SPECIAL BOARD OF ADJUSTMENT NO. 901

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES "ORGANIZATION" vs. NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) "CARRIER"	*	AWARD NO. 2

STATEMENT OF ISSUES

1) Whether the minimum force levels applicable to the Northern District Track Department, the Northern District Structures Department, the Southern District Structures Department, the Southern District Electric Traction Department, and the Southern District Track Department were temporarily suspended beginning on April 24, 1986 pursuant to Article II of the Minimum Force Level Agreements as a result of the BMWE strike of Guilford Industries.

2) Whether the employees (Southern District Track) recalled after April 1, 1986, who initially failed to pass their physical examinations allegedly due to the presence of drugs in their systems but who subsequently returned to service are entitled to backpay due to Amtrak's alleged failure to comply with Award No. 1 of Special Board of Adjustment No. 901.

BACKGROUND

In 1976, the Carrier acquired certain rail properties located in the eastern United States, that are collectively known as the "Northeast Corridor". Also in 1976, the federal government enacted the Northeast Corridor Improvement Project

(NECIP), the purpose of which was to provide necessary physical improvements to the Northeast Corridor.

The scope of NECIP was massive and unprecedented, involving billions of dollars and a projection of many years to complete the work. The Carrier and Organization therefore recognized that some form of expediting the contracting out of work to private contractors was needed if the work was to be completed in a timely fashion.

Accordingly, in 1980 the parties signed the Minimum Force Agreement(s) (MFA). The parties agreed therein that the Carrier was permitted to use outside forces on the NECIP. In return, the Carrier agreed to stabilize the workforce represented by the Organization at predetermined levels in five separate departments. The agreed upon force levels for the five departments were as follows:

Northern District Track Department	343
Northern District Bridge and Building Department	110
Southern District Track Department	1300
Southern District Bridge and Building Department	358
Southern District Electric Tractions Department	368

The MFA is comprised of five separate documents, each of which was individually signed by the Carrier and Organization. All five documents are identical, with the exception of Article I. In each document, Article I contains information concerning the minimum force in one

of the five departments.

Article II of all five documents states as follows:

> The provisions of the preceding Article I shall be temporarily suspended under emergency conditions such as flood, snowstorm, hurricane, earthquake, fire or strike, provided that Amtrak's operations are suspended in whole or in part.

Article IV of all five documents states that in the event conditions, including funding, change substantially during the life of the Agreement, the Carrier can seek modification of the minimum force levels.

In August, 1985, the Carrier notified the Organization that, pursuant to Article IV, it wished to modify the force levels set forth in the MFA. The Organization opposed any modification, contending that no change in the force levels was permissible.

The dispute was heard by Special Board of Adjustment No. 901, chaired by neutral member George S. Roukis. In Award No. 1, issued December 3, 1985, the Board held that certain changes made it permissible for the Carrier to reduce force levels in the winter months. The Board further held, however, that the Carrier must return to minimum force requirements set forth in the MFA by April 1, 1986, and remain at those levels throughout the remainder of Carrier's fiscal year.

Carrier did not, however, by April 1, 1986 return to minimum force levels set forth in the MFA. The Organization protested. Attempts to informally resolve this new dispute proved unsuccessful.

By letter dated June 30, 1986, Carrier informed the Organization of its desire to modify all minimum force levels for the remainder of fiscal year 1986. Carrier maintained that this action was necessary because of budgetary cuts. In addition, Carrier wrote:

> In accordance with Article II of the Minimum Force Agreement, the provisions of Article I of these Agreements have been temporarily suspended since March 3, 1986, due to the Guilford Transportation Industries strike which has clearly suspended Amtrak's operations in part, most notably the Track Laying System operation, as well as train service on the Delaware and Hudson subsidiary of Guilford.

The strike referred to by Carrier in this letter was one undertaken by the Organization on March 3 against Maine Central Railroad Company and the Portland Terminal Company, two railroads owned by Guilford Transportation Industries, which is unrelated to the Carrier. The Carrier maintained, however, that this strike resulted in a cutoff of ties being used by its Track Laying System (TLS), thereby necessitating the abolishment of 101 positions.

The Organization responded to Carrier's letter by continuing to oppose any reduction in the minimum force levels. Carrier sought to have the dispute returned to SBA 901 for resolution. The Organization refused, and brought an action in United States District Court for the

District of Columbia to enforce compliance with Award No. 1 of SBA 901.

By order dated April 24, 1987, the court directed Carrier to pay back pay to certain employees who were not recalled to work as of April 1, 1986, as required by Award No. 1 of SBA 901. The court remanded to SBA 901 the issue of whether the minimum force level requirements of the MFA were suspended on April 24, 1986 as a result of the Organization's strike against Guilford Transportation Industries.

Prior to this remanded issue being heard by SBA 901, another dispute arose between the parties. It concerned employees compelled to undergo physical examinations before returning from layoff to work.

Subsequent to April 1, 1986, the Carrier recalled certain BMWE employees to work. The Carrier required these employees to undergo return-to-work physical examinations, which included a test for drug usage. Some employees failed these examinations, allegedly because they tested positive for drugs. These employees were, however, subsequently allowed to return to work after cleansing their systems. The Carrier refused to grant these employees any back pay for the period from April 1 until the date of their return to work. The Organization protested, contending that these employees should receive back pay from April 1, 1986, until the date of their return to work.

By letter dated May 7, 1987, the parties voluntarily agreed to submit this dispute to SBA 901 for resolution.

The parties agreed upon the undersigned neutral to chair SBA 901. Hearing was held on both submitted issues on May 26, 1987. Both parties presented to the Board ex parte submissions and rebuttal submissions. The Board met in executive session on July 27 and 31, 1987.

POSITION OF THE ORGANIZATION

The Carrier was not privileged because of the strike to suspend the MFA in any of the five departments. Under the terms of Article II of the MFA, relied upon by the Carrier, the minimum work level can only be suspended because of a strike if an "emergency" exists. The strike against Guilford Transportation created no emergency in any department. Although the Carrier abolished 101 positions on the TLS, allegedly because of the strike, this resulted in the furlough of only 32 employees at most. Other positions abolished were either vacant or the incumbents were reassigned to other work. The Carrier posted many new positions during this period. Precedent clearly establishes that in these circumstances, no "emergency" exists. The absence of an emergency was further demonstrated in other ways. It was not until June 30, 1986, months after the strike began, that the Carrier first contended that the strike

caused an emergency. In addition, the Carrier did not invoke emergency provisions under Rule 23(b) of the labor agreement when furloughing employees. Clearly, the Carrier's claim of emergency is merely a belated effort to avoid its obligations under the MFA.

Moreover, even if an emergency existed in one or two departments, it did not privilege the Carrier to suspend the MFA in all five departments. There are, in reality, five separate minimum force agreements. An emergency must therefore be shown to exist within a department before that department's minimum staffing requirement can be abrogated. Even then, the reduction in the minimum force number could only be commensurate with the effect of the emergency in that department.

The second issue before the Board concerns employees who initially failed to pass their return-to-work physical examinations allegedly due to the presence of drugs in their systems but who subsequently passed the examinations and returned to service. They are entitled to back pay as a result of the Carrier's failure to comply with Award No. 1 of SBA 901. Their return to service was delayed by Carrier's failure to properly recall them. The Carrier is not entitled to a presumption that these employees would have tested positive for drugs on April 1 had they been properly recalled at that time.

POSITION OF THE CARRIER

Article II of the MFA allows the Carrier to modify the minimum staffing levels should a strike cause an emergency. An emergency is defined in the Article as occurring when the Carrier's operations are suspended "in whole or in part".

Article II further allows the Carrier to suspend the minimum staffing levels in all five departments should an emergency occur in one. This right is a logical consequence of the way the MFA was structured and worded. The MFA is in reality one agreement which was drafted into five documents for convenience only. Any emergency that exists under Article II, therefore, allows suspension of the force levels contained in the Article I of all five documents.

Applying this intent to the undisputed facts, the Carrier clearly was privileged to suspend the entire MFA, in all five departments, as of April 24, 1986. The strike caused an emergency, as the Carrier could not get ties used by the Track Laying System. This resulted in 101 positions being abolished, and numerous employees being furloughed.

Concerning the drug testing, it must be presumed that if the employees involved had been tested April 1, 1986, instead of the subsequent date they were tested, they would

have then also tested positive for drugs and been disqualified. This presumption is entirely reasonable, as the Organization's own literature show drugs may stay in an employee's system for up to 30 days, and no employee was delayed more than 30 days in his recall. Accordingly, none of these employees are entitled to back pay.

OPINION OF THE BOARD

There is agreement that the Board now has proper jurisdiction to decide both issues before it.

The first issue concerns interpretation and application of the MFA. The Board's function here is to determine and apply the intent of the parties to that Agreement.

The first major dispute between the parties about the MFA is whether it is one single or five separate agreements. The Board has determined that it was the intent of the parties to make five separate agreements. The parties expressed this intent by creating and signing five separate documents. Had they intended there to be only one Agreement, the parties could have drafted one document with five separate sections in Article I that set forth the force levels in the five departments. Contrary to the Carrier's arguments, the Board finds nothing in the bargaining history or subsequent actions of the Organization that establishes that the parties really intended there to be only one Agreement despite signing five documents.

Accordingly, the Board further finds that it was the intent of the parties that each of the five documents be treated as a self-contained entity. Article I sets forth the force levels for one department only. Article II sets forth the emergency circumstances under which the force levels of that department only may be temporarily suspended by the Carrier. It was not the intent of the parties that an Article II emergency in one department would privilege the Carrier to suspend the Article I force levels in the other four departments. Rather, before the Carrier can properly suspend the force levels in a department, it must be established that an Article II emergency exists separately in that department.

The second dispute about the MFA between the parties concerns the extent to which the Carrier may suspend the force levels within a department once it is established that an Article II emergency exists in that department. The Organization maintains that the force level can only be suspended to the extent of the impact of the emergency. The Carrier contends that once an Article II emergency is established, the entire force level for the department may be suspended.

The Board agrees with the Carrier's interpretation on this point. As the MFA is a special agreement between the parties, its provisions must be controlling.

Article II of the MFA evidences an intent by the parties to allow for a complete suspension of the force levels in a department for the duration of the emergency within that department. Article II states only that "the provisions of the preceding Article I shall be temporarily suspended under emergency conditions...". There exists no language in the Article confining the suspension to the effect of the emergency. The absence of such confinement language is in sharp contrast to Rule 23 (Force Reduction - Advance Notice - Emergency Force Reductions) of the labor agreement between the Carrier and Organization and the February 10, 1971 National Emergency Force Reduction Rule. Both Rule 23 and the 1971 Rule do contain language stating that emergency force reductions will be confined solely to those work locations directly affected by any suspension of operations. As the drafters of the MFA were aware of the rules containing this confinement language, and they chose not to include it in the MFA, the presumption must be that they intended no confinement effect within a department. Accordingly, once an Article II emergency is established within a department, the Carrier may suspend the entire Article I force level within that department for the duration of the emergency.

The third major dispute between the parties about the MFA concerns the circumstances under which an Article II "emergency" exists that allows for a temporary suspension of the Article I force levels. The Carrier maintains that

such an emergency is any strike that results in the Carrier's operations being "suspended in whole or in part". The Organization asserts that under precedent and reason, a strike emergency must be defined much more narrowly and involve a strike against the Carrier that results in more than a mere reduction in force.

The Board has determined that the clear intent of the parties to the MFA, as expressed in the language of Article II, was that a strike resulting in suspension of the Carrier's operations in whole or in part constitutes an Article II emergency. There is no requirement that the strike be against the Carrier itself. It is the effect of the strike, not the target, that is important. If any strike has a significant suspension of the Carrier's operations within a department, an Article II emergency exists within that department.

Applying the Board's interpretation of the MFA to the facts of this case, it is readily apparent that the Carrier was not privileged to suspend the MFA for the Northern District Bridge and Building Department, Southern District Bridge and Building Department and Southern District Electric Traction Department. The strike at issue had absolutely no effect of suspending the Carrier's operations in these three departments.

The Board does find, however, that the Carrier was privileged to suspend the MFA on April 24, 1986 in

the Northern District Track Department and Southern District Track Department. An Article II emergency existed within those departments, as the Organization's strike against Guilford had the effect of partly suspending the Carrier's operations therein. Specifically, the record establishes that the strike restricted the Carrier's receipt of concrete ties necessary for the track laying system, which resulted in suspension of the Carrier's track laying operations. This suspension of operations was significant, as it resulted in a number of positions being abolished and some incumbents being furloughed.

In sum, affected employees in the Northern District Bridge and Building Department, Southern District Bridge and Building Department and Southern District Electric Traction Department are entitled to a financial remedy of back pay. Employees in the Northern District Track Department and Southern District Track Department are not entitled to any remedy by this Board.

The Board now turns to the second issue submitted by the parties for resolution, that involving employees recalled to work after April 1, 1986 who failed their return-to-work physical allegedly because of the presence of drugs in their system, but who did later return to work. The Board's function on this issue is limited solely to determining whether these employees are entitled to back

pay from April 1, 1986 until the date of their return to work. Proper resolution of this dispute turns on whether the Carrier is entitled to make the presumption that because these employees tested positive for drugs after April 1, they would also have tested positive if given a return-to-work physical on or before April 1, 1986. If this presumption is valid, the employees are not entitled to back pay, while if the presumption is invalid, back pay is required.

The Board has concluded that under the circumstances here present, the Carrier is not entitled to the presumption it seeks. It cannot now be determined whether these employees would have tested positive for drugs if they had been given their return-to-work physical on or before April 1. It is possible that these employees tested positive for drugs in their system because of substances they took after April 1. As it was the Carrier who improperly failed to recall these employees by April 1, and thereby failed to stay in complaince with Award No. 1 of SBA 901, it is proper that uncertainty concerning these employees' conditions on April 1 now be resolved against the Carrier. Accordingly, these employees are entitled to the back pay they seek, and it will be so ordered by this Board.

AWARD

1) Those employees in the Northern District Bridge and Building Department, Southern District Bridge and Building Department, and Southern District Electric Traction Department, who have been compensated from April 1 to 23, 1986 for failure to be returned to service in accordance with the MFA, shall be compensated by the Carrier for wage loss, less outside earnings, until their return to work. This compensation shall be reduced by any period of time an employee's return to work was delayed by his or her own wishes or fault.

2) Those employees (Southern District Track) recalled after April 1, 1986, who initially failed to pass their physical examination allegedly due to the presence of drugs in their systems but who subsequently returned to service, are entitled to back pay, less outside earnings, for the period from April 1, 1986 until their return to work.

L.C. HRICZAK,
Carrier Member

W.E. LaRue
Organization Member

S.E. BUCHHEIT,
Neutral Member

DATED: 3/31/87