

SPECIAL BOARD OF ADJUSTMENT

In the Matter of the Interest Arbitration)
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NATIONAL CARRIERS) "TRUE-UP" ISSUE
CONFERENCE COMMITTEE)
)
Railroads)
)
)
and)
)
)
INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS)
)
Union)
)
)

SPECIAL BOARD OF ADJUSTMENT NO. 603
:

Joshua M. Javits, Neutral Member
A. Kenneth Gradia, Carrier Member
William T. Bohne, Union Member

APPEARANCES:

For the Railroads: Donald J. Munro, Esq.
Jones Day

For the Union: Carmen R. Parcelli, Esq.
Guerrieri, Bartos & Roma, P.C.

Place of Hearing: Washington, DC

Date of Hearing: July 10, 2018

Date of Pre-hearing Briefs: July 3, 2018

Date of Award: July 17, 2018

ISSUE

In their Interest Arbitration Agreement, the Parties have agreed to the following statement of the issue:

7) The scope of the Arbitration shall be confined to resolution of the following question, which shall be answered Yes or No:

Are the Carriers entitled to a deduction from the payment of retroactive wages equal to \$73.24 per month per employee, dating from February 2018, through May 2018 (four months), on account of delay in implementation of the plan design changes set forth in Article II, Part B, Section 2 of the 2018 Agreement?

DECISION

The central disagreement in this dispute is whether IBEW employees should be required to, in effect, reimburse the Carriers through a reduction to retroactive wages for the four months of health care benefit savings the Carriers would have been entitled to if the IBEW had implemented its agreement at the same time nearly all of the other Unions reached agreement.

The Carriers contend that the four months without the savings was inconsistent with the pattern settlement. The Carriers contend that making an exception for IBEW employees from this obligation would be inequitable to the other Unions, whose members were subject to the health plan changes, which produced the savings during the four month time period.

The IBEW argues that the four month delay was due to the exigencies of the bargaining process, which included a ratification defeat of its first tentative agreement, renegotiation and then successful ratification of the second tentative agreement. The four month delay was not a result of bad faith and should not, in any case, be considered an intrinsic part of the “pattern.” Minor variations in the implementation of effective dates are historically recognized and practically inevitable in multi-employer bargaining with multiple Unions and coalitions of Unions, the Union argues.

The Carriers and the IBEW have been in National Handling since the fall 2014 and reached a final ratified signed agreement on May 8, 2018, following a ratification failure of their first tentative agreement. That agreement provided for wage increases of 12.5 percent over 5 years (January 1, 2015 to December 31, 2019). Health insurance plan design and benefits changes provided savings to the plan that the Carriers would otherwise be obligated to pay. The changes were in large part intended to contain health care costs by incentivizing employees to utilize health care benefits more effectively and efficiently and also to expand certain benefits available to employees. These efficiencies were projected to save the plan \$73.24 on average per employee per month in 2018. Monthly employee contributions to health care were capped at the last bargaining round rate of \$228.89 and frozen at that rate for the term of the new agreement or until renegotiated. There were no work rule changes in the agreement.

Of the twelve Unions in National Handling, eight reached virtually identical voluntary agreements including these same health care changes, which all became

effective either January 1, 2018 or February 1, 2018. In late 2017, five of the six Unions in the Coordinated Bargaining Group (CBG) coalition (ATDA, BLET, BRS, NCFO and SMART-TD (Transportation Department)) (the full six CBG Organizations represent approximately 58% of rail Union employees) reached final agreement. Those agreements had effective dates for health care changes of January 1, 2018. Thus the Carriers provided retroactive General Wage Increases (GWIs) to the employees of those Unions and began receiving the savings from the health care plan changes (including changes in deductibles, out of pocket maximums, co-insurance and co-pays) as of January 1, 2018.

The sixth Union in the CBG coalition, the IBB, after two ratification failures, finally, in mid-April, reached an agreement that was authorized by the IBB President and leadership rather than subjecting it to a third ratification vote. The IBB agreement applied an effective date for the new health care plan changes of January 1, 2018, the same as the other CBG Unions, and required a "true-up" of \$105.00 per employee. While this did not track the \$73.24 per month per employee health care savings, through its combination of the January 1 effective date and the \$105 per employee payment, it was calculated to approximate the savings to the Carriers. This is in part due to the timing of the claims process. Where there is a delay between receipt of medical services and payment of claims, Plan changes may not be realized quickly, and claims are paid under the old plan design because of the difficulty of cleanly and suddenly implementing plan changes. The Carriers thus recouped savings under the IBB agreement through at least some but not all claims being paid in accord with the

health care changes effective January 1, 2018 (new deductibles, out of pocket maximums, co-pays and co-insurance) as well as the \$105.00 per employee in addition. Although the IBEW makes a powerful argument that the IBB “true-up” provision is quite different from the established pattern and that consideration should be weighed when rendering a decision, the fact remains that the IBB did negotiate terms that recognized and applied a “true-up” that, while different in structure, was nonetheless intended to be of the same proximate value as the \$73.24 figure.

The second Union coalition, the Coalition of Rail Unions (CRU) was composed of the TCU, BRC (part of TCU), TWU, IAMAW and IBEW. The CRU initially reached agreement with the Carriers on December 8, 2017, on the same basis as the CBG’s agreements. TCU (including the BRC) and TWU ratified their agreements and the health care changes went into effect February 1, 2018. Since these agreements were reached two months after the CBG coalition Unions, given the time needed to ratify, the health care changes were implemented February 1, 2018, a month after the CBG’s January 1 date. Thus the TCU (including the BRC) and the TWU were (counting CBG’s six Unions) Union numbers 7 and 8 to reach voluntary agreements with health care changes effective either January 1 or February 1, 2018. The IAMAW and the IBEW failed to ratify their tentative agreements. The IAMAW agreement is still open.

Thus by January 1 and February 1, 2018, the Carriers began to realize the savings from the health care changes in deductibles, out of pocket maximums,

coinsurance and copays. According to the accepted expert calculations, these changes amounted to savings of approximately of \$73.24 per employee per month.

The third coalition, composed of the BMWED and SMART-Mechanical, agreed to arbitrate their open disputes with the Carriers on February 27, 2018. These two Unions sought a new healthcare plan, while the Carriers sought to maintain the current plan. The Carriers also sought a “true-up” of \$73.24 per employee for the delay in implementing the healthcare plan changes, and an additional month payment as a penalty for the delay. Arbitration Board 602 (Gil Vernon, Neutral Member) found against the Union’s proposal for a new healthcare plan. That Board also found in favor of the Carriers’ proposed “true-up,” but against the extra month penalty proposal of the Carriers. The Board found that “[I]t [the true-up] is accepted as a measure of retroactivity which is extraordinarily common in collective-bargaining. The true-up generally mimics retroactivity under these circumstances and is consistent with the implementation agreed to by the other Unions. Like the TCU coalition, it should date in this case to February 1, 2018 and cover four months at the same rate as all the other Unions and be deducted from retroactive wages.” (Carrier Exhibit 1, Arbitration Board 602 at p. 22).

Thus while eight Unions reached voluntary agreements which initiated healthcare changes January 1 or February 1, 2018, these additional two Unions members, BMWED and SMART-Mechanical (the “ninth” and “tenth” Unions), did, as a result of the Arbitration Board 602 decision, make the equivalent contributions to the savings in

healthcare costs of \$73.24 per employee per month for the four months of February 1 to June 1.

That left two Unions, IAMAW and IBEW, as the only Unions whose employees were not yet subject to making either healthcare contributions through the plan changes (deductibles, out of pocket maximums, co-insurance and co-pays) or the equivalent proximation of \$73.24 per employee per month for the four month period between February 1 and June 1, 2018.

With regard to the IBEW, because of the delays in bargaining due to IBEW membership ratification defeat, renegotiation and the second successful ratification vote, the parties did not reach a final ratified agreement until May 2018. The parties agreed that the health care changes would be effective June 1, 2018 (in contrast to the IBB effective date of January 1).

At the same time, the NCCC and the IBEW agreed to submit the question of whether the employees should be required to deduct from their retroactive wage increases due for the period January 1, 2015 to December 31, 2019, the health care savings the Carriers were unable to capture due to the 4-month delay in reaching the agreement with the IBEW.

The Carriers contend that the exact implementation date of the health care plan design changes were part and parcel of the comprehensive pattern agreement reached

with the IBEW and the other Unions because that date would determine the savings it would receive. Moreover, the costs and benefits of these agreements were agreed to by the Carriers and the Unions based on the expectation that all Unions would be treated equally.

The IBEW argues that the four-month delay in reaching a full agreement was a product of good faith bargaining following a ratification defeat, which occurred despite the Union leadership's best efforts. The Union notes that reaching agreements with twelve Unions, bargaining through three coalitions, realistically does take time. It notes that historically "precise parity" is an elusive goal in any case since each employee group has different demographics, pay rates, health care usage, etc. The Union quotes PEB 243 for the proposition that "[R]ough equivalence, not precise parity, is the appropriate standard, even if the Board were applying pattern principles."

National Handling has historically been founded on the principle that a pattern once established will be applied to all Unions involved. This principle is essential to the process. Otherwise, Unions would be reluctant in the extreme to make the first agreement, knowing that the other Unions could be treated better than they in subsequent deals. The virtues and vices of pattern bargaining may be debated, but it is the recognized and generally accepted *modus operandi* in the industry. Thus good-faith and fair dealing as well as practicality dictates that a pattern, once established, be applied to all rail Unions in a bargaining round.

It is clear that a pattern was established in this case. Wages, the freeze on any increase in employee health contributions, the health care changes and the agreed-to absence of work rule changes were all the same in the ten agreements reached. In those agreements the health care savings were realized by the Carriers as of January 1, 2018 or February 1, 2018 when those agreements' health care provisions went into effect. The IBEW, because its ratification failure and renegotiation process, delayed final agreement and ended up with an agreement that initiated health care changes on June 1, 2018. The issue here is whether the 4 months of savings not realized by the Carriers between February 1, 2018 and June 1, 2018 should be recouped (called a true-up). That decision was determined by the parties to be the province of this Board.

It should be noted that four Unions did not voluntarily agree and reach health care implementation dates of January 1, 2018 or February 1, 2018, (IBEW, BMWED, SMART-Mechanical and IAMAW). Two of those Unions, BMWED and SMART – Mechanical – submitted to arbitration their remaining disputes with the Carriers related to an alternative proposed health care plan as well as the question of a “true-up.” Arbitration Board 602 (Gil Vernon, Chair) rejected the Unions' alternative health care plan and required them to “true-up” at the rate of \$73.24 per employee per month for the four-month period from February 1 to June 1, 2018. While that Board addressed the additional issue of whether an alternative health care plan should be adopted, it found that a true-up was appropriate as it was an intrinsic part of the pattern agreed to by the parties. The third Union without a voluntary agreement, the IAM, remains open. The fourth Union is the IBEW.

It should be noted that in the ratification process for the first agreement, the IBEW leadership communicated clearly to the membership that a pattern was established covering about 70% of rail employees and that alternative terms were highly unlikely to be obtained. The ratification vote was very close, and less than half the membership voted. The second ratified agreement recognized and agreed to the essential pattern agreement. Thus the IBEW recognized and accepted that there was a pattern agreement.

However, the IBEW is arguing here that the delay in reaching their agreement was the result of normal give-and-take bargaining as well as the failure of the membership to ratify despite the advice of the IBEW leadership, and that process should not be held against the members through a "true-up. The Union insists that this delay is typical of the staggered and differing agreement and implementation dates in railroad National Handling including those negotiated by coalitions of Unions. Those differing dates have not in the past nor should they in this case be made effectively identical with respect to their value, according to the Union. In fact, value or "savings" in this case are not identical between Union groups due to the demographics, pay levels and health care usage of members.

The Carriers, on the other hand, argue that the implementation dates impact the benefits and savings of the pattern agreement and that variations alter the value of each agreement. That value may not be controllable in certain respects, but with respect to

implementation dates it is. Thus a true-up is essential and intrinsic to the pattern, just as start and ending dates of retroactivity are part of the pattern. The Carriers would not achieve the benefit of their bargain without the true-up and the Unions would each be agreeing to different terms absent a true-up, destabilizing the pattern bargaining basis for railroad National Handling.

The Board believes that a true-up is appropriate in these circumstances. The central trade off in this round of National Handling as well as several immediately prior rounds has been that general wage increases (GWIs), here, 12.5% over five years, are provided in exchange for health care changes, which make more efficient and less expensive the health care plan costs. Of course in this round, in addition, employee health care contributions were capped at the level of the prior round and they were frozen for the term of the agreements, despite rising costs.

A central feature of the health care changes is that they do not provide savings until they are implemented. Since the health care savings are the *quid pro quo* for GWI increases, then a delay in implementing these health care changes alters the equation bargained for by the parties. The Carriers in this round gave retroactive GWI's back to January 1, 2015. The health care changes made in exchange were not put into effect for most of the Unions until January 1, 2018 or February 1, 2018. Thus the Carriers do not benefit from the savings as a result of the health care changes until at least three years after the dates encompassed by the retroactive GWIs. Nonetheless, that

arrangement was acceptable to the Carriers in exchange for the overall agreement. It also shows how vital the health care changes were to the overall agreement.

A delay in implementation by a few Unions undermines not only the value of the offset anticipated by the health care changes but undermines equity between the Unions themselves. The vast majority of rail Union members would be effectively paying \$292.96 per employee more than IBEW employees if there were no true-up for the 4-month period (four times \$73.24). It would mean that a Union member rejection of a clearly established pattern would be rewarded by the delay in implementing the health care concessions. Such an approach would undermine the willingness of Unions to timely agree to contract terms which constitute a clear pattern.

The IBEW makes the point that the uneven nature of collective bargaining in National Handling involving twelve Unions and three coalitions inevitably results in delays in reaching agreements with some Unions or groups. The IBEW argues that its members should not be responsible for this delay as it involved legal bargaining obligations and democratic ratification procedures. Moreover, the IBEW argues that the Carriers accepted inconsistent effective dates in this round by agreeing to the two different effective dates for health care changes of January 1, 2018 and February 1, 2018. The IBEW asserts that a similar understanding of the inevitability of such deviations should be accepted here, where despite efforts by the Union leadership, the first tentative agreement was rejected by the members and the leadership's ultimately

successful efforts in achieving a ratified agreement prevailed despite the NCCC's unwillingness to "sweeten" the first failed tentative agreement.

The Carriers note, on the other hand, that four months without accounting for the bargained for savings is an unacceptably long period of time and is not consistent with the pattern. The Carriers assert that the lost savings amounted to a total of approximately \$1,750,000. They also assert that it would be inequitable to the other Unions whose members would be paying for the health care savings for four months while IBEW members-employees would not. Moreover, Arbitration Board 602 found that the two Unions before it were required to true-up in accord with the pattern set. Including those two Unions, 90% of rail employees either are subject to the health plan changes or paid an equivalency (the true-up) for the four month period.

While the give and take of multi-employer bargaining with twelve Unions may have in the past resulted in different timing and implementation dates, the central tradeoff in this round was GWI increases for health care changes. A central feature of those health care design changes were savings which are lost for each day they are not implemented. Arbitration Board 602 recognized this as did the IBB in reaching its resolution with the Carriers. The other Unions that made voluntary agreements implemented very quickly after their first tentative agreements, another recognition of importance of the timing of implementation.

It is not unusual for Unions themselves to seek “me-toos” in bargaining. Any lack of parity between Unions which is the result of bargaining with multiple Unions and coalitions are often addressed through adjustments at some point in the bargaining process. This may result in Unions being provided an additional benefit or compensation as a result of a later agreement with another Union. Here, the “true-up” sought by the Carriers is comparable to a “me-too” – it represents an evening up between the Unions of savings to the plans.

It is noteworthy that the IBEW’s first tentative agreement provided for an implementation date of February 1, 2018 for the health care changes. That date was recognized as the starting point for the health care changes including changes in deductibles, out-of-pocket maximums, coinsurance and copays. That date conformed to the start date for the majority of other Unions which implemented on either January 1 or February 1, 2018. Thus there was an acknowledgement of the appropriateness of that implementation period by the Carriers and the IBEW in their first tentative agreement. Had it passed, IBEW employees would have been subject to the health care plan changes, including deductibles, out of pocket maximums, co-insurance and co-pays, beginning February 1, 2018, as were the TCU (including Carmen) and TWU employees (rather than the earlier January 1 date). The \$73.24 per month per employee “true-up” is simply a proximation of what IBEW employees would have paid had they ratified the first agreement. That agreement, by the Union’s own admission, represented the pattern in this case.

The sole change in the second tentative IBEW agreement was to advance the implementation date of the health care changes to June 1, 2018, 4 months later. However, the parties agreed in that agreement to submit to this Board the question of whether a true-up was appropriate. Thus the IBEW employees had full knowledge at the time of the first tentative agreement that they, along with the vast majority of the other rail employees, would be working under the new health care changes including the changes in deductibles, out-of-pocket maximums, coinsurance and copay rates. Members were also forewarned about that distinct possibility in the second tentative agreement.

It was even more apparent that the pattern was virtually unchangeable when the second TA went out to the employees for ratification. In its correspondence to employees after the first ratification failure, IBEW leaders emphasized that a pattern had been set with, at that time, 70 percent of the industry (Carrier Exhibit 12 dated February 16, 2018). The IBEW leaders noted that "it's very doubtful that we'll get anything better than the other Unions got...if not worse."

On April 12, 2018, the IBEW wrote to the members urging them to vote for the second tentative agreement, noting that, "whether we like it or not a 'pattern agreement' has been established, a pattern that in our experience and history indicates is very difficult if not impossible to break." The "pattern's" inclusion of a January 1 or February 1 implementation dates were thus made clear to the members.

The agreement that the IBEW sent out was identical to the first agreement but for the June 1 implementation date and the arbitration provision. Given the centrality of the health care changes in the bargaining it is apparent that all aspects of those changes were vital, including, and perhaps especially the implementation date.

Four months cannot be said to be such an insignificant amount of time that it should be disregarded. Four months of retroactive pay would certainly not be disregarded or tolerated by a Union. Nor would the other Unions be expected to tolerate its inequality. Four months is a third of a year or 7% of the 60 month agreement. The Carriers are not seeking that the retroactive wages be reduced by a fifth month, back to January 1 when six of the Unions implemented the health care changes. The \$73.24 calculation approximates the savings that would have come from the health care changes in the deductibles, out-of-pocket maximums, coinsurance and copays. Those are the changes IBEW employees would have been paying for the four months had they ratified the first agreement.

It would be hard to argue that one Union should be exempt from such changes for a period of four months while the others paid such expenses. The true-up is simply an approximation of the health care costs that would be paid by each employee had the IBEW implementation dates been as originally agreed to, February 1, 2018. The IBEW in good faith communicated to its members the strong likelihood that the pattern, which had been established, would be "impossible to break." The consequences of the first ratification failure should have been apparent to the members.

AWARD

Based on the above and the record as a whole, a majority of the Board answers the parties' issue in the affirmative, "Yes."

Joshua M. Javits

7/17/18

Joshua M. Javits, Neutral Member

Date

A. Kenneth Gradia *7/17/18*

A. Kenneth Gradia, Carrier Member

Date

William T. Bohne

7/17/18

William T. Bohne, Union Member

Date

Dissent