SPECIAL BOARD OF ADJUSTMENT NO. 1123

In the Matter of Arbitration

between

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

-and-

CONSOLIDATED RAIL CORPORATION

Board Members:

Richard Mittenthal
Neutral Member

Jed Dodd
BMWE Member

Jeffrey H. Burton
Carrier Member

Date of Award: August 24, 2000

BACKGROUND

This case involves a claim by BMWE that its 1992 Agreement with Conrail was violated when Conrail discontinued, as of September 26, 1996, the cost-of-living adjustments (COLAs), that had become effective on and after July 1, 1995. BMWE insists that such COLAs should have been paid to employees after September 1996 but were not. Conrail urges there has been no violation.

In order to understand this dispute, some history of the parties' bargaining is necessary. The 1988 round of bargaining began with the service of Section 6 notices under the Railway Labor Act. Those notices proposed changes in rates of pay, working conditions, and work rules. Multi-employer bargaining soon started between the carriers represented by the National Carriers Conference Committee (NCCC) and the various unions. This kind of bargaining, in railroad parlance, is known as national handling. However, BMWE refused to participate in national handling with Conrail and insisted on negotiating with Conrail separately. Conrail initially resisted but agreed, after litigation on this issue, to negotiate with BMWE outside the national handling format.

The multi-employer negotiations were fruitless and a period of mediation followed without success. Thereafter, President Bush appointed Presidential Emergency Board (PEB) 219 to study the dispute and make recommendations. After lengthy hearings, PEB 219 issued its report. Its recommendations were rejected and the unions called a national railroad strike. Congress intervened, enacting legislation that imposed the PEB 219 recommendations on the parties as if they represented the parties' agreement. That legislation also provided for a Special Board to interpret and clarify these recommendations. The strike ended. The Special Board met and dealt with many requests for interpretation and clarification. It completed its work in June 1991. And the parties who had participated in national handling thereupon, pursuant to Congressional mandate, entered into what is referred to as the July 1991 Imposed Agreement.[1]

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[1] The July 1991 Imposed Agreement was apparently not signed (or fully executed) until February 6, 1992. Hence, one of the later references alludes to the February 1992 (rather than July 1991) Imposed Agreement.

For the most part, the Imposed Agreement simply incorporated the PEB 219 recommendations as interpreted and clarified by the Special Board. As for wages, it called for a series of lump sum payments and general wage increases starting on July 1, 1991 and ending on January 1, 1995. It also provided in Article II, Part B, Section 1 for COLAs, the first on July 1, 1995 and then every six months thereafter. It established certain limitations on COLAs that go to the very heart of this dispute. Article II, Part B stated:

> Section 2...The cost-of-living allowance provided for by Section 1 of Part B of this Article...will not become part of the basic rates of pay.
>
> Section 4...The arrangements set forth in Part B of this Article...shall remain in effect according to the terms thereof until revised by the parties pursuant to the Railway Labor Act. (Underscoring added)

The Special Board had occasion to consider the COLA recommendation in one of the requests for clarification:

> BLE Request No. 5
>
> Did the PEB intend that the COLA allowance be rolled into the basic rates of pay, as they were during the last round of bargaining?
>
> Clarification or Interpretation
>
> The PEB intended that the question be resolved in the round of bargaining which will commence in 1995. The PEB intended that this COLA be included to give the parties an incentive to settle the next round. The PEB also intended to ensure that the individual employees gain some protection against inflation during the period of the next round of bargaining. The imposition of this COLA was not intended to limit organizations from asking for full COLA or other wage protections after 1995. (Underscoring added)

The Conrail-BMWE relationship was not part of the PEB 219 proceeding. These parties bargained separately but they too, like those who participated in national handling, were

unable to reach agreement. President Bush appointed PEB 221 to study this dispute and make recommendations. It recommended the same wage package, including the same COLA arrangements, as had been set forth by the PEB 219 report and it emphasized that adoption of the BMWE proposals "would be profoundly destabilizing to the present wage structure of the railroad industry". Conrail and BMWE voluntarily accepted these recommendations and executed the July 28, 1992 Agreement.

This July 1992 Voluntary Agreement contained the same COLA language as the July 1991 Imposed Agreement. It established the same Article II, Part B limitations on COLAs:

> Section 2...The cost-of-living allowance provided for by Section 1 of Part B of this Article...will not become part of the basic rates of pay.
>
> Section 4...The arrangements set forth in Part B of this Article shall remain in effect according to the terms thereof until revised by the parties pursuant to the Railway Labor Act. (Underscoring added)

The next round of bargaining began in November 1994 with Section 6 notices being served by the carriers, through NCCC, on BMWE. Those notices applied to all existing agreements. BMWE again refused to participate in national handling. The carriers, including Conrail, sued to prevent BMWE from bargaining with each carrier separately. A U.S. District Court held that BMWE could not refuse to participate in national handling. Thus, in this round, Conrail was part of the multi-employer group that negotiated jointly with BMWE. Those negotiations, however, failed to produce an agreement. President Clinton appointed PEB 229 to study the dispute and make recommendations.

Before PEB 229 began its hearings, there had been two COLA adjustments. The first was 9 cents per hour effective July 1, 1995; the second was 7 cents per hour effective January 1, 1996. After PEB 229 issued its report but before the parties reached agreement, there was another COLA adjustment, 11 cents per hour effective July 1, 1996.

PEB 229 was obviously influenced by the settlements reached earlier in this round between the carriers and three

other railroad unions, namely, UTU, BLE, and BRP. Its suggestions with respect to wages and COLA mirrored the terms of these settlements. It recommended, among other things, that the COLA adjustment of 9 cents per hour effective July 1, 1995 be rolled into the basic wage rates and that "semi-annual COLA will continue after the moratorium expires", a clear reference to the COLA arrangements in the 1991 Agreement.

The parties, following the issuance of the PEB 229 report, returned to the bargaining table. They accepted the PEB recommendations on wages, COLA, and other matters. But some differences remained between Conrail and BMWE. A tentative National Agreement was finally reached on July 22, 1996, subject only to resolution of these Conrail questions. That was accomplished in late July through certain side agreements. None of these differences at Conrail, however, involved the application of COLA. The end result of this bargaining was the September 26, 1996 National Agreement.

Article II, Part A of the new National Agreement contains the root of the present dispute. Its language states:

> Part A - Cost-of-Living Payments Under Imposed Agreement Dated February 6, 1992 [July 1991]
>
> The nine-cent cost-of-living allowance in effect beginning July 1, 1995 pursuant to Article II, Part B of the Imposed Agreement shall be rolled into basic rates of pay on November 30, 1995, and such Article II, Part B shall be eliminated at that time. (Underscoring added)

Conrail and BMWE were parties to this National Agreement. At no time during the PEB hearings, during the negotiations which followed the PEB report or during the special negotiations later on Conrail issues was there any mention of separate arrangements for Conrail regarding COLA. Nor did BMWE request that Conrail be treated differently from the other carriers with respect to COLA.

Conrail took the following actions on October 17, 1996. It implemented the wage increase called for by the new National Agreement; it rolled the 9-cent COLA adjustment, effective July 1, 1995, into basic wage rates pursuant to Article II, Part A above; and it discontinued the 7-cent

and 11-cent COLA adjustments, effective January 1, 1996 and July 1, 1996, respectively, pursuant to Article II, Part A. The latter discontinuance of these COLAs, effective September 26, 1996, prompted BMWE's complaint in this case.

BMWE filed claims protesting the discontinuance of the 7-cent and 11-cent COLA adjustments mentioned above. It later amended its claims to protest the 9-cent COLA adjustment being rolled into the basic rates of pay. It believed all three of these COLA adjustments should have "remain[ed] in effect" after September 26, 1996, until such time as these COLAs were "revised by the parties pursuant to the Railway Labor Act". It insisted that no such "revis[ion]" had occurred, that the September 1996 National Agreement "revis[ion]" dealt with the July 1991 Imposed Agreement but not the July 1992 Conrail/BMWE Agreement. It asked that all employees be made whole for their loss of earnings.

Conrail rejected these claims. Its view was that there had indeed been a "revis[ion]" and hence no contract violation. Notices of intent were submitted to the National Railroad Adjustment Board but were later withdrawn when the parties agreed to place the dispute before a Special Board of Adjustment. Conrail designated Jeffrey H. Burton as its member of the Board; BMWE designated Jed Dodd as its member of the Board. They chose Richard Mittenthal to serve as the neutral member. A hearing was held in Detroit on June 28, 2000. Conrail was represented by Robert S. Hawkins and Andrew J. Rolfes, Attorneys; BMWE was represented by Steven V. Powers, Director of Arbitration. Briefs and reply briefs were submitted by both sides prior to the hearing, along with a great many exhibits. The parties waived the 30-day time limit for the issuance of the award.

ARGUMENTS

BMWE says its position is supported by "clear and unambiguous language". There are two basic strands to its argument: (1) that the COLAs established by the July 1992 Conrail/BMWE Agreement were to "remain in effect...until revised by the parties..." and (2) that such COLAs were not "revised" by the September 1996 National Agreement or any other joint understanding. The critical consideration, according to BMWE, is that the September 1996 National Agreement referred only to the COLAs in the July 1991 "Imposed Agreement". It believes this express reference to the "Imposed Agreement" cannot reasonably be construed to encompass the COLAs in the July 1992 Conrail/BMWE Agreement.

Moreover, it objects to Conrail's attempt to use extrinsic evidence (e.g., bargaining history) to alter what it believes to be the plain meaning of the September 1996 National Agreement. It asks the Board to apply the "parol evidence rule" and disregard such extrinsic evidence. It acknow-ledges that the September 1996 National Agreement "revise[d]" COLA arrangements under the July 1991 Imposed Agreement. But it stresses that the parties to the September 1996 National Agreement went no further and made no mention of the July 1992 Conrail/BMWE Agreement. That omission, in BMWE's opinion, is fatal to Conrail's case.

It urges further that bargaining history, even if considered, supports its position and that the result it seeks here is neither harsh nor absurd. For all of these reasons, BMWE requests that the 9-cent, 7-cent, and 11-cent COLA adjustments should have continued in effect after September 26, 1996, and should still be in effect today. It requests, accordingly, that employees be made whole for their loss of earnings.

* * *

Conrail, on the other hand, has a quite different view of the COLA provisions. It emphasizes that the COLA adjustments in the July 1992 Conrail/BMWE Agreement were to "remain in effect...until revised by the parties..." Those words, it contends, meant that such COLA would be terminated when Conrail and BMWE agreed to some other COLA arrangement. It urges that this is precisely what happened when new COLA arrangements were created through the September 26, 1996 National Agreement. It suggests that because Conrail and BMWE were parties to the September 26, 1996 National Agreement, BMWE cannot legitimately claim it was not covered by the new COLA arrangements.

Conrail believes that the parties' intent should be the critical factor before the Board and that any extrinsic evidence of such intent should be given great weight. It relies on the bargaining history behind all of the agreements relevant to this case; it relies on the reports issued by PEBs 219, 221 and 229 as well as the Special Board's report in connection with 219. It notes, in this connection, that there is no language in the September 26, 1996 National Agreement that suggests Conrail should be treated differently than other carriers with respect to COLA. It also stresses the limited purpose of the COLA in the 1991-92 Agreements. It contends that its interpretation is perfectly consistent with that purpose while BMWE's

interpretation is not. Indeed, it says the BMWE argument, if sustained, would produce an extraordinary windfall for Conrail employees, a COLA benefit enjoyed by no other carrier employees.

Finally, it points to BMWE's own explanation to Conrail employees of the terms of the September 26, 1996 National Agreement and to BMWE's original statements of its claim to Conrail in this case. It asserts that all of this reveals that BMWE believed, initially at least, that the COLA provision of the September 26, 1996 National Agreement did apply to BMWE and did serve to eliminate the COLA set forth in the 1991-92 Agreements.

For all of these reasons, Conrail asks that the BMWE claim be denied.

DISCUSSION AND FINDINGS

At the outset, BMWE's large reliance on the parol evidence rule should be examined. That "rule", simply stated, is that extrinsic evidence should not be considered for the purpose of varying or contradicting the clear and unambiguous language of the contract. The most commonly read hornbook on labor arbitration offers the following advice:

> The parol evidence rule is very frequently advanced and generally applied in arbitration cases...While some might argue that arbitrators should consider any evidence showing the true intent of the parties and that this intent should be given effect whether expressed by the language used or not, the general denial [in the arbitration clause] of the power to add to, subtract from, or modify the agreement provides special justification for the observance of the parol evidence rule in arbitration.[2]

Thus, BMWE asserts that Article II, Part A of the September 26, 1996 National Agreement, through clear and unambiguous language, calls for the elimination of the COLA found in the July 1, 1991 Imposed Agreement but nowhere mentions the July 28, 1992 Conrail/BMWE Agreement. It urges

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[2] Elkouri & Elkouri, How Arbitration Works, 3rd ed. (Washington: BNA Books, 1973), 362-363.

that Conrail is attempting to show through extrinsic evidence that Article II, Part A of the September 1996 National Agreement has also eliminated the COLA found in the July 28, 1992 Conrail/BMWE Agreement. It believes such evidence should be disregarded under the parol evidence rule.

The difficulty with this argument is that before any evidence can be said to vary or contradict a contract provision, that provision must be interpreted. And extrinsic evidence may always be raised to assist the arbitrator in the interpretive process. The parol evidence rule may come into play only after the interpretation, and only then as a rationalization for a ruling already made. Hence, if BMWE's view of the September 1996 National Agreement turns out to be correct and Article II, Part A is construed as it suggests, only then could it properly be said that Conrail had sought to vary clear and unambiguous contract language.

Although arbitrators have sometimes embraced this "rule", the better authority is on the other side of this issue. No less an authority than Corbin, one of the great thinkers on contracts, has commented:

> No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined. The "parol evidence rule" is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation. Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted and all those factors that are of assistance in this process may be proved by oral testimony. (Underscoring added)[3]

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[3] See Arthur Corbin, The Parol Evidence Rule, 53 Yale L. J. 606, 622 (1944). See also, citing Corbin with approval on this point, Sylvester Garrett, "Contract Interpretation" in Arbitration 1985 Law & Practice, National Academy of Arbitrators, Proceedings of the 38th Annual Meeting (Washington: BNA Books, 1985), 125-128, and Addison Mueller, "The Law of Contracts - A Changing Legal Environment" in Truth, Lie Detectors & Other Problems, National Academy of Arbitrators, Proceedings of the 31st Annual Meeting (Washington: BNA Books, 1978), 211.

The fundamental contract principle is that the intent of the parties should govern the outcome of a dispute. That intent is often found in contract language alone but extrinsic evidence may also, in appropriate circumstances, be decisive in determining what was intended.

* * *

Any analysis of the merits of this dispute must begin with the July 1991 Imposed Agreement and the July 1992 Conrail/BMWE Agreement. The former incorporates the COLA recommended by PEB 219 and imposed by Congress; the latter incorporates the COLA recommended by PEB 221 which was of course the very COLA that emerged from PEB 219 and the Imposed Agreement. Both of these Agreements stated that their COLA arrangements "shall remain in effect...until revised by the parties..."

The issue, simply put, is whether these earlier COLA arrangements were "revised by the parties..." in the September 26, 1996 National Agreement. Conrail says they were "revised" for all carriers. BMWE says they were "revised" for all carriers other than Conrail. Their disagreement stems from the fact that the September 1996 National Agreement provides that "Article II, Part B of the [July 1991] Imposed Agreement...shall be eliminated..." but does not mention the July 1992 Conrail/BMWE Agreement. BMWE relies on this omission as the basis for its claim that the COLA in the July 1992 Conrail/BMWE Agreement was not eliminated and hence should have been continued in effect during the life of the September 1996 National Agreement. Indeed, its position is that this COLA must be continued until such time as it has been "revised".

The key document, it seems to the Board, is the July 1992 Conrail/BMWE Agreement. It clearly addresses the question of how long the COLA in Article II, Part B of that Agreement would be binding on Conrail. It states, to repeat again, that such COLA arrangements were to "remain in effect...until revised by the parties pursuant to the Railway Labor Act". Nothing in this language, or elsewhere in Article II, describes what would constitute a "revis[ion]". Nor did the parties say that an express statement eliminating this COLA was necessary in order to find a "revis[ion]" had occurred. And parenthetically we take notice of the fact that a "revis[ion]" is, by definition, something less than an elimination. These realities must be kept in mind in determining whether the

September 1996 National Agreement served to "revise" the COLA arrangements in the July 1992 Conrail/BMWE Agreement.

The COLA provision of the September 1996 National Agreement consists of three parts. Part A rolled the 9-cent COLA adjustment of July 1, 1995 into the basic rates of pay. (The rest of Part A, the "eliminat[ion]" of the COLA established by the July 1991 Imposed Agreement, is discussed later in this opinion.) Part B created a COLA adjustment for the period through January 1, 2000, the effective date of the adjustment being December 31, 1999. Part C created COLA adjustments for the period after January 1, 2000, at six-month intervals. It involved the same kind of COLA adjustments, the same principles, as were found in the July 1992 Conrail/BMWE Agreement. It tracked the earlier COLA clause closely, except of course for different measurement periods, different payment dates, and different amounts.

A fair reading of Parts A, B and C compels the conclusion that the COLA in the July 1992 Conrail/BMWE Agreement was effectively "revised". Conrail and BMWE were parties to the September 1996 National Agreement. They accepted a new series of COLA arrangements. BMWE members became entitled to the benefits of Parts A, B and C. They seek these COLA benefits plus the COLA benefits from the earlier July 1992 Conrail/BMWE Agreement. To accept that view, to provide Conrail's BMWE employees this additional COLA which no other carrier's BMWE employees enjoy, would require a clear statement that the parties intended such an unusual result. No such statement can be found in the September 1996 National Agreement.

BMWE believes the parties did make such a statement in Article II, Part A of the September 1996 National Agreement when they spoke of the COLA in the July 1991 "Imposed Agreement" being "eliminated". Its argument is that the failure to mention the July 1992 Conrail/BMWE Agreement meant that the COLA under that Agreement was not "eliminated" and was to "remain in effect..." However, as I have already explained, the COLA arrangements under the July 1992 Conrail/BMWE Agreement ended when they were "revised by the parties..." That was a self-effectuating provision. Having made those "revis[ions]", there was no need for the parties to say in the September 1996 National Agreement that they were "eliminat[ing]" the old COLAs.

BMWE's response is that such reasoning treats the "eliminate" language in Article II, Part A of the July 1992 Conrail/BMWE Agreement as mere surplusage. That is true.

But it is not that unusual in collective bargaining for parties to state a right (or responsibility) in contract language even though the same right (or responsibility) has previously been expressed elsewhere in the contract or can be reasonably inferred from other language. Surplusage does happen. It cannot, given the peculiar circumstances of this case, be the basis for reading into the September 1996 National Agreement an obligation upon Conrail to continue the earlier COLA.

The Board's interpretation is supported by other considerations as well. Article II, Part B, Section 1 of the July 1992 Conrail/BMWE Agreement established COLA adjustments to be made under that Agreement. It provided a schedule of COLA payments and then went on to say:

> ...Measurement Periods and Effective Dates conforming to the above schedule shall be applicable for all years subsequent to those specified during which this Article is in effect. (Underscoring added)

The continuation of the July 1992 COLA was dependent, in other words, upon "this Article [II]" remaining "in effect". However, it was replaced by Article II of the September 1996 National Agreement and was therefore, by its own terms, no longer applicable at such time. The July 1992 COLA arrangements ceased to exist.

Further support for this view is found in the purpose behind PEB 219's recommended COLA - as elaborated upon by the Special Board, as imposed by Congress, as embraced by PEB 221, and finally as incorporated without change in the July 1992 Conrail/BMWE Agreement. The Special Board explained that the object of this COLA was "to ensure that individual employees gain some protection against inflation during the period of the next round of bargaining" and thereby provide "the parties an incentive to settle the next round" without delay. The first such COLA adjustment was effective July 1, 1995, six months after the final general wage increase. Other COLA adjustments were to follow until such time as the COLA was "revised by the parties..." To treat this COLA as a benefit to be kept in place throughout the life of the September 1996 National Agreement, as BMWE urges, would defeat PEB 219's purpose in creating it. To treat this COLA as a benefit which protected employees against inflation only during the 1995 round of bargaining would effectuate PEB 219's purpose.

The bargaining history preceding the September 1996 National Agreement points in the same direction. The carriers, Conrail included, negotiated as a group with BMWE. A single, uniform resolution of the pending issues was contemplated. Exceptions for a given carrier were of course possible but any exception would have to be carefully spelled out. BMWE never took the position, during these negotiations or in the presentation to PEB 229, that COLA adjustments made under the July 1992 Conrail/BMWE Agreement should continue in effect at Conrail after the new 1996 National Agreement was executed. Nor did it suggest in any way that Conrail be treated differently than other carriers for purposes of COLA. Those matters did not surface even though various aspects of COLA were discussed later. When some special Conrail-BMWE issues delayed the final execution of the 1996 National Agreement, COLA was not among those issues.

BMWE itself, prior to its members' ratification vote on the September 1996 National Agreement, analyzed the projected wages under this Agreement. It listed the roll-in of the 9-cent COLA adjustment of July 1995 and the COLA equity adjustment due on December 1, 1999. But it made no mention whatever of any continuation of the COLA adjustments previously made under the July 1992 Conrail/BMWE Agreement. No other COLA payments were listed in this analysis. Obviously, BMWE did not then believe that this earlier COLA would remain in effect at Conrail during the life of the new 1996 National Agreement. Had such a benefit existed, BMWE would surely have publicized it to show that Conrail employees had done even better than their counterparts at other carriers. BMWE's silence is telling. Its other documents, for instance, a "Summary of the Memorandum Agreement", likewise say nothing about a continuation of the prior COLA adjustments at Conrail during the life of the new 1996 National Agreement.

Given these circumstances and given the terms of both the July 1992 Conrail/BMWE Agreement and the September 1996 National Agreement, Conrail had every reason to believe that the earlier COLA adjustments would cease with the 1996 National Agreement. Conrail had every reason to believe that its COLA obligation under the 1996 National Agreement would be no different than that of any other carrier. BMWE never suggested anything to the contrary before the execution of the 1996 National Agreement. Its claim in this case arose not from what the parties intended but rather from what they wrote - or, more accurately, from what they failed to write - in the 1996 National Agreement. But apart

from the words in Article II, Part A, "eliminat[ion]" of the earlier COLA under the July 1991 "Imposed Agreement", there is not a shred of evidence to suggest that the parties intended the earlier COLA adjustments to survive and remain in effect under the 1996 National Agreement. There is, as already explained, sound evidence to show that the earlier COLA was "revised" by the 1996 National Agreement and that the parties meant to terminate the COLA adjustments that had taken effect during the July 1992 Conrail/BMWE Agreement. That this was the parties' intent, although not plainly expressed, seems clear. And such intent should be the controlling consideration here. BMWE's claim lacks merit.

AWARD

The BMWE claim is denied.

Richard Mittenthal
Neutral Member

Jeffrey H. Burton 8/31/00
Carrier Member
Concerning

Jed Dodd
BMWE Member
Dissenting