

ARBITRATION PROCEEDINGS

In the Matter of the Arbitration Between

GRAND TRUNK WESTERN RAILROAD

- and -

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

Subject: CDL Wage Differential

Dana Edward Eischen, Arbitrator

Appearances

For the Union:

Stephen V. Powers
Assistant to President

For the Employer:

Marilyn J. Kovacs,
Senior Director- Labor Relations
and
The John Lange Consultancy
by John P. Lange, Principal

Also Present

For the Union:

Paul Beard, General Chairman NP W&LE
Perry K. Geller, Sr., General Chairman CRSF
Rick Mc Lean, Assistant General Chairman

For the Employer:

R. O. Papa, Engineer Production

PROCEEDINGS

This is an arbitration of an unresolved interest dispute between the Brotherhood of Maintenance of Way Employees ("BMWE" or "Organization") and the Grand Trunk Western Railroad ("GTW", "Grand Trunk" or "Carrier") arising out of negotiations which culminated in new Collective Bargaining Agreements ("Agreements"), executed May 18, 1998. Those Agreements included moratoria on any new notices prior to September 1, 1999, to be effective after December 31, 1999. In negotiations leading to that Agreement the Organization's September 29, 1995 Section 6 notice addressed several issues relating to a Commercial Driver's License ("CDL"), including a demand for payment of a wage differential to employees when assigned to positions requiring a CDL. The new GTW/BMWE Agreements addressed the CDL matter in two places. First, with respect to the costs associated with obtaining a CDL and the use of company trucks to take CDL driving tests, the Parties agreed as follows:

ARTICLE XIV - COMMERCIAL DRIVER'S LICENSE

(a) Employees who are required by the company to obtain a Commercial Driver's License (CDL) and successfully obtain a CDL will be compensated for lost wages and, upon presentation of proof of expenditures, the Company shall reimburse an employee for all costs associated with obtaining and maintaining such license.

(b) Employees shall be permitted the use of an appropriate GTW vehicle to take a CDL test provided that written request for the use of such vehicle is made to the designated company officer no less than five (5) working days prior to the CDL test.

Second, when they could not reach agreement on BMWE's CDL wage differential demand, the Parties agreed to submit the matter to final and binding arbitration in the May 18, 1998 Letter of Agreement which established this proceeding.

In August 1998, the Parties selected me to hear and decide their CDL dispute in interest arbitration, in accordance with procedures set forth in Side Letter No. 5, dated May 19, 1998. Extensive pre-hearing and rebuttal submissions were filed and exchanged, following which a hearing was held at Detroit, Michigan on February 29, 1999. Both Parties were represented and afforded full opportunity to present oral and documentary evidence in support of their positions. Following the hearing, additional evidence and supplemental briefs were filed and exchanged in May and June, 1999, after which the record was declared closed.

ISSUES

Under the terms of Side Letter No. 5, dated May 19, 1998, the Parties agreed to submit the following questions to me for final and binding interest arbitration:

- | | |
|-----------------------|---|
| <u>Question No. 1</u> | Should employees who obtain a Commercial Driver's License (CDL) be paid a rate differential when assigned to positions requiring a CDL? |
| <u>Question No. 2</u> | If the answer to Question No. 1 is in the affirmative, what is the appropriate wage differential for positions requiring a CDL? |

BACKGROUND

The Parties

For many years the Canadian National Railroad ("CN System") has owned the Grand Trunk Western Railroad, which also includes the former Detroit and Toledo Shore Line Railroad Company ("D&T SL") and the former Detroit Toledo and Ironton Railroad Company ("DT&I"). The present day GTW has about 900 track miles and employs about 300 individuals represented by BMW under three (3) separate Collective Bargaining Agreements: Pre-1980 Grand Trunk, former Detroit and Toledo Shore Line ("D&TSL"), and former Detroit, Toledo and Ironton (DT&I"). [The Interstate Commerce Commission conditioned its approval of GTW's 1980 acquisition of D&TSL and DT&I upon imposition of "New York Dock" protective conditions but as of June 1999, the Parties have not yet consolidated the three separate agreements.] Thus, this arbitration proceeding impacts all three of the separate agreements which now govern BMW-represented employees on the combined GTW, all of which were amended by the above-referenced Agreements of May 1998.

Following full integration of the combined Grand Trunk into the CN System effective January 1, 1992 the Canadian Government privatized the enterprise 1995, with CN shares now traded on the New York Stock Exchange. CN Systems, which also includes the Soo Line Railroad, reached agreement in 1998 to acquire the Illinois Central Railroad ("ICG") and the Chicago, Central & Pacific ("CC&P"); a transaction approved by the Surface Transportation Board ("STB"), subject to New York Dock labor protective provisions and successful merger negotiations. At present, CN has about 19,800 track miles, Illinois Central has about 2,600 track miles and CC&P has about 790 miles. Thus, the 900 track miles of the combined Grand Trunk Western represents less than 4 percent of CN Railways' merged system.

The BMWE is a main line railroad labor organization representing most of the construction, track repair and roadway maintenance employees on the Nation's major rail carriers. Prior to 1988, GTW participated in national bargaining with BMWE, along with most other Class I railroads, by delegating to the National Carriers' Conference Committee ("NCCC") and its predecessor organizations authority and responsibility to negotiate wages and rules. However, BMWE and the NCCC have not traditionally established uniform classifications or rates of pay on the various railroads. Instead, national percentage wage increase settlements usually have been applied across-the-board to already existing base rates, which the individual carriers and BMWE general committees occasionally adjust to reflect equity and marketplace trends. As a result, one finds a patchwork of differences among and between various railroads' BMWE classifications, work rules and pay rates. Moreover, comparing basic rates at any given moment in time is problematic because the different bargaining cycles have resulted in activation of percentage COLA and lump sum increases in various collective bargaining agreement at different times. This lends another element of fluctuation in the relationships of wages under the various BMWE agreements with various carriers, making basic wage comparisons largely an "apples to oranges" proposition.

Grand Trunk opted to withdraw from national handling parties in 1988 and since then has negotiated locally with various labor organizations, including BMWE. Since the early 1990's, CDL-related issues have been a source of conflict in negotiations between BMWE and the nation's rail carriers, both in national bargaining and on individual properties. The present dispute arose out of negotiations generated by Section 6 notices served by the BMWE on September 29 and October 4, 1995. As noted, *supra*, when the Parties executed their most recent Agreement(s) in May 1998, the question of CDL differential was left unresolved and referred to interest arbitration.

The CDL Standards

Some background discussion of the governmental requirement that operators of certain types of highway motor vehicles possess a CDL should help to place this dispute in context. Issuance and regulation of licenses to operate highway motor vehicles traditionally has been an area for State action but since the mid-1980's the Federal government has assumed a much greater role. In 1985, Congress directed the United States Department of Transportation ("DOT"), through the Federal Highway Administration ("FHWA"), to enact regulations regarding the operation of certain commercial motor vehicles. *See* 49 U.S.C. §104; 49 U.S.C. §205. Those regulations, including those found in 49 C.F.R. Part 391, primarily concern an employer's responsibilities in connection with qualifications and certification of drivers of commercial motor vehicles. FHWA qualification and certification are required for employees who drive vehicles in excess of 10,000 lbs., carrying hazardous materials or carrying 16 or more passengers, including the driver. The FHWA certification procedures, which became effective in 1988, require employers like GTW to certify, among other things, that employees who operate commercial motor vehicles are qualified and medically fit to do so.

Congress again entered the field of commercial vehicle driving safety in 1986, when it enacted a law directing the DOT to promulgate regulations "... establishing minimum uniform standards for the issuance of commercial drivers' licenses by the States...." 49 U.S.C. §2705. Those regulations, known as the Commercial Driver's License ("CDL") standards, resulted in uniform national CDL qualifications, effective April 1, 1992, four years after the FHWA certification standards. *See* 49 C.F.R. Part 383. Vehicles ordinarily used in the rail industry which were affected by the April 1992 uniform CDL requirements are single vehicles with a gross vehicle weight rating

(GVWR) of 26,001 or more pounds (Group B) or single vehicles or combination of vehicles which are either designed to carry 16 or more passengers or are placarded for hazardous materials (Group C). See 49 C.F.R Part 383.

While the CDL standards and FHWA certification both concern commercial driving safety, they are separate and distinct governmental regulations. Unlike FHWA certification, CDL's are issued to the individual driver by the state and are not administered by the employer. Obtaining and maintaining a state-issued CDL is the personal responsibility of the individual employee and the CDL holder is required to maintain vehicle inspection reports and duty status logs, subject to criminal penalties for failure to comply. As discussed in greater detail, *infra*, the basic requirements for obtaining a CDL, effective April 1, 1992, are set forth in 49 CFR Part 383- Commercial Driver's License Standards: Requirements and Penalties, with additional knowledge and skill requirements are set forth in Sections 383.117 and 383.121, respectively, for passenger endorsements and hazardous material endorsements on CDL's.

Industry Bargaining and Arbitration on the CDL Issue

Ever since the DOT/FHWA regulations became effective, BMWWE has been pursuing bargaining initiatives with individual carriers and at the national bargaining level to obtain extra compensation, usually in the form of an hourly differential, for employees whose job duties include driving vehicles requiring possession of a CDL. Those efforts have produced the following mixed results: 1) an interest arbitration award establishing a differential payment of \$.30/hour to employees when assigned to positions requiring a CDL, subject to application of the COLA formula [Conrail/BMWWE (Award No. 2 of Public Law Board 5542, Arbitrator Robert M. O'Brien, March 29, 1996. See also Special Board of Adjustment 1099, Arbitrator Arnold M. Zack, February 3,

1998)]; 2) an Emergency Board recommendation which declined to improve upon the \$.30 "O'Brien Award" CDL differential or extend it beyond Conrail to the rail carriers which participated in the most recent round of national bargaining between the BMW and the NCCC [Recommendation No. 29 of Presidential Emergency Board 229, Chairman David P. Twomey, June 23, 1996. *See also* Special Board of Adjustment, BMW and NCCC (Commercial Driver's License Dispute), George Nicolau, July 2, 1997]; 3) negotiated agreements with several individual small and mid-size carriers and two major carriers, outside of national bargaining, before and after Recommendation No. 29 of PEB No. 229, providing various amounts and types of differential payments expressly linked to the CDL requirement [Soo Line/BMW Agreement, May 16, 1992; Denver & Rio Grande Line/BMW Agreement, October 1, 1992; Indiana Harbor Belt Line/BMW Agreement, November 16, 1996; Texas Mexican Railway Company/BMW Agreement, January 27, 1997; Maryland & Pennsylvania/BMW Agreement, March 10, 1998; CSXT-Conrail/BMW Implementing Agreement, March 23, 1999; Norfolk Southern-Conrail/BMW Implementing Agreement, May 6, 1999]; and, 4) a negotiated agreement with a major carrier in which no specified differential amount is expressly linked to CDL in the final document, albeit the bargaining history plainly manifests the mutual intent of the contracting parties to attribute some portion of substantial increases in truck driver wage rates to the CDL requirement. [Union Pacific/BMW Agreements, August 13, 1993].

The Parties disagree as to whether the single arbitrated CDL differential and the several negotiated CDL differentials in collective bargaining agreements between BMW and a minority of the nation's rail carriers constitute a "growing trend" or "pattern". For present purposes, it suffices simply to set forth those CDL contract provisions chronologically, as follows:

Soo Line/BMW Agreement, May 16, 1992

It is hereby agreed that a differential in the amount of \$0.30 per hour will be allowed section laborers, welders, and/or carpenters who are assigned to positions identified as having duties that include truck driving requiring DOT Certification, in addition to other regular duties. Individuals assigned to such positions must possess necessary DOT Certification as a qualification for such position. The agreement to allow this differential is based on the acknowledgment of a new and additional skill level, not normally required of laborers, welders or carpenters.

Denver & Rio Grande Line/BMW Agreement, October 1, 1992

Regarding conference of October 1, 1992, the following was agreed to:

Employees operating vehicles that require a CDL license will be paid a differential allowance of forty-five cents (.45) per hour....

Indiana Harbor Belt Line/BMW Agreement, November 16, 1996

Section 1 - CDL and FHWA testing, Licensing and Certification

- (a) Upon presentation of proof of expenditures, CSXT shall reimburse employees for all fees necessary to obtain CDL License for the first application. Once the CDL is obtained, subsequent additional endorsements required to maintain the license requirements will also be reimbursed.
- (b) Employees shall be permitted the use of an appropriate CSXT vehicle to take CDL test provided that written request for the use of such vehicle is made to the Engineer of Maintenance of Track no less than five (5) working days prior to the CDL test.
- (c) Failure of CSXT to provide a vehicles for CDL qualification upon proper written request shall result in the employee being considered CDL qualified for the purpose of job assignments until the next available CDL test for which CSXT provides a vehicle for testing purposes.
- (d) No employee shall be denied assignment to a position based upon CSXTs failure to provide FHWA certification.

Section 2 - CDL and FHWA Rates

Other than the Vehicle Operator class an employee who may be assigned to operate a vehicle which requires CDL will receive \$.30 per hour in addition to their regular rate for the entire work day.

Section 3

Vehicle operators will be the only job class required to obtain and maintain CDL qualifications. However, some positions may be required to obtain CDL and/or FHWA certification based on vehicle assigned. In this event, Sections 1 and 2 of this rule will apply.

Texas, Mexican Railway Company/BMWE Agreement, January 27, 1997

This will confirm our understanding regarding the payment of a differential for the requirement of a Commercial Drivers License of employees.

A position that necessitates that the driver of a vehicle possess a Commercial Drivers License will receive an additional ten (10) cents per hour, effective December 1, 1996.

Maryland & Pennsylvania/BMWE Agreement, March 10, 1998

1.) All employees under the jurisdiction of the BMWE Agreement that are required to obtain and maintain a Commercial Driver's License (CDL), will receive an additional fifteen (15) cents per hour pay increase on all hours worked.

2.) The employee required to obtain and maintain a CDL and assigned as the primary driver of the vehicle will receive an additional thirty (30) cents per hour pay increase on all hours worked. This is not in addition to the 15 cents in paragraph 1.

CSXT-Conrail/BMWE Implementing Agreement, March 23, 1999

RULE 39 - COMMERCIAL DRIVERS LICENSE

Section 1 - CDL and FHWA testing, Licensing and Certification

(a) Upon presentation of proof of expenditures, CSXT shall reimburse employees for all fees necessary to obtain CDL License for the first application. Once the CDL is obtained, subsequent additional endorsements required to maintain the license requirements will also be reimbursed.

(b) Employees shall be permitted the use of an appropriate CSXT vehicle to take CDL test provided that written request for the use of such vehicle is made to the Engineer of Maintenance of Track no less than five (5) working days prior to the CDL test.

(c) Failure of CSXT to provide a vehicle for CDL qualification upon proper written request shall result in the employee being considered CDL qualified for the purpose of job assignments until the next available CDL test for which CSXT provides a vehicle for testing purposes.

(d) No employee shall be denied assignment to a position based upon CSXT's failure to provide FHWA certification.

Section 2 - CDL and FHWA Rates

Other than the Vehicle Operator class an employee who may be assigned to operate a vehicle which requires CDL will receive \$.30 per hour in addition to their regular rate for the entire work day.

Section 3

Vehicle operators will be the only job class required to obtain and maintain CDL qualifications. However, some positions may be required to obtain CDL and/or FHWA certification based on vehicle assigned. In this event, Sections 1 and 2 of this rule will apply.

NSR-Conrail/BMWE Implementing Agreement, May 6, 1999

Section 7- Commercial Drivers License

The CDL differential rate as specified in PLB 5542, Award No. 2, and amended by COLA increases as specified in SBA 1099 (Referee Zack), will apply for positions bulletined with a CDL requirement on the Northern Region (Dearborn, Pittsburgh, or Harrisburg Divisions) and for positions bulletined with a CDL requirement on all gangs established under the DPG arbitrated agreement.

Just as they disagree over the meaning and significance of the foregoing negotiated CDL provisions between BMWE and several other carriers, the Parties to this proceeding also have exchanged rhetorical points and counterpoints concerning the reach and relevance of the arbitrated CDL differential in the Conrail/BMWE Agreement signed July 28, 1992. That \$.30 CDL differential was created by Award No. 2 of PLB 5542, (Referee Robert M. O'Brien, March 26, 1996), which in turn arose out of the Select Committee procedures established by BMWE and Conrail in Side Letter No. 9, dated July 28, 1992. Letting neutral arbitrator Robert O'Brien speak for himself at pp. 6-7 of Award No.2 of PLB 5542 is more instructive than partisan summaries or characterizations of his explanation for creation of the Conrail/BMWE CDL differential in March 1996 (Emphasis added):

The BMWE proposes that employees assigned to positions which list CDL qualifications as a requirement to hold the positions, except relief drivers, be granted a rate differential of \$1.50 per hour added to their regular rate of pay. Track and B&B relief drivers would be allowed a rate differential of \$.50 per hour when not operating a vehicle and \$1.50 per hour for any day that they operate a vehicle requiring a CDL for more than two (2) hours under the BMWE's proposal.

The Carrier is opposed to any rate differential for employees who are assigned to positions listing CDL qualifications as a requirement.

The parties have an underlying dispute over whether employees who are required to obtain a CDL are entitled to additional remuneration. Both the Organization and the Carrier have submitted a plethora of evidence and arguments in support of their respective positions. They have made very

persuasive and cogent arguments to support their positions.

Based on the extensive record before us, this Board is convinced that employees are entitled to additional compensation for obtaining a CDL even though it was the Federal Government, not Conrail, that imposed this requirement on them. Although the fundamental nature of the work has not been changed by the obligation to obtain a CDL, nevertheless additional responsibility has been placed on employees by FHA regulations. For instance, employees subject to the Federal Motor Carrier Safety Regulations must inspect their vehicles before each trip and maintain a record of their duty status. They are subject to criminal penalties if they fail to maintain duty status logs for each trip. (Emphasis added)

Employees operating Commercial Motor Vehicles must also complete a vehicle inspection report at the completion of each day's work. They must be satisfied that a vehicle is safe before driving it. They must also comply with complex regulations, including those governing hazardous materials if they transport hazardous materials.

This Board is not convinced that obtaining a CDL requires additional "knowledge,, or "skills" as the Organization maintains. As noted heretofore, it does increase an employee's responsibility, however, due to the extensive Federal Regulations governing operation of a Commercial Motor Vehicle. Even though that added responsibility has been externally imposed on Conrail and its employees, it justifies some additional compensation, in our view.

This Board is unable to find a rational basis for the \$1.50/hour rate differential proposed by the BMW. This would constitute about a 10% wage adjustment and give employees approximately \$16.28/hour in wages. The added responsibility imposed on operators of Commercial Motor Vehicles does not justify such an extensive wage increase, in our opinion.

It is noteworthy that on two or three rail freight carriers employees represented by the Brotherhood of Maintenance of Way Employees who operate vehicles requiring a CDL receive a differential allowance. On the Denver and Rio Grande Western Railroad Company they receive an additional \$.45/hour and on the Soo Line Railroad Company they are paid a differential of \$.30/hour. On the Union Pacific Railroad, truck drivers receive a differential between \$.55/hour and \$.98/hour (\$.20 more if the vehicle is being operated with a hy-rail attachment) although it is unclear whether they receive this differential because they are obligated to obtain a CDL. Additionally, on the Illinois Central Railroad employees represented by the Brotherhood of Railroad Signalmen are reimbursed the cost of obtaining and maintaining a Class "A" CDL and receive an annual payment of \$25.00 .

To this Board, the rate differential negotiated for section laborers, welders and carpenters on the Soo Line Railroad clearly and unambiguously predicates the additional \$.30/hour on the "...new and additional skills level, not normally required of laborers, welders or carpenters." Such a rate differential would be appropriate for employees on Conrail who are assigned to positions requiring a CDL, in our judgment. They shall therefore receive an additional \$.30/hour when assigned to positions requiring a Commercial Drivers License.

There also has been much disagreement between the parties concerning the relevance and weight to be accorded the truck driver rate increases contained in the August 1993 Union Pacific/BMW Ξ Agreements (two separate agreements dated August 16, 1993 and related sic

letters). Significant wage increases were provided in those agreements but the Parties are sharply divided as to whether a CDL differential was any part of that bargain. In that connection, based on the record before him, Arbitrator O'Brien commented in Award No.2 of PLB 5542, *supra*, as follows: "On the Union Pacific Railroad, truck drivers receive a differential between \$.55/hour and \$.98/hour (\$.20 more if the vehicle is being operated with a hy-rail attachment), although it is unclear whether they receive this differential because they are obligated to obtain a CDL". Finally, each Party takes a different view of the disposition of the CDL issue in the last round of national negotiations between BMWE and NCCC, which produced a National Agreement premised upon acceptance by the Parties of the recommendations of the Report to the President by PEB No. 229, including Recommendation No. 29, at page 41, reading as follows:

In view of the recent Award of the CDL differential [the O'Brien Award], 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.

Latent ambiguity in that recommendation spawned controversy leading to a definitive interpretation by Arbitrator George Nicolau, who held as follows on July 2, 1997, in Special Board of Adjustment, BMWE and NCCC (Commercial Driver's License Dispute), at p. 17:

In their primary arguments, both Parties contended that the PEB's intent could be gleaned from the words of the Report and that there was no real need to go beyond them. I agree.

My conclusion from a reading of those words is that the Board, in making Recommendation No. 29, did not intend to recommend the establishment of an initial \$.30 per hour rate differential for positions requiring a Commercial Driver's License (CDL) on those carriers that did not then have an existing CDL differential.

The CDL Issue on GTW

Employees who are required to obtain CDL's on GTW fall into two broad groups: (1) approximately ten (10) full-time truck drivers whose primary work is to drive trucks with equipment accessories such as log loaders, boom trucks, dump trucks, etc.; and (2) another estimated 45 positions, such as track foremen, trackmen, B&B foremen, carpenters, welders and welder helpers, who occasionally drive CDL-mandated vehicles incidental to the regular work of their classes. As of 1998 the GTW (proper) had 6 dump trucks, two log (material handling) trucks, one semi-tractor trailer and two fuel trucks which require FHWA certification and a CDL licensed driver. (The record does not show whether GTW has other CDL-mandated vehicles and contains no information at all about the truck fleet on the former D&TSL and DT&I properties).

Under the GTW/BMWE Agreement, trucks in the first group come under the category of "Class 2 Track Department Group C" machines listed in Rule 1 as follows (Emphasis added):

Class 2- Machine

Operator of Bulldozers Entire Line (All Models)
 Dumpers, Multiple Self-Powered
 Brush Cutters Tie Saw
 Power Tamping jack (Wire Devices)
 Track Liner/Wire Device
 Ballast Regulator Including All Attachments
 Tie Inserter and Scarifier
 Tie Injector
 Tie Bed Scarifier
 Track Cleaner
 Front-End Loaders & Speed Swings
 Automatic Spikers
 Tie Handlers
 Off-Track Mowers including
 Brush Hogs
 Track Surfacers with Wire Devices
 Track Broom
 Snow Tractor
 Truck Grader
 Boom Trucks, Dump Trucks, Log Trucks
 Grapple Trucks, Semi-LowBoy

For many years under the GTW/BMWE Agreement, the compensation of drivers of such "Class 2 rated" trucks (\$17.03 per hour, effective January 1, 1999) has been supplemented with a fifty (50) minute daily "arbitrary" or bonus payment (\$14.13 per day, effective January 1, 1999).

Rule 15 of the current GTW/BMWE Agreement had its genesis in a Memorandum of Agreement dated August 1, 1968, applying the provisions of the Award of Arbitration Board 298, dated September 30, 1967. That Memorandum of Agreement, which now appears as Appendix G in the May 18, 1998 Schedule Agreement reads in pertinent part at Section III, Item 2 as follows:

2. It is agreed that employees working in the following 'Occupational Classifications' covered by Rule 2(a):

Track Department
Group D
Grades 1, 2 and 3

shall receive an arbitrary allowance of fifty (50) minutes, pro rata rate, per regular working day for servicing their machines during their tour of duty. (Emphasis added)

That August 1, 1968 Memorandum of Agreement was revised in February 1975 to reflect reorganization of machine classifications and subsequently recodified as Rule 15 in the current Agreement:

RULE 15 - ARBITRARY TO MAINTAIN EQUIPMENT

Employees working in the Occupational Classification of Track Department Group C Machine Operators operating Class 1 and Class 2 machines covered by Rule 1 shall receive an arbitrary allowance of fifty (50) minutes, pro rata rate, per regular work day for servicing their machines during their tour of duty.

No such provision appears in the DT&I/BMWE Agreement or the D&TSL/BMWE Agreement. On the former DT&I and D&TSL properties, there are about 6 or 7 people who drive CDL-mandated vehicles. There are two truck driver rates of pay on the former DT&I: Trackman/Truck Driver (\$15.89 per hour) and Mechanic/ Truck Driver (\$16.90 per hour) and on the

former D&TSL there is currently one Truck Driver rate (\$15.83 per hour). To reiterate, however, the D&TSL/BMWE Agreement and the DT&I/BMWE Agreement do not classify any of those vehicles as "Class 2 machines" nor do they contain provisions like Rule 15 or Appendix G in the Grand Trunk/BMWE Agreement. Thus they do not provide for the 50 minute arbitrary which certain designated Class 2 vehicle operators on GTW receive for "servicing machinery".

Regarding its payment of the Class 2 machine operators' rate to certain truck drivers, the GTW introduced into the record of the February 29, 1999 hearing in these proceedings an intra-Company letter written some two months earlier, on December 17, 1998, reading as follows:

Ms. M. J. Kovacs
Senior Manager Labor Relations
Troy, Michigan

I have been employed by the Grand Trunk Western in the Maintenance of Way Department since July 5, 1960 and have held the position of Division Engineer from September 25, 1974 until April 1, 1988 when I became Production Engineer and I have held the position since that time.

As I advised during our discussion concerning payment of the fifty minute arbitrary to GTW BMWE employees who drive vehicles requiring CDL certification, the company began paying such employees the 50 minute arbitrary in April of 1990. In October 1989 the State of Michigan enacted regulations requiring drivers of vehicles subject to DOT regulations to obtain commercial drivers' licenses. In 1990 the GTW purchased two trucks subject to the DOT regulations, and effective April 1, 1990, the beginning of the 1990 production season, I determined that the incumbents of the dump truck driver positions were to be classified as and paid at the Class 2 machine operator rate including the fifty minute allowance for servicing machines provided in Appendix G of the current GTW working Agreement.

Truck drivers are not required to "service their machines" in the same manner that most Class 2 machine operators service track machines. Track machines are isolated to the railroad tracks and servicing is required to be performed at the work site or tie-up point by the machine operator. Conversely, truck drivers drive a vehicle to a certified service center for servicing. However, the company determined that inclusion of the fifty minute arbitrary payment would be an incentive for Class 2 BMWE employees to become CDL certified and bid in the Truck Driver positions.

R. O. Papa
Engineer Production

Unlike the classification rules and rates of pay provisions set forth in many other such agreements, Rule 1 and Appendix R of the GTW/BMWE Agreement signed May 18, 1998 contain neither a specific pay rate nor separate seniority classification for "Truck Driver" or "Vehicle Operator". The hearing record before me contains countervailing assertions but no evidence other than the above-quoted "Papa Letter" concerning whether or to what extent drivers of CDL-mandated trucks on GTW, other than those expressly listed in Rule 1, *supra*, receive the Class 2 machine operators rate and the associated Rule 15/Appendix G fifty (50) minute arbitrary payment. In that connection, in its initial submission, at page 5, GTW asserted that "all of these [CDL-mandated truck driver] positions are paid the Class 2 rate for CDL certified work....in addition, employees working under the Grand Trunk Schedule receive a 50 minute arbitrary at the same rate". That statement is directly contradicted in the BMW rebuttal submission, which asserts at page 9: "While the 50 minute arbitrary is afforded to employees assigned to trucks with equipment accessories listed in Class 2 (boom, grapple, log and dump trucks, etc.), it is not afforded to other employees who drive large gang trucks that require CDL's" (Emphasis in original). From all of this, I conclude that under the GTW/BMWE Agreement approximately ten (10) full-time drivers of CDL-mandated trucks are classified, bulletined and paid as Class 2 machine operators, which entitles them to be paid the Rule 15/Appendix G arbitrary. However, approximately forty-five (45) other GTW/BMWE Agreement-covered employees who are required to possess a CDL for "casual" or "irregular" driving of CDL-mandated trucks are not classified, bulletined and paid as Class 2 machine operators and thus do not receive the 50 minute arbitrary under Rule 15/Appendix G.

POSITIONS OF THE PARTIES

The following statements of position have been extrapolated and edited from the respective submissions filed by the Parties:

The Union

BMWE submits that the answer to Question No. 1 is "Yes" and the answer to Question No. 2 is that the appropriate wage differential for positions requiring a CDL is \$.30/hour, subject to the same future percentage and COLA increases applied to the basic wage rates.

BMWE's proposal for a \$.30/hour wage differential is supported by a triumvirate of classic wage determinates: (1) increased knowledge; (2) increased skill; and (3) increased responsibility. In addition to these three classic wage determinants which support BMWE's position, BMWE will show that there is a steadily evolving trend in the maintenance of way craft to pay wage differentials on positions which require a CDL. While a strong case can be made for a CDL rate differential that is far greater than \$.30/hour, we also recognize the precedent set by the O'Brien Award.

The key points for the Board to keep in mind as it considers this issue are as follows:

- CDL regulations require applicants to demonstrate knowledge of complex regulations on a 66 question test.
- CDL applicants must demonstrate the skill to operate large, heavy vehicles with complex shifting mechanisms and sophisticated air brake systems in a wide variety of road, traffic and weather conditions.
- Employees assigned to positions requiring a CDL are required to assume supervisor-like responsibilities with potential loss of livelihood and criminal penalties for failure to comply.
- Other railroads (UP, D&R, SOO, IB., MA&PA, T&M, CSXT and NSR) have negotiated higher rates of pay for positions requiring CDL's.
- This is not a matter of first impression in interest arbitration. Arbitrator O'Brien found that employees assigned to positions requiring a CDL should receive an additional \$.30/hour.

The Employer

The Arbitrator derives his jurisdiction from Side Letter No. 5, which authority is confined to the two questions at issue in the context of the facts at Grand Trunk. If he decides Question One in the affirmative, he is also empowered in Question Two to decide whether a differential awarded will be in addition to or in lieu of the \$14.13 arbitrary Grand Trunk now pays. The facts and evidence clearly leave the Arbitrator no fair alternative but to conclude that, in the best interests of both the employees and the carrier, he should answer Question One in the negative.

There is no objective justification for concluding the CDL requirement justifies a 30 cents per hour differential. Given the current high rates of pay, a differential clearly is not warranted. Nonetheless, if the Arbitrator were to determine that a differential should be paid across the board, he should also say, as a matter of fairness and equity, that the payment is made in lieu of the 50 minute arbitrary. In the abstract, the Carrier would rather that it not pay such an expensive arbitrary as the \$14.13 it already pays for the CDL. However, we feel if one is paid it should not exceed the small railroad payment of 10 cents per hour as is now being paid on the Texas Mexican Railway. Moreover, such payment should not include additional general wage increases or the complications of a COLA formula and should be limited to straight time hours actually worked. Finally, the differential should not be included in any time paid and not worked, such as penalty claims, vacations and holidays.

As we have repeatedly shown, the Board should deny the Union's request for additional compensation for the following reasons:

1. GTW pays CDL qualified employees high base rates to attract and retain the skilled employees. Both GTW and UP determined that factors far more significant than CDL qualification justified a higher rate. There is no need for an additional differential.
2. While a differential is not necessary, GTW now pays employees \$1.766 per hour. Any further payments will disrupt wage relationships and complicate negotiations for a consolidation of labor contracts if the IC/CC&P are later acquired and merged into CN.
3. PEB 229 had an opportunity to hear this same Union presentation and declined to recommend a wage differential. The objective facts do not support the allowance, particularly on a Carrier that pays significantly higher hourly rates for motor vehicle operators.
4. Contrary to the Union's argument, only about 20 per cent of the BMWWE employees have a differential provision in their contracts. PEB effectively ended any activity in this area until the next round of negotiations.

Collective bargaining is about drawing limits. From the Union perspective, the worst possible outcome is to leave something they could have obtained on the table. Therefore, inherent in the process is a Union's vigorous testing of the limits to assure nothing has been left behind. A denial award in this case says nothing more than the Union did the very best job. Nothing is left on the table.

OPINION OF THE IMPARTIAL ARBITRATOR

Discussion

Most arbitrators would agree that establishing wages or writing contract language for adversarial parties is a daunting and disquieting responsibility. In my considered judgement, no matter how well-informed or well-meaning an independent impartial arbitrator might be, the mutual interests of the Parties are always better served by negotiating and agreeing on their own contract terms. However, since these Parties were unable to achieve a meeting of the minds on the CDL differential issue in negotiations, I must now conscientiously exercise the interest arbitration authority with which they have entrusted me in Side Letter #5. In performing that task, it is well to bear in mind that the interest arbitrator as contract writer stands on a different footing than the grievance or rights arbitrator who functions as contract reader. The interest arbitrator serves more as a fiduciary for the Parties, with the responsibility to make a decision that best reflects what they would have done themselves had they been able to overcome the barriers which divided them and reached a voluntary agreement.

Achievement of closure by interest arbitration where the Parties have proven unable to do so voluntarily is possible primarily because the disinterested and impartial arbitrator is better able to objectively analyze and impersonally weigh the evidence of record with respect to established criteria--essentially the same criteria which the Parties themselves utilize in bargaining. In that connection, it is generally recognized that the most prevalent standard used in interest arbitration of wage disputes is "prevailing practice" and this is especially true in certain industries. It can hardly be gainsaid that the establishment and promulgation of industry patterns has been a hallmark of collective bargaining in the railroad industry for countless rounds of bargaining under the Railway

Labor Act.

More particularly, in interest arbitration of issues like the CDL differential dispute presented in these proceedings, the most commonly used standard guiding arbitral judgement is whether and to what extent increased knowledge, skill and responsibility justify payment of a wage differential. See Elkouri & Elkouri, 4th edition, 1985, pp. 804, 813-14. The Elkouris expounded further on these primary tenets at pages 1102 and 1103 in the 5th edition (1997) of their treatise, as follows:

... It may not often be possible or desirable for the arbitrator to make a strict application of the standards. Rather, they must be applied so that the end result provides a workable solution satisfactory to both sides. The circumstances of the parties must always be kept in mind. The arbitrator's task is to determine what the parties, as reasonable persons, should have agreed upon by negotiations.

No single standard is available for universal application in all industries and under all circumstances. Arbitrators generally apply a combination of standards, the combination varying from case to case.

...
In the final analysis, the weight to be accorded a standard in any given case is, or should be, the result of the evidence submitted by the parties in respect to its application. The burden is upon the parties to submit evidence that is both factual and material, for arbitrators can be expected to be "unwilling to enter into the field of speculation.

As the moving Party seeking to achieve arbitral endorsement of its bargaining proposal for a CDL differential on GTW, (inclusive of D&TSL and DT&I), the BMW bears the burden of persuasion by a preponderance of probative record evidence. In my considered judgement, the Organization has shown on the record before me a growing recognition in the industry that such a differential is warranted because attainment, retention and utilization of a CDL by an employee requires demonstrable increases in the individual's knowledge, skill and responsibility on the job. In that connection, the present record requires my concurrence with the following observation by Arbitrator O' Brien in PLB 5542-Award No.2:

[E]mployees are entitled to additional compensation for obtaining a CDL even though it was the Federal Government, not Conrail, that imposed this requirement on them. Although the fundamental nature of the work has not been changed by the obligation to obtain a CDL, nevertheless additional responsibility has been placed on employees by FHA regulations".

In Arbitrator O'Brien's judgement, the primary justification for paying employees a CDL differential is that attainment and utilization of a CDL "does increase an employee's responsibility...due to the extensive Federal Regulations governing operation of a Commercial Motor Vehicle." Indeed, that conclusion is convincingly supported in the record before me by simple reference to pertinent sections of the Federal Motor Carrier Safety Regulations in 49 CFR, Parts 390, 392, 395, 396 and 397, §§ 390.3(e)(2), 392.7 through 392.9, 395.8, 396.11, 396.13, and 397.1, as follows:

§390.3 General applicability.

(2) Every driver and employee shall be instructed regarding, and shall comply with, all applicable regulations contained in this subchapter.

§392.7 Equipment, inspection and use.

No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:

Service brakes, including trailer brake connections.
 Parking (hand) brake.
 Steering mechanism.
 Lighting devices and reflectors.
 Tires.
 Horn.
 Windshield wiper or wipers.
 Rear-vision mirror or mirrors.
 Coupling devices.

§392.8 Emergency equipment, inspection and use.

No motor vehicle shall be driven unless the driver thereof is satisfied that the emergency equipment required by §393.95 of this subchapter is in place and ready for use; nor shall any driver fail to use or make use of such equipment when and as needed. [49 FR 38290, Sept. 28, 1984]

§392.9 Safe loading.

(a) *General.* No person shall drive a motor vehicle and a motor carrier shall not require or

permit a person to drive a motor vehicle unless—

(1) The vehicle's cargo is properly distributed and adequately secured as specified in §§393.100—393.106 of this subchapter.

(2) The vehicle's tailgate, tailboard, doors, tarpaulins, its spare tire and other equipment used in its operation, and the means of fastening the vehicle's cargo are secured; and

(3) The vehicle's cargo or any other object does not obscure the driver's view ahead or to the right or left sides, interfere with the free movement of his arms or legs, prevent his free and ready access to accessories required for emergencies, or prevent the free and ready exit of any person from the vehicle's cab or driver's compartment.

(b) *Drivers of trucks and truck tractors.* Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must—

"(1) Assure himself that the provisions of paragraph (a) of this section have been complied with before he drives that vehicle;

(2) Examine the vehicle's cargo and its load-securing devices within the first 25 miles after beginning a trip and cause any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the vehicle's load; and

(3) Reexamine the vehicle's cargo and its load-securing devices periodically during the course of transportation and cause any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the vehicle's load. A periodic reexamination and any necessary adjustments must be made—

(i) When the driver makes a change of his duty status; or

(ii) After the vehicle has been driven for 3 hours; or

(iii) After the vehicle has been driven for 150 miles, whichever occurs first.

(4) The rules in this paragraph do not apply to the driver of a sealed vehicle who has been ordered not to open it to inspect its cargo or to the driver of a vehicle that has been loaded in a manner that makes inspection of its cargo impracticable.

(c) *Buses.* No person shall drive a bus and a motor carrier shall not require or permit a person to drive a bus unless—

(1) All standees on the bus are rearward of the standee line or other means prescribed in §393.90 of this subchapter.

(2) All aisle seats in the bus conform to the requirements of §393.91 of this subchapter; and

(3) Baggage, freight, or express on the bus is stowed and secured in a manner which assures—

(i) Unrestricted freedom of movement to the driver and his proper operation of the bus;

(ii) Unobstructed access to all exits by any occupant of the bus; and

(iii) Protection of occupants of the bus against injury resulting from the falling or displacement of articles transported in the bus.

[36 FR 18863, Sept. 23, 1971, as amended at 37 FR 12642, June 27, 1972; 38 FR 23522, Aug. 31, 1973]

§395.8 Driver's record of duty status.

(a) Every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24-hour period using the methods prescribed in either paragraphs (a)(1) or (2) of this section.

(1) Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24-hour period. The duty status time shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section

may be combined with any company forms. The previously approved format of the Daily Log, Form MCS—59 or the Multi-day Log, MCS—139 and 139A, which meets the requirements of this section, may continue to be used.

(2) Every driver who operates a commercial motor vehicle shall record his/her duty status by using an automatic on-board recording device that meets the requirements of §395.15 of this part. The requirements of §395.8 shall not apply, except paragraphs (e) and (k)(1) and (2) of this section.

(b) The duty status shall be recorded as follows:

- (1) 'Off duty' or 'Off.'
- (2) 'Sleeper berth' or 'SB' (only if a sleeper berth used).
- (3) 'Driving' or 'D.'
- (4) 'On-duty not driving' or 'ON.'

(c) For each change of duty status (e.g., the place of reporting for work, starting to drive, on-duty not driving and where released from work), the name of the city, town, or village, with State abbreviation, shall be recorded.

NOTE: If a change of duty status occurs at a location other than a city, town, or village, show one of the following: (1) The highway number and nearest milepost followed by the name of the nearest city, town, or village and State abbreviation, (2) the highway number and the name of the service plaza followed by the name of the nearest city, town, or village and State abbreviation, or (3) the highway numbers of the nearest two intersecting roadways followed by the name of the nearest (sic) city, town, or village and State abbreviation.

(d) The following information must be included on the form in addition to the grid:

- (1) Date;
- (2) Total miles driving today;
- (3) Truck or tractor and trailer number;
- (4) Name of carrier;
- (5) Driver's signature/certification;
- (6) 24-hour period starting time (e.g. midnight, 9:00 a.m., noon, 3:00 p.m.);
- (7) Main office address;
- (8) Remarks;
- (9) Name of co-driver;
- (10) Total hours (far right edge of grid);
- "(11) Shipping document number(s), or name of shipper and commodity;

(e) Failure to complete the record of duty activities of this section or §395.15, failure to preserve a record of such duty activities, or making of false reports in connection with such duty activities shall make the driver and/or the carrier liable to prosecution.

§ 396.11 Driver vehicle inspection report(s).

(a) *Report required.* Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated and the report shall cover at least the following parts and accessories:

- Service brakes including trailer brake connections
- Parking (hand) brake
- Steering mechanism
- Lighting devices and reflectors
- Tires

- Horn
- Windshield wipers
- Rear vision mirrors
- Coupling devices
- Wheels and rims
- Emergency equipment

(b) *Report content.* The report shall identify the motor vehicle and list any defect or deficiency discovered by or reported to the driver which would affect safety of operation of the motor vehicle or result in its mechanical breakdown. If no defect or deficiency is discovered by or reported to the driver, the report(s) shall so indicate. In all instances, the driver shall sign the vehicle inspection report. On two-driver operations, only one driver needs to sign the report, provided both drivers agree as to the defects or deficiencies. If a driver operates more than one vehicle during the day, a report shall be prepared for each vehicle operated.

§396.13 Driver inspection.

Before driving a motor vehicle, the driver shall:

- (a) Be satisfied that the motor vehicle is in safe operating condition;
- (b) Review the last vehicle inspection report required to be carried on the power unit; and
- (c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit which is no longer part of the vehicle combination.

[44 FR 76526, Dec. 27, 1979, as amended at 48 FR 55868, Dec. 16, 1983]

§397.1 Application of the rules in this part.

(a) Except as provided in paragraph (c) of this section, the rules in this part apply to each motor carrier engaged in the transportation of hazardous materials by a motor vehicle which must be marked or placarded in accordance with §177.823 of this title and to—

(1) Each officer or employee of the carrier who performs supervisory duties related to the transportation of hazardous materials; and

(2) Each person who operates or who is in charge of a motor vehicle containing hazardous materials.

(b) Each person designated in paragraph (a) of this section must know and obey the rules in this part.

[36 FR 4876, Mar. 13, 1971, as amended at 36 FR 16067, Aug. 19, 1971; 53 FR 18058, May 19, 1988]

I do not know what paucity of evidence in the record before Arbitrator O'Brien caused him to be unconvinced that obtaining a CDL also requires additional or increased "knowledge" or "skills". But the record before me shows that successful applicants for a CDL must take and pass

a 66-question written examination and a driving test with heavy trucks in a variety of on-road conditions, objectively demonstrating attainment of the knowledge, skills and proficiency required by 49 CFR Part 383- Commercial Driver's License Standards: Requirements and Penalties, Subpart G, Sections 383.111 and 383.113, pp. 482-484, as follows:

§383.111 Required knowledge.

All commercial motor vehicle operators must have knowledge of the following general areas:

(a) Safe operations regulations. Driver-related elements of the regulations contained in 49 CFR parts 391, 392, 393, 395, 396, and 397, such as: Motor vehicle inspection, repair, and maintenance requirements; procedures for safe vehicle operations; the effects of fatigue, poor vision, hearing, and general health upon safe commercial motor vehicle operation; the types of motor vehicles and cargoes subject to the requirements; and the effects of alcohol and drug use upon safe commercial motor vehicle operations.

(b) Commercial motor vehicle safety control systems. Proper use of the motor vehicle's safety system, including lights, horns, side and rear-view mirrors, proper mirror adjustments, fire extinguishers, symptoms of improper operation revealed through instruments, motor vehicle operation characteristics, and diagnosing malfunctions. Commercial motor vehicle drivers shall have knowledge on the correct procedures needed to use these safety systems in an emergency situation, e.g., skids and loss of brakes.

(c) Safe vehicle control—

(1) Control systems. The purpose and function of the controls and instruments commonly found on commercial motor vehicles.

"(2) Basic control. The proper procedures for performing various basic maneuvers.

(3) Shifting. The basic shifting rules and terms, as well as shift patterns and procedures for common transmissions.

(4) Backing. The procedures and rules for various backing maneuvers.

(5) Visual search. The importance of proper visual search, and proper visual search methods.

(6) Communication. The principles and procedures for proper communications and the hazards of failure to signal properly.

(7) Speed Management. The importance of understanding the effects of speed.

(8) Space management. The procedures and techniques for controlling the space around the vehicle.

(9) Night operation. Preparations and procedures for night driving.

(10) Extreme driving conditions. The basic information on operating in extreme driving conditions and the hazards that are encountered in extreme conditions.

(11) Hazard perceptions. The basic information on hazard perception and clues for recognition of hazards.

(12) Emergency maneuvers. The basic information concerning when and how to make emergency maneuvers.

(13) Skid control and recovery. The information on the causes and major types of skids, as well as the procedures for recovering from skids.

(d) Relationship of cargo to vehicle control. The principles and procedures for the proper handling of cargo.

(e) Vehicle inspections. The objectives and proper procedures for performing vehicle safety

inspections, as follows:

- (1) The importance of periodic inspection and repair to vehicle safety.
- (2) The effect of undiscovered malfunctions upon safety.
- (3) What safety-related parts to look for when inspecting vehicles.
- (4) Pre-trip/enroute/post-trip inspection procedures.
- (5) Reporting findings.
- (f) Hazardous materials knowledge, such as: What constitutes hazardous material requiring an endorsement to transport; classes of hazardous materials; labeling/placarding requirements; and the need for specialized training as a prerequisite to receiving the endorsement and transporting hazardous cargoes.
- (g) Air brake knowledge as follows:
 - (1) Air brake system nomenclature;
 - (2) The dangers of contaminated air supply;
 - (3) Implications of severed or disconnected air lines between the power unit and the trailer(s);
 - (4) Implications of low air pressure readings;
 - (5) Procedures to conduct safe and accurate pre-trip inspections.
 - (6) Procedures for conducting enroute and post-trip inspections of air actuated brake systems, including ability to detect defects which may cause the system to fail.
- (h) Operators for the combination vehicle group shall also have knowledge of:
 - (1) Coupling and uncoupling—The procedures for proper coupling and uncoupling a tractor to semi-trailer.
 - (2) Vehicle inspection—The objectives and proper procedures that are *unique* for performing vehicle safety inspections on combination vehicles.

§383.113 Required skills.

- (a) Basic vehicle control skills. All applicants for a CDL must possess and demonstrate basic motor vehicle control skills for each vehicle group which the driver operates or expects to operate. These skills should include the ability to start, to stop, and to move the vehicle forward and backward in a safe manner.
- (b) Safe driving skills. All applicants for a CDL must possess and demonstrate the safe driving skills for their vehicle group. These skills should include proper visual search methods, appropriate use of signals, speed control for weather and traffic conditions, and ability to position the motor vehicle correctly when changing lanes or turning.
- (c) Air brake skills. Except as provided in §393.95, all applicants shall demonstrate the following skills with respect to inspection and operation of air brakes:
 - (1) Pre-trip inspection skills. Applicants shall demonstrate the skills necessary to conduct a pre-trip inspection which includes the ability to:
 - (i) Locate and verbally identify air brake operating controls and monitoring devices;
 - (ii) Determine the motor vehicle's brake system condition for proper adjustments and that air system connections between motor vehicles have been properly made and secured;
 - (iii) Inspect the low pressure warning device(s) to ensure that they will activate in emergency situations;
 - (iv) Ascertain, with the engine running, that the system maintains an adequate supply of compressed air;
 - (v) Determine that required minimum air pressure build up time is within acceptable limits and that required alarms and emergency devices automatically deactivate at the proper pressure level; and

(vi) Operationally check the brake system for proper performance.

(2) Driving skills. Applicants shall successfully complete the skills tests contained in §383.113 in a representative vehicle equipped with air brakes.

(d) Test area. Skills tests shall be conducted in on-street conditions or under a combination of on-street and off-street conditions.

(e) Simulation technology. A State may utilize simulators to perform skills testing, but under no circumstances as a substitute for the required testing in on-street conditions.

When all is said and done, the BMW has amply demonstrated on the record before me that a CDL pay differential is warranted by the increase in skills and knowledge which are required of an employee to obtain and retain a CDL and because of the added responsibilities which are required of such an employee under the applicable cited Federal regulations. That is not a novel notion, as demonstrated by the O'Brien Award and by a growing list of small, mid-size and large individual carriers who have agreed to some form of CDL differential in voluntary collective bargaining with the BMW.

It is true that a majority of the nation's rail carriers, notably those involved in national level bargaining with the BMW through the NCCC, did not agree to pay a CDL differential in the most recent National Agreement growing out of the recommendations of PEB 229. However, a significant sampling of small, mid-size and large individual carriers have voluntarily agreed to some form of a CDL differential, both before and after Recommendation No. 29 of PEB No. 229 and the resultant National Agreement. Contrary to GTW's stated position that only small fringe carriers have voluntarily agreed to pay a CDL differential, major carriers as CSXT, Norfolk Southern and Union Pacific currently pay some form of CDL differential under their most recent agreements with the BMW. One does not find here an industry-wide pattern, but the evidence of record does support BMW's position that a growing number of rail carrier's have agreed that payment of a CDL differential is appropriate.

Regarding "major" Carriers, the CSXT/Conrail/BMWE Implementing Agreement of March 23, 1999 contains the identical CDL provision which BMWE first bargained with the IHB in November 1996. Under the NSR-Conrail/BMWE Implementing Agreement of May 6, 1999, specified employees also receive a \$.30 CDL payment, albeit the core group of NSR-Conrail employees who receive the CDL differential is distinctly more restricted than under the CSXT-Conrail/BMWE Implementing Agreement. Under the Union Pacific/BMWE Agreements and related side letters of August 16, 1993, the Truck Operator positions afforded rate increases under the UP/BMWE Agreements and related side letters, were as follows:

<u>Position</u>	<u>Hourly Increase</u>	<u>New Hourly Pay Rate</u>
Sectionman Truck Driver	\$.77*	\$13.79
System Truck Operator (System Semi-Trailer)	\$.57*	\$15.41
Division Truck Operator (Division Semi-Trailer)	\$.83*	\$14.60
Division Truck Operator (Division Non Semi-Trailer GVW 10,000 lbs. or more assigned to Division, District Extra Gang or Track Maintenance Gang or Bus Operators)	\$.77*	\$14.12
System Truck Operator/Bus	\$.98*	\$14.33
Track Welder-Arc Weld Process	\$.52*	\$14.79
Track Welder Helper-Arc Weld Process	\$.53*	\$13.66
Thermite Welder Helper/Truck Operator	\$.53*	\$13.66

*Additional \$.20 differential per hour when vehicle is equipped with hy-rail attachments.

Those August 16, 1993 agreements identified specific positions that would require CDL qualifications and conditioned incumbency on holding a valid current CDL, established grace periods and time frames within which employees should become CDL qualified, provided that the

UP would assist employees in becoming qualified based on written requests, stipulated that the UP would reimburse employees for acquisition or renewal of CDL's and provided for the above-quoted pay rate increases for various newly established Truck Operator positions in the Bridge and Building and Track Departments. As Arbitrator O'Brien pointed out in PLB 5542, Award No. 2, *supra*, however, it is not possible to put a precise valuation on the CDL differential component of the wage package for the new "Truck Operator" positions created in those agreements.

Bargaining for these contracts was initiated in March 1991 in anticipation of the April 1992 effective date for the DOT's uniform CDL standards and continued in that context before final closure in August 1993. In countervailing affidavits placed in evidence before PLB 5542, PEB 229 and this Arbitrator, the chief negotiator of those contracts for UP attempted to minimize the CDL factor while his BMW counterpart attempted to maximize the impact of CDL on the August 1993 wage rate increases. The record before me shows that throughout those bargaining talks the chief negotiators for both BMW and UP frequently emphasized the CDL standards, among other reasons, for negotiating changes in Truck Operator requirements and wages. For example, UP draft proposals presented to BMW on July 29, 1992, May 14, 1993 and May 17, 1993 each contained the following preamble (Emphasis added):

As the requirements of service relative to the operation of vehicles in Maintenance of Way service have undergone significant change due to increased governmental regulations (D.O.T. Certification, Commercial Driver's License, etc.), and requirements relative to the operation of cranes and hy-rail attachments necessitating qualified employees, the parties hereto desire to enter into an Agreement as follows:...

Toward the end of the talks, however, the UP negotiators insisted on substituting for earlier prefatory language specifically linking part of the rate increases to CDL/FHWA requirements the following elliptical references: "...significant change necessitating qualified employees" and

"...necessary licenses and certifications to be eligible for promotions to a truck operator assignment in the Maintenance of way Department". While attribution of a discreet monetary figure to CDL is not possible, the record before me plainly demonstrates that both the UP and BMW negotiators mutually intended that at least part of the significant rate increases over former truck operator rates was in recognition of employees obtaining, maintaining and utilizing the CDL required to drive certain vehicles.

Conclusion

Base on all of the foregoing, I must answer Question No. 1 in the affirmative. As to Question No. 2, I can find no good reason in this record to deviate from the \$.30/hourly differential established by Award No. 2 of PLB 5542 and endorsed by most of the negotiated agreements to date. GTW counters that it already pays some of its vehicle operators a *de facto* CDL differential of \$1.766 per hour, in the form of the Rule 15/Appendix G "arbitrary", as recounted in the December 18, 1998 "Papa Letter", *supra*. On that basis, GTW urges that an arbitral award of any CDL differential would be superfluous, unfair and inequitable. However, the record evidence falls far short of supporting the theses that Mr. Papa unilaterally extended the Machine Operator's rate and associated Rule 15/Appendix G arbitrary payments to dump truck drivers on and after April 1, 1990 in gratuitous recognition of their attainment of the CDL requirement. To the contrary, the evidence shows that the express language of Rules 1 and 15/Appendix G of the GTW/BMW Schedule Agreement clearly, unambiguously and specifically mandates such payments to drivers of "Class 2" trucks **"for servicing their machines during their tour of duty"**. (Emphasis added).

Arbitrators and courts alike presume that understandable language means what it says, despite the contentions of one of the parties that something other than the apparent meaning was

intended. Independent School Dist. No. 47, 86 LA 97, 103 (1985) (Gallagher). Even when the parties to an agreement disagree on what contract language means, an arbitrator who finds the language to be unambiguous will adopt its plain meaning. *See, e.g., Safeway Stores*, 85 LA 472, 476 (1985) (Thorp); Metropolitan Warehouse, 76 LA 14, 17-18 (1981) (Darrow). This rule is both practical and equitable because; 1) it brings order to contract construction by eliminating as a viable subject for dispute exquisitely clear contract language such as that contained in Rule 15/ Appendix G; and, 2) when language is so crystal clear and unambiguous both parties to a contract are presumed to have understood how they were bound when they executed the contract.

For all of the foregoing reasons and after full consideration of all of the record evidence, in the exercise of the jurisdiction and authority vested in me by the Parties pursuant to Side Letter No. 5, I conclude that BMWWE persuasively demonstrated that a \$.30/hourly CDL differential, subject to applicable COLA adjustments, should be included in the GTW/BMWE, D&TSL/BMWE and DT&I/BMWE Agreements.

AWARD OF THE IMPARTIAL ARBITRATOR

Question No. 1 is answered as follows:

Employees who obtain a Commercial Driver's License (CDL) should be paid a rate differential when assigned to positions requiring a CDL.

Question No. 2 is answered as follows:

The appropriate wage differential for positions requiring a CDL is \$.30 per hour, subject to application of appropriate COLA adjustments.



Dana Edward Eischen

Signed at Spencer, New York on June 30, 1999

STATE OF NEW YORK }
COUNTY OF TOMPKINS } SS:

On this 30th day of June, 1999, I, DANA E. EISCHEN, do hereby affirm, upon my oath as Arbitrator, and certify, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing instrument and acknowledge that it is my Opinion and Award in the above matter.