONRAIL

Conrail first contends that the language of the Agreement supports its calculation. It asserts that the 1996 National Agreement rejected any increase in the CDL differential in view of its recent award and instead provided for a "limited cost of living adjustment", which as the BMW itself notes is a "wage adjustment sufficient to cover rises in the cost of living" to maintain real wages. The Union's proposal, it continues, would yield a 70% increase in the CDL differential far exceeding any conceivable cost of living recognition when the inflation rate was only 2.8%. It argues that the agreement requires the cost of living formula be "applied" to the CDL differential of 30 cents per hour and not added in its entirety to the existing differential, it cites for comparison the conversion of the COLA formula for hourly wages to daily rates, weekly rates, and monthly rates to show the past practice of adjusting the amount of adjustment to the base rated pay.

Second, Conrail cites the bargaining history of the Agreement to support its calculation noting that Public Law Board 5542 rejected the Union's request for a dramatically higher CDL differential of \$1.50 per hour in favor of a 30-cent differential, and that two months later PEB 229, rejected its demand for a 20-cent per hour increase followed by two 5-cent annual increases.

Third, Conrail contends that the BMW interpretation of Addendum No. 29 would lead to a harsh, absurd, and nonsensical result, nullifying the finding of PLB 5542 that a 30-cent per hour increase was sufficient to compensate employees for the additional responsibility imposed by the federal CDL requirement. The Union's approach, according to Conrail, would produce a large hidden wage increase for certain maintenance of way employees that other employees would receive on any other carrier, i.e., a 1.3% increase in their total wages in 1997 on top of a 3.5% general wage increase.

The carrier responds to the Union's challenge to the prorata approach to adjusting the differential as being contrary to past practice, by pointing out this application of a cost of living escalator to the CDL differential is itself unprecedented. Differentials provided by other carriers contain no such adjustments for increases in the cost of living. It also cites the clear past practice

of applying hourly COLA adjustments to daily and weekly rates as justifying the application of the differential in this case.

In the light of the foregoing, Conrail concludes that its interpretation of the disputed language should be endorsed.

DISCUSSION

The bargaining history of the CDL Differential shows that the BMW E originally sought a differential of \$1.50 per hour in March 1996 before PLB 5542 and that it was awarded a rate fixed at 30 cents per hour. Shortly thereafter, before PEB 229, the Union requested a 20-cent per hour increase in the differential coupled with two annual 5-cent increases which would have resulted in a 70-cent differential by the year 2000. That request was rejected in the report of PEB 229 in the first sentence of Addendum No. 29 which clearly denied an increase in the differential, "in view of the recent award of the C DL differential" by PLB 5542 only a few months earlier. But what the Board in PEB 229 did provide was a protection against the erosion of the real dollar value of the CDL differential which would have resulted if the rate remained constant, as it occurred with the CDL differentials of the other carriers cited by the BMW E.

To protect against the erosion by inflation of the real value of the 30-cent differential, PEB 229 provided for application of a limited cost of living adjustment to the CDL differential "applying" to that hourly differential the formula that was used to calculate the differential for the wage recommendations. The "only change" for applying the formula to the differential that applied to the wage recommendations was to use a single measurement period.

Thus, in the second sentence of Addendum No. 29, the Board adopted the formula used in calculating wage COLA, but for the single measurement period and proposed applying it to the existing CDL differential. Its use of the term "applying" the wage formula persuades me that it intended to adopt the hourly wage COLA to the 30-cent differential just as it had traditionally "applied", rather than "added", the hourly COLA adjustment to daily, weekly, monthly, and piece work rates in the section of the parties agreement entitled, "Section 3, Application of Cost of Living Allowances". The requirement for "applying" the hourly COLA adjustment to the CDL differential was dictated by the fact that this differential was a new feature, and its application consistent with Section 3 had not been a part of the parties prior compensation structure. By the application of the COLA to the differential in the same proportional fashion as the parties applied the hourly COLA to daily, weekly, monthly, and piece work rates, the real purchasing power of the CDL differential would be similarly preserved. Just as the Union would not expect the hourly 21-

cent COLA adjustment to be paid as a once-a-day, week, or month payment, it can not expect that hourly adjustment to be paid in full in addition to the hourly differential.

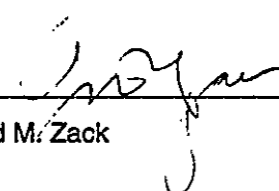
To do as it argues, would be to rewrite Addendum No. 29 to substitute the word "adding" in place of the word "applying" and would result in achieving an increase in the real value of the differential well beyond the intent in Addendum No. 29 to preserve the purchasing power of the CDL differential the Union had only recently won.

Indeed, to adopt the Union's interpretation of Addendum No. 29 would permit it to achieve through this arbitration forum a substantial increase in the hourly payment for the CDL differential which it had twice been denied in prior proceedings. That flies in the face of logic when the clear intent of the PEB was not to create a significant real wage increase in the CDL differential but rather, in the words of Tom Roth, "to introduce a COLA adjustment as the simplest, most logical, most precise, and most equitable method of adjusting wages for the purpose of maintaining real wages". The whole concept of COLA is to protect the employees purchasing power, leaving additions to real wages a matter for bargaining between the parties.

As noted by the BMW, my authority in this case does not extend to rewriting the parties agreement. I am explicitly prohibited from rewriting the parties agreement or from rendering an interest arbitration award that would result from adding the full hourly COLA to the CDL differential. My jurisdiction is limited to interpreting Addendum No. 29 and in that task I find the intent of Addendum No. 29 was to apply the hourly COLA adjustment to the CDL differential and that the Conrail procedure for so doing is consistent with the intent as well as the terms of that Addendum.

DECISION

1. The cost of living adjustment to the CDL differential on January 1, 1997 and January 1, 1999 provided for in Addendum No. 29 of the September 26, 1996 Mediation Agreement is to be computed as proposed by Conrail, prorating the 21 cents produced by the COLA formula for hourly wages as found in Article II of the 1996 Agreement to the existing 30 cents per hour CDL differential. The proper adjustment to the CDL differential for January 1, 1997 is 1.3% or 0.39 cents.
2. Inasmuch as the 0.39 cents is rounded down to the nearest cent, no increase is warranted in the differential after the 1997 adjustment.



 Arnold M. Zack