AWARD NO. 397
Case No. 397

File No. BLET 190-12-21C

SPECIAL BOARD OF ADJUSTMENT NO. 940

PARTIES) BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN
)
TO)
)
DISPUTE) NEW JERSEY TRANSIT RAIL OPERATIONS, INC.

STATEMENT OF CLAIM:

Allow eight hours pay for all engineers, per day, from July 1, 2020 to October 27, 2021 account Carrier violation of NJT/BLET Agreement by refusal to implement the 12/19/1982 Agreement revised effective 6/18/2018 in regard to Appendix 5 of the Agreement.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

At issue before us is agreement language which addresses pay rates for engineers when compared to pay rates for conductors. A Letter of Understanding, dated December 29, 1982, provides as follows:

"This is to confirm the understanding reached during negotiations of the Agreement between New Jersey Transit Rail Operations, Inc. and the Brotherhood of Locomotive Engineers signed this date that the effective hourly rate of pay of the

Engineer shall be no less than 10.4% greater than the effective hourly rate of pay of the Conductor for identical time on duty. The effective hourly rate of pay shall be determined by taking the total daily compensation, including payments for arbitraries and allowances, and dividing it by the actual daily hours on duty or held for duty less any hours not on duty including layovers."

Another Letter of Understanding, dated June 18, 2018, further addressed the pay differential between engineers and conductors, providing:

"This will reflect the parties' understanding to interpret Appendix 5 to the Agreement ('10.4% Differential') as follows, effective July 1, 2016.

The parties agree that the calculation of the 10.4% differential shall be limited to 1) Engineer and Conductor straight time wages, 2) Engineer and Conductor certification allowances (20 minutes straight time each), and 3) the (i) newly created BLET 15 minutes straight time safety/speed control seal payments and (ii) the Conductors' 15 minutes straight time report writing payments only. In the future, should the UTU (SMART-TD) negotiate with Carrier for additional or increased arbitrary or allowance payments, or payments in lieu of those payments listed above, the BLET and Carrier will likewise confer to assure that the 10.4% differential is maintained. The 10.4% payments will be allowed on the same basis as the certification payments as outlined in Rule 56 (FRA Certification) the June 22, 2016 letter pertaining to FRA Certification payment."

On September 25, 2021, the Carrier entered into another agreement with SMART-TD, which included general wage increases for conductors covering the period of January 1, 2020, through June 30, 2024. Those wage increases were implemented December 9, 2021. The Carrier and this Organization were also engaged in Section 6 bargaining at that time, but they had not reached agreement.

The increases set forth in the SMART-TD agreement narrowed the pay gap between engineers and conductors to less than 10.4%. The Organization requested that the wages for engineers be adjusted to conform with the 10.4% LOUs, but the Carrier declined to do so. On October 28, 2021, the Organization filed the instant claim, seeking the pay adjustment and penalty payments for each day the adjustment was not made.

The Carrier declined the claim, first stating that the claim was not sufficiently specific. It also asserted that, in consideration of the parties' ongoing Section 6 negotiations, the existing terms of the agreement must remain in status quo until the negotiations were resolved, as required by the Railway Labor Act. The Carrier asserted that the Organization's request was premature, and it stated that when an agreement with the Organization was reached, it would satisfy the 10.4% agreement language.

The Carrier also asserted that the Organization had acquiesced to the status quo concerning the 10.4% differential during previous rounds of negotiations. It cited agreements reached regarding the periods of 2004-2008 and 2008-2011, and it noted that the Organization made no claims then for immediate application of the 10.4% differential and that no adjustments were made to engineer wage rates until after the BLET agreements were reached. The Carrier cited Award 52 of SBA 940, which involved a dispute over how the 10.4% agreement applied to a new holiday, as supporting its position.

The parties were unable to resolve the matter on the property, and by letter dated April 26, 2024, the Carrier informed the National Mediation Board that the parties had agreed to add this case and three others to this Board. The NMB notified the parties that the undersigned was authorized to work on the case on September 13, 2024.

Although the Carrier had agreed to list this case to arbitration pursuant to Section 3 of the RLA, by letter dated September 17, 2024, the Carrier requested the NMB to hold the case in abeyance pending resolution of the ongoing Section 6 negotiations. It noted that PEB 251 had been created to hold hearings on the major dispute, but that the parties had still not reached agreement after the

PEB recommendations were issued. The NMB declined that request, stating that the issues should be left to the members of the Board.

The Carrier then appealed to this neutral, again seeking to have the case held in abeyance. We found nothing had been properly presented to us which would warrant deviation from the NMB's requirements for scheduling and hearing the matter. We informed the parties that they could make their arguments regarding arbitrability of the matter at the hearing.

The Carrier eventually filed suit in federal court seeking to enjoin the arbitration from proceeding. The parties requested that the hearing be postponed until the court could issue a decision. The hearing was postponed for that purpose, but we were advised at the hearing that the federal court had declined to rule on whether the matter was a major dispute, and that it had left that decision to this Board. Meanwhile, PEB 252 had also been convened, and it issued recommendations for settlement of the Section 6 dispute on January 20, 2025.

At our hearing, held on February 21, 2025, the parties spent considerable time arguing whether the matter was properly before this Board. The Carrier contended that the Board has no jurisdiction, because claim constituted a major dispute and an attempt to change the status quo in violation of the RLA. It noted that the 10.4% differential had been addressed in the PEB 251 recommendations for settlement, and that it was included in the Carrier's final offer before PEB 252. The Carrier asserted that this matter involved a major dispute, and that the parties are obligated to maintain the status quo until the RLA processes for handling such matters are exhausted, which would be 60 days after the PEB 252 report was issued, and that any changes to the underlying conditions in the meantime were prohibited.

The Carrier stated that in prior rounds of bargaining, the parties had observed a practice of completing the negotiation process, including agreement on wage increases, before implementing any changes to the status quo. It stated that, while wage increases had always been implemented retroactive to the effective date of SMART-TD wage increases, BLET wages were never increased before an agreement with the Organization had been reached. The Carrier posited that such

practice was in keeping with the fact that wages have always been considered to be a major dispute.

The Carrier further asserted that Rule 45 of the parties' CBA limits the scope of this Board's authority and jurisdiction. That rule provides in pertinent part:

> "The Board shall have no power to add to, subtract from, or modify any of the terms of this Agreement . . . No questions affecting the negotiated wage structure of NJTRO shall be arbitrable, and the Board may not establish or change any wage rates."

It posited that by such language, the parties agreed that the instant claim is not arbitrable because wage structures are issues best left to the negotiations of the parties.

The Carrier argued that, while this Board has exclusive jurisdiction over minor disputes, it cannot resolve a major dispute. It asserted that an award on the 10.4% dispute would unlawfully change both parties' positions and leverage in bargaining to resolve the ongoing major dispute, stating that the RLA prohibits such changes during the status quo period. The Carrier urged that the only correct recourse would be for the Board to find the grievance to be non-arbitrable.

With respect to the merits, the Carrier contended that the claim was defective, in that it was unripe and premature. It claimed that the Organization had not furnished sufficient information to identify the basis of the claim, noting that the Organization had not identified the specific SMART-TD rates in question. It also stated that the period set forth in the claim was limited and did not apply to dates beyond October 27, 2021, even though the SMART-TD wage increases were not implemented until December 9, 2021.

With respect to its application of the 10.4% differential provision, the Carrier contended that the Organization had not met its burden of proving a violation thereof. It stated that it recognizes its obligation to ensure that engineers are paid at least 10.4% more than conductors, but it claimed that it had at all times complied with that obligation since it was put in place. The Carrier stated

that engineers had not always received wage increases on the same date as conductors, but that it had always complied with its obligations by making engineers whole through retroactive increases. The Carrier asserted that the language of the agreement is silent as to the timing of the payments, and it contended that the Organization was attempting to insert timing language which it had not negotiated.

The Carrier referred to prior wage settlements involving both the engineers and conductors when the engineers did not receive increases at the same time as the conductors did, and it argued that this was a past practice which is consistent with its current interpretation of the agreement. It argued that the past practice demonstrated the parties' intent and understanding concerning the agreement language. The Carrier stated that the Organization had not filed claims for any of the earlier contract periods, and it posited that this demonstrated a shared understanding that the only way to resolve an issue relating to proposed wage changes is to wait until a new agreement is reached. It also claimed that, because the Organization's request would violate the RLA, any conflict between the agreement and the law must result in the law prevailing. The Carrier concluded that the Organization's claim should be rejected in its entirety.

The Organization, on the other hand, insists that the matter is a minor dispute and that the Board has jurisdiction to decide the case. It cites court decisions addressing the difference between major and minor disputes under the RLA, and it asserts that, because it is seeking to enforce existing agreement language, not to create new contractual rights, this is a minor dispute. The Organization asserts that this Board therefore has exclusive jurisdiction over the dispute.

The Organization states that whether the parties are in the midst of discussing potential changes to agreements has no bearing on whether the Carrier can refuse to take action mandated by existing agreements. It cites case law authority for the proposition that the mere filing of a Section 6 notice does not turn a minor dispute into a major one. The Organization asserts that adjusting engineer pay rates while the parties are in negotiations over amendments to the CBA is not a violation of the status quo, as the adjustments are required by the existing CBA itself. It posits that if the Carrier's position were to be accepted, the Carrier would be free to deny other contractually

provided benefits simply because a Section 6 notice had been served to initiate negotiations on those matters.

With respect to the contract language at issue, the Organization states that it bases its arguments on the plain and unambiguous language of the 10.4% LOUs, which contain no limitation on their application during the period in which negotiations for amendments to the CBA are ongoing. It quotes the portion of the LOU which states that "the effective hourly rate of pay of the Engineer shall be no less than 10.4% greater than the effective hourly rate of pay of the Conductor for identical time on duty," and it asserts that the Carrier was required by that language to adjust engineer pay to remain in compliance with the agreement.

With respect to the Carrier's argument that past practice allows delay and retroactive adjustments, the Organization states that the plain language of the agreement is such that there is no reason to resort to review of extrinsic evidence. It cites prior awards as holding that the plain and common meaning of agreement language should be given effect, and that because there is no ambiguity in these agreements or mention of suspending their application while the parties are in negotiations for amendments, there is no basis for examining past practice. The Organization also denies that it acquiesced or that it should be barred by the doctrine of laches from insisting on enforcement of the agreement as written, citing prior awards for the proposition that a union does not forfeit its right to insist on future compliance with an agreement by not pursuing meritorious grievances in the past. It maintains that it has not given up its right to police the agreements as written.

After the hearing, the parties requested that we delay issuing our decision to allow them to continue negotiations on a new agreement. The parties did reach a tentative agreement, but the engineers did not ratify it, and at the end of the cooling off period following the second PEB, the Organization went on strike. After they resumed negotiations, they were able to reach another tentative agreement, which was ratified by both sides.

Included in the agreement was the following provision pertaining to this case:

10. Percent Agreement

All pending grievances regarding the payment of penalty pay under the 10.4% Agreement are withdrawn; provided, however, the arbitrator shall issue a decision on the merits of the grievance currently pending.

We first address the Carrier's contention that the claim is not arbitrable. It appears to us that the arguments regarding whether the RLA and/or Rule 45 of the agreement prohibit arbitrability of such a claim are inextricably entwined with whether the Organization can ever seek enforcement of the 10.4% LOUs, so to address "the merits of the grievance currently pending" we will address the jurisdictional arguments.

We are well aware of the distinction between major and minor disputes as those terms are used in connection with the Railway Labor Act. The parties have supplied ample citations of authority which address those matters, and we have our own decades of experience applying the RLA to draw on. In the simplest terms, minor disputes are those which involve interpretation of existing collective bargaining agreements via the Section 3 process of the RLA, while major disputes involve creation of new agreements, or modification to existing agreements under the Section 6 process. Here, the parties were engaged in the major dispute process during their lengthy Section 6 negotiations for a new agreement, the two PEBs, and the strike which occurred after the cooling off period following issuance of the second PEB recommendations.

At issue in this case, however, is the interpretation of existing agreement language. There is no question that the parties had long ago agreed to the 10.4% differential agreement. The only dispute is how it should be applied, and we hold that this presents a straightforward minor dispute. Why the federal court punted on this issue is hard to fathom.

The fact that the parties' current agreement addresses wage rates does not remove it from the Section 3 minor dispute realm. The parties were of course free to request changes to that agreement through the Section 6 process, but the 10.4% LOUs remained valid and enforceable agreements

until and unless they were changed through the bargaining process. Likewise, the fact that the parties may have been in negotiations to change the agreement does not alter the enforceability of the current version. To enforce a current agreement is not a violation of the RLA status quo provisions; to the contrary, such a violation would occur if an existing agreement were not enforced. A party's decision to not comply with a current agreement is indeed a change to the status quo.

Likewise, we hold that Rule 45 of the parties' agreement does not prohibit us from interpreting the 10.4% LOUs. It is not this Board which is establishing or changing wage rates. The Board is merely performing its function of interpreting agreements the parties themselves reached which impact wages. The fact that those agreements address how pay is calculated does not insulate them from handling under the Section 3 minor dispute resolution process or from review by this Board under Rule 45, any more than agreements which address other subjects.

As noted above, the Carrier itself agreed to submit the dispute to this Board for resolution, without having raised an argument regarding Rule 45 in the on-property handling. The Organization did not unilaterally foist it upon us. We must question why the Carrier would do so if it truly believed that Rule 45 prohibited our hearing the matter. Moreover, the Carrier also concedes that it is obligated to make the adjustments required by the LOUs, contending that the only issue is when it should have to do so. For us to address <u>when</u> wages should be adjusted is not equivalent to us establishing or changing the rate; the parties have already addressed what the rates will be themselves. To accept the Carrier's contention that Rule 45 prohibits us from interpreting the LOUs would in our view be the equivalent of subtracting from or modifying the terms of the current agreements, something which Rule 45 says we have no power to do.

The issue then, is whether the current LOUs permit the Carrier to delay adjusting wage rates of engineers when the wages of conductors rise to within 10.4% of the engineer rates. On that question, we find that the language of the LOUs is clear and unambiguous, and that there is nothing therein which would permit the Carrier to delay making adjustments if the conductor rates rise to within 10.4% of the engineer rates. When the BLET rates are not at least 10.4% greater than the

conductor rates, engineers are entitled to an adjustment.

We find no ambiguity in the agreement language which would permit the Carrier to delay making the adjustments required by the LOUs. The LOUs state that engineer pay will be no less than 10.4% greater than conductor pay, and when the Carrier changes the conductor rate so that the gap is less than 10.4%, the agreement requires the adjustment to engineer rates be made then to maintain that gap, not at some indeterminate time in the future.

Although the Carrier contends that its past practice of delaying adjustments shows that its current actions are consistent with the parties' intent, we find nothing in the plain and unambiguous language of the LOUs to support that proposition. The fact that prior Organization representatives apparently were content to wait for adjustments is insufficient in our view to prevent the Organization from insisting on compliance with the agreements as written now. The Organization has supplied multiple awards addressing the level of evidence regarding past practice needed to overcome plain and unambiguous contract language, and we do not find the evidence relied on by the Carrier to be sufficient to overcome the contract language at issue here.

The Carrier's argument that immediate adjustment of wage rates while Section 6 bargaining is ongoing would somehow skew the playing field is not persuasive. The parties involved are experienced negotiators, and they are certainly capable of taking into account any wage adjustments required by the existing agreements during their Section 6 bargaining. It is not unusual for wage adjustments to be made pursuant to prior agreements after negotiations for new agreements have begun, and we see no reason why such adjustment provisions should not be enforceable while the negotiation process continues. It appears to us that the Carrier is seeking to add a provision regarding delay to wage adjustments which does not appear in the current agreement, but we do not find any basis for modifying the current agreement language.

We therefore conclude that the Organization is entitled to insist on adjustment to engineer wages consistent with the 10.4% LOUs whenever the wage gap is less than that set forth in the agreements. We find nothing in the agreements which would allow the Carrier to delay making

such adjustments, regardless of whether negotiations for changes to engineer wage rates are ongoing. With respect to the Organization's initial claim for additional penalty payments and interest, however, we do not find a basis to make such an award. The parties apparently resolved that issue in their recent agreement, and the portion of the agreement requesting that we decide the merits of the 10.4% dispute states that grievances regarding penalty payments are withdrawn. That portion of the initial claim is therefore denied.

AWARD: Claim sustained in part and denied in part.

Michael D. Phillips
Chairman and Neutral Member

I DISSENT
(See attached dissent.)

James P. Louis
Employee Member

Patrick J. McGreal
Carrier Member

Dated: August 5, 2025

Carrier's Dissent to Award No. 397 of Special Board of Adjustment No. 940

Carrier issues this dissent to Award No. 397 of Special Board of Adjustment No. 940 for the reasons cited herein.

In the forty plus years of NJ Transit Rail Operations' existence, the 10.4% rule has been in the parties' CBA the entire time. This rule was negotiated by Organization and Carrier representatives prior to the January 1, 1983, commencement of Carrier operations on lines previously operated by Conrail.

The parties negotiated the 10.4% rule with the knowledge and understanding that during contract negotiations, the Railway Labor Act required the parties to maintain the status quo with regard to wages and other conditions.

During the aforecited 40 plus years period, the parties have consistently understood the rule to require the maintenance of a 10.4% wage differential between Engineer and Conductor hourly wage rates, as specified in detail in the rule and its 2018 amendment. Of this there is no dispute.

Specific to this case, the parties' consistent interpretation of the 10.4% rule has been that in those rounds of collective bargaining in which the UTU (now SMART-TD) reached agreement with Carrier prior to the BLET reaching agreement, the BLET recognized and understood that changes in wage rates necessary to maintaining the 10.4% differential with UTU - represented Conductors would come ***after*** it concluded negotiations with Carrier. Inasmuch as full retroactivity has always been granted, the 10.4% differential was historically always maintained. Prior to the filing of the instant grievance, the leadership of the BLET has never taken issue with this.

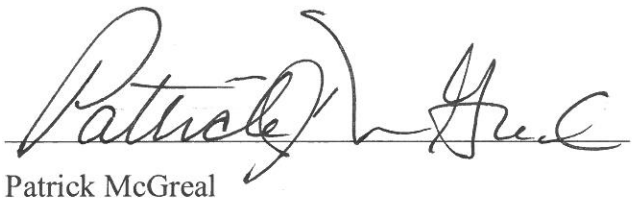
In labor relations stability and predictability are key components in maintaining a respectful and productive working relationship. Here, for the first time in the parties' long history, the former General Chairman of the BLET (the same individual who encouraged and led an illegal job action during the just concluded round of negotiations which resulted in thousands of dollars in fines to the Organization, as well as his own dismissal from service for his role in that illegal work stoppage which was upheld by a prior Award of this Board) pursued a new and disruptive course of action in the filing and progression of this claim. It was clear to Carrier that the Organization was frustrated and angry with the Carrier's determination at the time not to grant the BLET wage increases above the established pattern that was negotiated with over 90% of the represented work force (including the UTU/SMART-TD) and it elected to pursue this claim despite the Carrier's clear and repeated statements to the Organization, the NMB and two (2)

Presidential Emergency Boards that it would maintain the contractually-required 10.4% wage differential with the Conductors once the MOU was ratified by both the membership of the Organization and Carrier's Board of Directors. As explained, it is customary on NJT property to provide retroactive pay once a contract is procured, resulting in the continuous maintenance of the 10.4% differential. The Organization was repeatedly made aware that Carrier fully intended to make retroactive payments once the MOU was fully ratified.

We cannot agree with the majority's decision as it overturns the parties' long standing and consistent interpretation of the 10.4% rule. Looking to the future, this Award can only serve as a destabilizing factor in the parties' efforts to reach consensus in future rounds of negotiations. This does not benefit the Organization and Carrier, nor the long-term interests of Carrier's passengers and the taxpayers of the State of New Jersey, the later two (2) of whom expect Carrier to provide economical, reliable and predictable train service.

The Board's determination will, in those future rounds of negotiations in which SMART-TD (by far the largest union on the property) reaches agreement before the BLET, have the effect of unnecessarily complicating and likely delaying negotiations by immediately creating a wage floor that could hamper the parties' efforts to reach agreement in situations where the Organization might be willing to trade or modify valuable work rules or other agreement provisions in an effort to gain percent wage increases above those negotiated by SMART-TD. This is an outcome which is neither desirable nor helpful to the parties in their quest to reach agreement concerning complicated work rules which are unique to the BLET collective bargaining agreement.

For these reasons, and for all the reasons set forth by Carrier in support of its position in this dispute in its brief and oral argument to the Board, Carrier respectfully dissents to the decision reached by the Board in Award No. 397.



Patrick McGreal

Carrier Member, SBA 940

August 5, 2025