

Special Board of Adjustment, No.____

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In the Matter of the Arbitration
Between
BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

- and -

NATIONAL CARRIERS CONFERENCE COMMITTEE
(Commercial Driver's License Dispute)
-----X

OPINION
AND
AWARD

Appearances:

For the Union:

Steven V. Powers, Esq.

For the Carriers:

Shea & Gardner
By: Ralph J. Moore, Jr. Esq.
Patrick M. Hanlon, Esq.

In this controversy, the Parties dispute the meaning of Recommendation 29 made by Presidential Emergency Board No. 229 (PEB 229) in its Report of June 23, 1996. When the Brotherhood of Maintenance and Way Employees ("BMWE" or "Union") and the railroads represented by the National Carriers' Conference Committee (the "Carriers") executed their National Agreement, they adopted Recommendation 29 while continuing to disagree over its meaning. As a consequence, they executed a Letter of Agreement (Side Letter 8), which provides in pertinent part:

This will confirm our understanding regarding Item 29 Commercial Drivers License in the Addendum to the Agreement of this date.

It is the carriers position that on those carriers who do not have an existing differential for Commercial Drivers License, that Recommendation 29, Commercial Drivers License of PEB No. 229, does not establish a CDL differential. The BMWWE contends that it does establish a CDL differential.

The Preamble to the above referenced Addendum to the Agreement reads:

The Parties have agreed to settle the issues described below by adopting the applicable recommendations of PEB No. 229 as set forth in its Report and Recommendations (Board Report). Each such issue is identified below by the numerical reference used by the Board and is intended to have effect on those properties where the local union committee had actually served a Section 6 Notice on the particular subject in question and such notice has not been withdrawn.

The Addendum then goes on to set forth Recommendation 29 and the process by which the dispute over its meaning is to be resolved. Recommendation 29 reads:

29. Commercial Drivers License

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

In their Procedural Agreement of April 30, 1997, the Parties did not have identical versions of the issue to be decided. However, they agree that there is no substantive difference as to the question before me. The Union's version, which I accept for purposes of the inquiry, is:

By virtue of its Recommendation No. 29, did Presidential Emergency Board No. 229 intend to establish an initial \$.30 per hour rate differential for positions requiring a Commercial Driver's License (CDL) on those carriers who do not have an existing CDL differential but where the local union committee had actually served a Section 6 Notice on the particular subject and such notice had not been withdrawn?

Pursuant to their April 30, 1997 Procedural Agreement, the Parties filed written submissions on May 20, 1997 and rebuttal submissions on May 30. The Parties then orally argued the matter before me on June 5, 1997 at the offices of the National Mediation Board in Washington, D.C., after which the Record was closed.

The Background

The dispute can only be understood in light of its background. That history was set forth at considerable length by both Parties. Since they know it so well, I will not recount it detail, but summarize it as briefly as I can.

In 1985, the Congress of the United States directed the Federal Highway Administration ("FHWA"), a constituent part of the Department of Transportation ("DOT"), to adopt regulations governing the qualifications and certification of commercial motor vehicle drivers. Those

regulations, which became effective in 1988, require certification for employees who drive vehicles in excess of 10,000 pounds that carry hazardous materials or sixteen or more persons.

In 1986, Congress, by enacting another statute, required the DOT to adopt regulations "...establishing minimum uniform standards for the issuance of commercial drivers' licenses by the States..." Those regulations, found at 49 C.F.R. Part 383 and effective April 1, 1992, are known as the Commercial Driver's License (CDL) standards.

As the Parties agree, the FHWA and the CDL standards are not the same; each one imposing different responsibilities on employers and employees.

The 1988 bargaining between BMW and most of the nation's carriers, except for Conrail, ended on July 21, 1991 when Congress, following the parties' inability to reach a voluntary settlement, imposed the recommendations of PEB 219 as clarified and modified by a congressionally-created Special Board. This round of bargaining, done on a multi-employer, "national handling" basis, did not address any CDL issues because both the Section 6 notices and the recommendations of PEB 219 preceded the April 1, 1992 effective date of the CDL regulations.

The imposed settlement of PEB 219's recommendations mandated a moratorium on Section 6 notices until November 1, 1994. Following the effective date of the CDL regulations, the BMW, concerned about emerging CDL issues, asked a number of carriers to negotiate CDL pay differentials and rules governing the application of those regulations. It was successful with two smaller carriers, but the carriers in this

proceeding refused to agree to differentials or modified rules or to arbitrate those issues on the ground that the CDL regulations had not created new positions. Rather than seeking to compel carrier-by-carrier arbitrations, the BMWWE then decided to address the CDL rate differential by Section 6 notices upon the moratorium's expiration.

Conrail and the BMWWE, which had begun separate bargaining back in 1988, were not directly affected by the PEB 219 recommendations or bound by its November 1, 1994 moratorium. At some point in 1992, the recently-adopted CDL regulations became a focus of contention in the BMWWE/Conrail negotiations. Those CDL issues were not resolved and on July 28, 1992, Conrail and the BMWWE, as part of an overall agreement, executed Letter No. 9 providing for additional negotiations on CDL matters and binding arbitration if needed.¹ During the subsequent negotiations, the Union argued for both FHWA and CDL differentials, but Conrail insisted that FHWA issues were not encompassed within Letter No. 9 and were therefore not arbitrable.

In a decision dated November 30, 1994, Arbitrator Robert M. O'Brien ruled that FHWA requirements and a FHWA differential were not arbitrable, but that "pay rate differentials for positions which list a CDL certification as a requirement to hold a position as either a regular or relief driver" on Conrail were arbitrable.²

Following this award, Conrail and the BMWWE returned to the bargaining table, but were unable to reach agreement on the CDL

¹The Conrail/BMWWE overall agreement adopted a Section 6 moratorium expiring at the same time as that set in the PEB 219 proceedings, i.e., November 1, 1994.

² The Award, known as Award No. 1 of Public Law Board No. 5542, is in evidence as BMWWE Exhibit 7.

differential. After further proceedings before Arbitrator O'Brien, he ruled on March 29, 1996 that Conrail employees assigned to positions requiring a CDL should "...receive an additional \$.30/hour when assigned to [such] positions..."³

Long before the issuance of this March 29, 1996 award, bargaining had begun between the BMWWE and the Carriers involved in this proceeding, with both Parties serving Section 6 notices on November 1, 1994. In BMWWE's Section 6 notices, the General Chairmen of BMWWE's local committees sought skill differentials in an unspecified amount for employees assigned to CDL positions. Typical of these is BMWWE Exhibit 3, the Section 6 Notice filed by the General Chairman of the Atchison, Topeka & Santa Fe system.

The General Chairmen at Conrail, whose locals were also free to bargain as of November 1, 1994, filed different Section 6 notices. Those notices were applicable to both CDL and FHWA requirements and much more detailed, seeking a CDL differential of \$1.50 per hour, a new FHWA differential, subsequent annual increases, reimbursement for license fees, etc. (BMWWE Exhibit 9).

The BMWWE had filed separate Section 6 notices on each carrier and sought what is known as local bargaining on a individual carrier basis. The Carriers had designated the Conference as their bargaining agent and asked for national handling. In fact, the Carriers filed a declaratory judgment motion on November 1, 1994, in which they sought a ruling compelling BMWWE to bargain on that basis. Their argument was that

³ Award No. 2 of Public Law Board No. 5542 and its clarification of January 27, 1997, are in evidence as BMWWE Exhibit 8.

national handling of wages and work rules was practical and appropriate in that it was more conducive to "equalization of treatment" and "commonality of result...in a given craft throughout the industry."⁴ The BMWE opposed and asked that court to permit local bargaining.

Applying the two-part test of Atlantic Coast Line,⁵ the District Court, in a decision dated May 28, 1996 (BMWE Exhibit 12), mandated national handling.

PEB No. 229, which had already been appointed, held its first hearing on the same day as the above referenced District Court decision. During the PEB proceedings, BMWE national representatives addressed a number of general issues. Other presentations were made by local committees. The CDL issue was of the latter category, with the Conrail Local Committee, the only group then with a CDL differential, leading the way. In his June 4, 1996 testimony before the Board, Conrail General Chairman Jed Dodd suggested that the two-month old \$.30 per hour O'Brien Award in favor of the Conrail employees was in reality a 1992 rate and that for Conrail's BMWE employees an increase to \$.50 per hour as of January 1, 1995 and an additional \$.05 per hour in each year of the contract would be appropriate. He also asked that the differential be extended to FHWA issues. (BMWE Exhibit 13, p. 674). Other Local Chairmen did little more than advise the PEB that they were willing to

⁴ The quotes are from the testimony of then NCCC Chair Charles Hopkins, Jr. in that judicial proceeding, as cited in BMWE's Submission, pp. 24-25

⁵ Brotherhood of Railway Trainmen v. Atlantic Coast Line Railroad Co., 383 F. 2d 229 (D.C. Cir. 1967), cert. denied, 389 U.S. 1047 (1968) requires an examination of past bargaining on a particular issue or issues and an independent determination that mass bargaining of such issues is also practical and appropriate. If the tests are meant, national handling is obligatory.

accept the basic \$.30 per hour Conrail differential with the improvements Dodd had proposed.⁶

In their initial presentation to the PEB, Carrier representatives, acting on behalf of Conrail and in response to the Conrail Local Committee demand, opposed any increase in the differential for Conrail employees or the application of that differential to FHWA matters (Carriers' Exhibit 18). In a lengthier presentation, the Carriers also opposed extending the Conrail CDL differential to other carriers, essentially saying there was no justification for it (Carriers' Exhibit 17). Somewhat later in the PEB proceedings, a Carrier spokesman, while continuing to oppose an increase for Conrail employees, suggested that for the employees of the carriers other than Conrail, what was sought was "really a request for an increase in wages and should be considered as part of that total package." (BMW Exhibit 16, p. 1364).

In its Report prefatory to its Recommendations, the PEB summarized the contentions of the Parties on this matter as follows:

29. Commercial Drivers License and FHWA Issues

a. The BMW

As the result of an arbitrated agreement, BMW employees on Conrail currently receive a \$.30/hour rate differential for positions requiring a Commercial Drivers License (CDL). BMW seeks an increase to \$.50/hour effective January 1, 1995 and then an increase of \$.05/hour for each year of the agreement. BMW also seeks to apply the terms of the arbitrated agreement to Federal Highway Administration (FHWA) issues. BMW seeks to extend this proposal to cover all major carriers.

⁶ See BMW Exhibit 14, p. 749 and Carriers' Exhibits 6, p. 740 & 769 and Carriers' Exhibits 11, 12 and 14.

b. The Carriers

Conrail opposes any increase in the differential for holding a position requiring a CDL. Conrail notes that Public Law Board No. 5542 issued its award requiring a differential for positions requiring a CDL on March 29, 1996. Since the Public Law Board did not choose to make its award retroactive to January 1, 1995, Conrail opposes any request to change that award. Conrail also opposes any extension of the CDL differential to FHWA certification. The remaining Carriers view BMW's CDL proposal as a request for an increase in wages which should be considered as part of the total package.

Later in its Report, after recommending a general "wage package," a \$.50 per hour skill differential for 70% of the craft presently working in skilled positions and health and welfare and rule changes (BMW Exhibit 2, pp. 29-39), the PEB turned, in Section C, to the proposals made by local committees. The preamble to that Section reads:

C. BMW Committee Proposals

Issues were raised by one or more of BMW's local committees. Some local committees joined in with other local committees seeking a rule or benefit where they had not filed a Section 6 Notice or their Section 6 Notice was withdrawn. The Board's recommendations, if any, on the following proposals are only intended to have effect on those properties where the local union committee had actually served a Section 6 Notice on the particular subject in question and such notice has not been withdrawn.

The Board then made Recommendation No. 29, which for purposes of continuity, I shall set forth again. That Recommendation reads:

29. Commercial Drivers License

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

The Contentions of the Parties

Here too, I shall try to be relatively brief and summarize the main arguments, though all arguments have been fully considered.

The BMWWE asserts that PEB 229 "clearly intended" to establish an initial \$.30 per hour CDL rate differential on those carriers that did not have an existing CDL differential as long as the local union committee of that carrier had actually served and had not withdrawn a Section 6 Notice on that subject. The BMWWE rests this assertion on the "clear language...of Recommendation No. 29 when read in the context of the Report of PEB No. 229 as a whole."

According to the BMWWE, the only limitation on the reach of Recommendation No. 29 that can be drawn from the recommendation when read in the context of the Report, particularly the above-referenced Preamble to Section C, is that a Section 6 Notice must have been filed by

a local committee and not withdrawn. If a local committee filed a Section 6 Notice on the differential and that Notice was not withdrawn, then Recommendation No. 29 must apply to that carrier. The case, the BMW insists, is "just that simple."

The BMW further contends that its position leads to a reasonable result while the Carriers' position leads to an absurd or nonsensical result. Throughout the proceedings in court and before the PEB the Carriers consistently called for national uniformity. Yet, they now argue that the PEB's recommendation on a differential that rests on uniform national standards for truck-driving employees, should be interpreted to apply only to Conrail's truck-driving employees. This, the BMW says, is absurd because it leads to the nonsensical denial of the differential to the identically situated employees of other carriers.

Finally, the BMW argues that the Carriers' position in the judicial proceeding, the ruling of the court requiring national handling and the Carriers' representations to the PEB regarding the value of uniformity achievable through national rather than local bargaining should estop the Carriers from arguing to the contrary with respect to the application of the CDL differential. At the very least, the Carriers' vigorous advocacy of national handling should create, absent an explicit PEB statement to the contrary, a "strong presumption in favor of national application of the CDL provisions."

The Carriers similarly contend that the language of Recommendation No. 29 is clear and unambiguous. However, their conclusion is that the PEB "very clearly did not recommend extension of a

CDL differential to carriers on which such a differential did not already exist."

All that the Parties adopted in their National Agreement were the PEB "recommendations" and the recommendation at issue did not do what the BMWWE contends. According to the Carriers, it is clear from Recommendation No. 29 itself that what the PEB was referring to was the CDL differential then existing at Conrail. When the Board spoke of a recent CDL differential award and went on to say that it did not recommend an increase in that differential at this time but would endorse cost of living increases in the differential, it could only have been referring to the differential at Conrail. That was the only existing differential; there was no other.

The Board dealt with that Conrail differential, refusing to recommend an immediate increase, but approving cost of living adjustments to it, i.e., the "existing CDL differential" in the future. It then dealt with the proposal to extend the differential to FHWA issues, recommending that this proposal be withdrawn. But it said nothing about the last proposal it had set forth in its summary of BMWWE's position, i.e., that the differential be extended to cover all major carriers.

The Board, in other words, never specifically addressed the request of the other BMWWE committees that the Conrail differential should be extended to their carriers. As a consequence, the disposition of the proposals by those committees was governed by Section D of the PEB Report, which reads:

D. Issues Not Covered

Any issues in dispute before the Board on which no recommendations were made, or which are not mentioned in the Report shall be deemed withdrawn.

In the Carriers' view, what the Board did can be simply stated: it simply refused to "broaden the Conrail Award," declining to extend it to new positions (those requiring FHWA certification) or to carriers other than Conrail.

In support of their assertion that this is the proper reading of Recommendation No. 29, the Carriers point out that the local committees spent little time on the proposal to extend the differential to their carriers. No arguments were made in support of that position. Moreover, the BMWWE did not even mention the extension issue when asked by the Board to summarize its contentions either in the form of a matrix during the hearing (Carriers' Exhibit 15 at para. 29)⁷ or in its final post-hearing submission (Carriers' Exhibit 16, p. 42). The Board, judging what was important and what was not and knowing that it would likely not address all of the issues dividing the Parties, chose to dispose of this one by silence.

In rebuttal, the BMWWE argues that the Carriers' reliance on the catch-all language of Section D is misplaced. The Board specifically recommended withdrawal of BMWWE's proposal to extend the differential to FHWA issues. If it had intended to recommend withdrawal of the equally

⁷ In its rebuttal, the BMWWE submitted a revised matrix of the same date, June 5, 1996 (BMWWE Exhibit 19, p. 15). Written in opposite No. 29, identified in the matrix as a "Conrail Local" proposal, are "AT&SF, BN, Conrail, CSX, NS, C&NW, UP." The BMWWE asserts that this writing indicates that those committees were joining together to seek the proposal the Conrail local committee had presented.

important proposal to extend the CDL differential to other carriers, it would have been a simple matter for it to have said so. Since it did not, the only conclusion that would harmonize all sections of the Report is that extension of the differential to other carriers was in fact the Board's intention and that the sole proposal intended to be withdrawn upon its recommendation was that involving the FHWA. In the BMW's view, all Section D was meant to cover were the "literally dozens of issues" in the formally served Section 6 Notices that were never mentioned in the presentations or covered in the Board's report.

In their rebuttal submission the Carriers assert that the misplaced argument is BMW's heavy reliance on the Preamble to Section C. That Preamble was obviously intended as a limitation on the scope of the Board's recommendations on matters presented by local committees. Without it, local committees that had not filed Section 6 notices on a particular subject or had withdrawn a previously filed notice, could piggyback on the efforts of others. Section C was meant to foreclose that possibility. The BMW's interpretation of the Preamble would broaden its scope, turning a non-recommendation on a particular issue, such as Recommendation No. 29, to a recommendation by implication. That simply misconstrues what the Preamble was all about. What the BMW needs to sustain its position is what does not exist in Recommendation No. 29 or elsewhere, i.e., an affirmative recommendation to extend the differential beyond Conrail to other carriers.

Finally, the Carriers argue that they are not estopped from urging the denial of a differential or that their prior conduct raises a presumption in favor of the differential. While national handling has

permitted the carriers to "treat employees throughout the country in a reasonably consistent and uniform manner," national handling is procedural, not substantive. Moreover, as the District Court easily recognized and as shown in this PEB's recommendations on certain other issues, national handling does not inevitably lead to uniform outcomes. Here, given this Record, there is no reason that it should.

Discussion and Analysis

I fail to find merit either in the BMW's estoppel argument or in its contention that this matter should be governed by a presumption in its favor.

The Carriers strongly opposed the extension of the differential beyond Conrail in their written presentation to the PEB (see Carriers' Exhibit 17). If the BMW believed that principles of estoppel should have foreclosed that presentation, the place to make the argument was during those proceedings, not in this forum.⁸

As to the supposed presumption, the BMW has failed to explain why the Carriers' espousal of national handling should create a "strong presumption in favor of national application of the CDL provisions" when the Union itself invited the PEB to consider a host of issues on a carrier-by-carrier basis. Beyond that, what must be ascertained here, as clearly

⁸ Citing the "wage increase" comment by a Carrier representative in oral testimony and the PEB's summary of positions, the BMW asserts that the Board must have concluded that the Carriers had abandoned their opposition to the differential's extension and that there was therefore no need, in the end, to make the estoppel argument. I do not read these events in the same way. Besides, this fails to explain why the BMW did not make the estoppel argument in the beginning.

contemplated in the BMW's framing of the issue, is the intention of the PEB. It is difficult to see how a presumption of which the PEB was totally unaware can be of aid in discerning that body's intentions.

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.

It's clear enough that Recommendation No. 29 did not affirmatively make such a recommendation. The BMW concedes as much when it says that Recommendation No. 29 must be read "in the context of the Report of PEB No. 229 as a whole."

The context on which the BMW principally relies is Section C of the PEB Report, namely:

C. BMW Committee Proposals

Issues were raised by one or more of BMW's local committees. Some local committees joined in with other local committees seeking a rule or benefit where they had not filed a Section 6 Notice or their Section 6 Notice was withdrawn. The Board's recommendations, if any, on the following proposals are only intended to have effect on those properties where the local union committee had actually served a Section 6 Notice on the particular subject in question and such notice has not been withdrawn.

The difficulty is that the Union misreads that provision. Its purpose, in the event the Board decided to make a recommendation (hence, the phrase "if any"), was not to expand the reach of any particular recommendation on a local issue, but to prevent application of that recommendation to those local committees that had not filed a Section 6 notice on the issue or, having filed such a notice, had later withdrawn it. What the Board was saying is that if it were to make a recommendation on a local issue, no local committee which failed to file and continue in effect a Section 6 notice on that issue could hope to benefit from the efforts of others.

Consistent with that intent, if a recommendation is silent on a particular matter, that silence cannot, through some alchemy, be converted into a positive recommendation on that subject simply because a local committee had filed and had not withdrawn a Section 6 notice on the issue. Yet, this is what the BMW's reading of Section C would do.

Recommendation No. 29 was in fact silent on the extension of the differential. All it dealt with was the proposal of Conrail's Local Committee. That Committee, the only committee benefiting from a differential as a result of the O'Brien Award, sought an increase. The Board, in "view of the recent [i.e., Conrail] award," did "not recommend an increase in the differential [at Conrail] at this time." However, it recommended future cost of living adjustments to the "existing [i.e., the Conrail] differential" effective January 1, 1997 and January 1, 1999. The BMW also sought to apply "the terms of the arbitrated agreement," i.e., the O'Brien Conrail Award, to Federal Highway

Administration (FHWA) issues. The Board recommended withdrawal of that proposal.

Finally, the BMWWE sought to extend the entire proposal to cover all major carriers, while, in the words of the PEB's summary, the remaining Carriers viewed "BMWWE's CDL proposal as a request for an increase in wages which should be considered as part of the total package." On that disagreement, the PEB said nothing. That is to say, the PEB decided not to make "any" recommendation on that subject.

Of course, the Board could have recommended withdrawal of the differential's extension as it did with the proposal to extend the existing Conrail differential to FHWA matters. Then, its intention would have been beyond doubt. But the fact that it did not recommend withdrawal in that fashion cannot transform silence into a positive affirmation of the differential's extension to those Carriers opposing it. It would take much more than that to persuade me that the PEB's concentration on the Conrail Local Committee proposal and the language the Board chose to use in dealing with that proposal carried somewhere soundlessly within it a recommendation to extend a benefit exclusive to Conrail employees to those of other major carriers. The proof offered is insufficient to warrant such a conclusion.

On this Record, my judgment, for all the reasons stated, is that the Carriers have the better of the argument here and that their position should prevail. The Award that follows so provides.

The Undersigned, acting as the Arbitrator pursuant to the Procedural Agreement of April 30, 1997 between the Brotherhood of Maintenance of Way Employees and the National Carriers Conference Committee and having duly heard the proofs and allegations of the Parties, renders the following

AWARD

By virtue of its Recommendation No. 29, Presidential Emergency Board No. 229 did not intend to establish an initial \$.30 per hour rate differential for positions requiring a Commercial Driver's License (CDL) on those carriers who do not have an existing CDL differential but where the local union committee had actually served a Section 6 Notice on the particular subject and such notice had not been withdrawn.



George Nicolau, Neutral Member

ACKNOWLEDGMENT

On this 2nd day of July, 1997, I, George Nicolau, affirm, 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 as my Opinion and Award in the above matter.



George Nicolau