BEFORE ARBITRATION BOARD NO. 604

Between

The Railroads Represented
By the National Carriers' Conference Committee

And Their Employees
Represented by the International Association of Machinists.

CARRIERS' SUBMISSION

September 12, 2018

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INTRODUCTION

Over the last 11 months, the freight rail carriers represented by the National Carriers' Conference Committee ("NCCC") have reached new collective bargaining agreements – either voluntarily or through interest arbitration – with 12 out of 13 unions, representing over 130,000 employees, or approximately 95 percent of the Carriers' unionized workforce.[1] These agreements are virtually identical: they provide for wage increases totaling 12.5 percent (uncompounded) over a period of five years, from 2015 through 2019. They also provide for changes in the Carriers' healthcare plans – including modest increases in copayments, co-insurance, out-of-pocket maximums, and deductibles – that save the Carriers the equivalent of $73.24 per employee per month, beginning no later than February 1, 2018. Monthly employee healthcare contributions are frozen, and all of the new agreements preserve the status quo on work rules. Because these agreements cover a large majority of the Carriers' workforce and provide for the same terms, they constitute a strong internal pattern.

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[1] The participating railroads include 5 Class I carriers, which together employ more than 90 percent of the employees at issue: BNSF Railway Company ("BNSF"), CSX Transportation, Inc. ("CSXT"), The Kansas City Southern Railway Company ("KCSR"), Norfolk Southern Railway Company ("Norfolk Southern"), and Union Pacific Railroad Company ("Union Pacific"). The additional participating railroads are: Alton & Southern Railway Company, The Belt Railway Company of Chicago, Bessemer and Lake Erie Railroad Company (Canadian National), Central California Traction Company, Chicago, Central & Pacific Railroad Company, Consolidated Rail Corporation, Gary Railway, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, Indiana Harbor Belt Railroad Company, Los Angeles Junction Railway Company, New Orleans Public Belt Railroad, Norfolk & Portsmouth Belt Line Railroad, Northeast Illinois Regional Commuter Railroad Corporation (Metra), Northern Indiana Commuter Transportation District, Port Terminal Railroad Association, Portland Terminal Railroad Company, Terminal Railroad Association of St. Louis, Texas City Terminal Railway, Wichita Terminal Association, Winston-Salem Southbound Railway Company, and Wisconsin Central (all participating railroads referred to collectively as the "Carriers").

The International Brotherhood of Machinists ("IAM") – which represents railroad machinists – agreed to the pattern terms late last year, but its members failed to ratify the agreement. Four other unions also failed to ratify or refused to put the pattern out for a vote. In the intervening months, one of those unions relented and agreed to accept the pattern. The other unions went to interest arbitration, seeking different terms with respect to healthcare. Their demands were rejected. In two separate proceedings, Arbitrators Gil Vernon and Josh Javits imposed the pattern terms, including an effective implementation date of February 1, 2018, for the healthcare plan changes. Both arbitrators awarded a "true-up" – an adjustment in retroactive wages of $73.24 per employee per month – to compensate the Carriers for their lost healthcare savings.

The IAM is now the lone hold-out. Like the other unions that initially rejected or voted down the pattern, the IAM is demanding more. In particular, the IAM wants to exceed the pattern in three respects: (1) an extra general wage increase ("GWI") of 3 percent, payable as of January 1, 2020, with no offsetting adjustment in healthcare costs; (2) a $1 per hour "wage responsibility adjustment" for all IAM-represented employees, effective January 1, 2019; and (3) delayed implementation of the healthcare plan design changes, with no "true-up." Any one of these changes would add millions of dollars to the Carriers' labor costs, but the IAM is not proposing any offsetting changes to reduce the Carriers' costs in other areas. In other words, it wants the same package that the other unions accepted – including annual wage increases through 2019, a freeze on employee healthcare contributions and status quo on work rules – ***plus*** substantial additional compensation.

The core issue before this Board is whether the IAM is entitled to more than any other union. Paragraph 6 of the Arbitration Agreement poses a simple choice between the Carriers' proposed agreement – *i.e.*, the pattern – and the IAM's proposed agreement. Arbitration Agreement (Ex. 1) at 1. Paragraph 7 confirms that this is a form of so-called "final offer" or "baseball" arbitration. Thus, the Board may select either the pattern agreement or the IAM's "pattern plus" agreement, but has no discretion to impose any other alternative. *Id.*

For at least four different reasons, the Board should select the Carriers' proposal. *First*, and perhaps most importantly, the Carriers' proposal is justified by the internal pattern. The "pattern principle" in freight rail bargaining provides that once a multi-carrier group reaches agreement with a union or group of unions, that agreement will set the pattern for further settlements in the same bargaining round. Here, a pattern was set by the initial round of agreements with eight unions, representing more than 70 percent of the total workforce. Awarding the IAM's proposal would break the pattern, reward the IAM for holding out to the end of the round, and punish the other unions that reached voluntary agreements.

Second, the Carriers' proposal is justified by precedent, including the two other interest arbitration awards from this same round of bargaining. Both the Vernon and Javits awards confirm that the voluntary settlements in this round are compelling evidence of reasonable terms, and that hold-out unions are not entitled to more. Those awards track a long line of similar precedent regarding pattern, as well as remedies for delayed implementation.

Third, principles of fairness – both to the Carriers and to the other unions – justify application of the pattern to the IAM. More specifically, there is no equitable reason why the other unions' members should receive less compensation or be required to pay more for their health care than the IAM's members. The other unions would be understandably upset if the IAM got more than anyone else simply as a result of a failed ratification and the associated delay.

Fourth, none of the IAM's individual proposals – let alone all of them together – are remotely justifiable:

- The IAM's proposed extra GWI in 2020 does not conform to the internal pattern. Duration, or, more precisely, the number of wage increases, is a key element of any pattern. Other unions sought a sixth year of increases, but none of the pattern agreements exceed five years. Moreover, the pattern provides that GWIs are balanced by healthcare cost savings, yet the union's proposed GWI in 2020 does not include any such offset.

- The proposed additional $1 per hour is tantamount to an extra 2.6 percent GWI. Again, that would violate the pattern. Nor is there any equitable basis for a "responsibility" adjustment. Any marginal increase or other change in the responsibilities of a machinist is no different than the gradual progression of responsibilities in other rail jobs, and so IAM is not specially situated. Indeed, other crafts sought similar adjustments in this round, without success. In fact, in contrast to the other crafts who expressly sought such adjustments, IAM never raised this issue in bargaining, and so is not entitled to seek it now. Nor is there any plausible argument that IAM members are underpaid, either vis-à-vis their railroad peers or versus comparators in other industries.

- The union's proposal to implement the new healthcare terms without any true-up would also be inconsistent with the pattern and would run counter to the recent decisions of Board Nos. 602 and 603. Without a true-up, IAM members would pay less for their healthcare than all other railroad employees. As both Mr. Vernon and Mr. Javits recognized, that is not appropriate. A true-up ensures that all unionized employees have the same effective implementation date for the healthcare cost savings in the pattern agreement.

We address all of these points in greater detail below. However, before turning to the specifics of the Carriers' arguments, it is worth noting that this is hardly the first time that railroads and unions have ended up in interest arbitration following a failed ratification vote. In these situations, the union always asks for more than it had agreed to (perhaps in an effort to placate the dissident factions within its organization that were unhappy with the original agreed-upon terms). Arbitrators routinely reject those demands and impose the tentative agreement.

A good example is Arbitration Board No. 559. In that case, the NCCC and the United Transportation Union ("UTU") reached a tentative agreement in December 1995, covering wages, benefits, and work rules. The union membership voted it down, and the parties went to arbitration, where the UTU asked for more and the Carriers asked for less. The Board awarded the original package. It explained:

> The organization might be right as to what its members want. Whether it is right to give them that is another question. We believe it is not enough to simply claim "more" and be rewarded with more. Good faith bargaining is put at risk by rewarding employees with greater gains for simply saying "no." The automatic rejection of agreements reached by experienced and elected organization representatives without further justification is a destructive practice that cannot be tolerated. We may disagree with the Carriers' remedy in these circumstances [*i.e.* to award less] but we do agree with the Carriers that a rejection of an agreement without any persuasive explanation is unacceptable.

Award of Arbitration Board No. 559 (Ex. 2) at 7; *see also id.* at 12-13 (citing similar awards).

The same is true here. The pattern terms that the IAM originally accepted in 2017 remain fair and reasonable, and should be awarded by this Board.

FACTUAL BACKGROUND

In this section, we begin with a brief overview of the history of the 2014 bargaining round. Next, we outline the calculation of the monthly savings attributable to the new healthcare plan design.

I. THE 2014 BARGAINING ROUND

The current round of bargaining began in November 2014, with the service of Section 6 notices proposing changes in rates of pay, rules and working conditions. As they have done for many rounds, the railroads served their notices and bargained on a multi-employer basis through the NCCC. *See* NCCC Section 6 Notice to IAM (Nov. 3, 2014) (Ex. 3). The labor organizations formed three different coalitions:

(1) The Coordinated Bargaining Group ("CBG") represented 58 percent of the workforce, and included the American Train Dispatchers Association ("ATDA"), International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers and Helpers ("IBB"), National Conference of Firemen and Oilers ("NCF&O"), Brotherhood of Railroad Signalman ("BRS"), Brotherhood of Locomotive Engineers and Trainmen ("BLET"), and SMART – Transportation Division (including Yardmasters);

(2) The Coalition of Rail Unions ("CRU"), represented 22 percent of the employees. It included the IAM as well as the International Brotherhood of Electrical Workers ("IBEW"), the Transportation Communications Union ("TCU"), Brotherhood of Railway Carmen ("BRC"), and Transport Workers Union ("TWU");

(3) The BMWED and SMART-Mechanical group represented approximately 20 percent of the workforce.

1. ***CBG*** After almost three years of bargaining, the NCCC reached a tentative agreement with the six CBG unions on October 6, 2017. The terms included general wage increases of 12.5 percent over five years, status quo on work rules, and various new healthcare benefit features, such as telemedicine services, pharmacy benefit programs, and improved vision plan benefits. The terms also included increases in healthcare plan copays, out-of-pocket maximums, co-insurance, and deductibles (the "Pattern Plan Design"). These changes reduce the Carriers' per-employee per-month cost of providing benefits by $73.24 in 2018 (and $87.03 in 2019). *See* Report of David Scofield (Ex. 4) at Chart 4 (summarizing Pattern Plan Design's financial impact).

Five of the six CBG unions ratified the agreement by wide margins, and the plan design changes for those unions were implemented effective January 1, 2018. *See* Pattern Agreements (Exs. 5-9). Thus, as of January 1, 2018, the Carriers began realizing the savings from the Pattern Plan Design.

The IBB membership initially failed to ratify the tentative agreement. It did not agree to the pattern terms until April 13, 2018. Upon ratification, the pattern plan design changes were made effective January 1, 2018. However, the delay diminished the savings the Carriers would have obtained had IBB ratified the Pattern Agreement at the same time as the other CBG unions because the prior benefit levels had been applied to at least some claims processed during the interim period (between January and April). The parties accounted for the difference by reducing the retroactive pay owed to the IBB members in an amount estimated to compensate the Carriers for the lost health care savings. *See* IBB Agreement at 17, Side Letter #4 (Ex. 10).

2. ***BMWED/SMART*** Following the agreement with CBG, the Carriers offered the same terms to the other two coalitions. Even after most of the CBG unions ratified, the BMWED and SMART-Mechanical refused to submit the pattern terms to their memberships for a vote, and instead insisted on going to interest arbitration. Under the terms of the interest arbitration agreement, BMWED and SMART-Mechanical accepted all of the pattern terms, except for the changes in the health care plan that are designed to lower the Carriers' costs. In lieu of the Pattern Plan Design, the unions proposed a scheme they called the "357 Plan," which included no plan design changes. The Carriers, by contrast, proposed the Pattern Plan Design, including a true-up to reflect their lost savings since February 1.

On May 23, 2018, the interest arbitration panel – chaired by Gil Vernon – issued a decision in favor of the Carriers, adopting the Pattern Plan Design in all respects. *See* Award of Board No. 602 (Ex. 11). In particular, the Board found that the date on which the plan design changes were implemented was a critical part of the overall bargain struck between the carriers and the other unions. *Id.* at 22. Accordingly, the Board awarded a true-up of $73.24 per-employee per-month, dating back to February 1, 2018, to account for the carriers' lost savings.[2] The award was subsequently incorporated into new agreements with the two unions. As with IBB, the true-up was collected through a deduction from retroactive wages.

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[2] By contrast, the Board rejected the carriers' request for a penalty or "punitive deduction" to punish the unions for resisting an overwhelming pattern. *Id.* at 22. The Board noted that a true-up is distinct from a penalty. *Id.*

3. CRU The CRU – including IAM – agreed to the pattern terms on December 15, 2017. The IAM's District 19 President described it as a "very good" agreement. IAM Newsletter (Dec. 2017) (Ex. 12). Nevertheless, the IAM's members failed to ratify. The IBEW also voted down the agreement. Members of the other three Coalition unions – TCU, TWU, and BRC – ratified by large margins, and the plan design changes for these unions were implemented effective February 1, 2018. (Exs. 13-14).

In May 2018, IBEW agreed to conduct a second ratification vote, while deferring the issue of the true-up to interest arbitration. *See* IBEW Pattern Agreement (Ex. 15). After IBEW's members voted to ratify the agreement, the true-up question was submitted to a panel chaired by Josh Javits. As in this proceeding, the Board was asked to select one of two proposals – either the full true-up, or none at all.

On July 17, 2018, the Javits Board issued a decision adopting the Carriers' proposal for a four-month true-up. *See* Award of Board No. 603 (Ex. 16). The arbitration panel observed that "the central tradeoff in this round of National Handling as well as several immediately prior rounds has been that general wage increases [], here, 12.5% over five years, are provided in exchange for health care changes, which make more efficient and less expensive health care plan costs." *Id.* at 11. The Board also noted that "[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 a *quid pro quo* for GWI increase, then a delay in implementing these health care changes alters the equation bargained for by the parties." *Id.* The Board therefore concluded that "a true-up is appropriate in these circumstances." *Id.*

II. THE SAVINGS FROM PATTERN PLAN DESIGN

As noted above, the Carriers calculate a per-employee per-month savings of $73.24 in 2018 from the Pattern Plan Design. *See* Report of David Scofield (Ex. 4) at 10. That figure incorporates both cost-shifting and savings associated with projected changes in healthcare consumption. More specifically, the monthly amount of $73.24 includes roughly $60 for benefit provisions, $3 for pharmacy programs, and around $9 for behavior change. The $9 for behavior change reflects a conservative estimate of 15 percent of the $60 per-month savings in medical benefits. *See id.* at 10-11 (explaining that the standard assumption is 30 percent). Because the implementation delay now spans 8 months (February – September), the lost savings to the Carriers is $585.92 per employee (8 months * $73.24). That amounts to a total of $3,925,664, assuming 6,700 qualified employees and an October 1 implementation date.

NCCC WITNESSES

At the hearing, the Carriers intend to present testimony from the following individuals as part of their direct case:

1. Kenneth Gradia, Chairman, NCCC

Mr. Gradia will testify about the history of the current bargaining round, as well as the adequacy of machinist compensation.

2. David Scofield, Willis Towers Watson

Mr. Scofield is an actuary and an expert on the valuation of healthcare plans. He will testify as to the savings achieved by the Pattern Plan Design, and the cost of IAM's delayed ratification of the agreement.

ARGUMENT

The Carriers' proposed terms are justified by settled principles of pattern bargaining, as well as directly applicable precedent, including the recent Awards of Board Nos. 602 and 603. The Carriers' terms are also fair and reasonable. By contrast, IAM's proposal would break the pattern, reward it for holding out, and punish the unions that settled earlier.

I. THE PATTERN PRINCIPLE SUPPORTS THE CARRIERS' PROPOSAL

A. The Pattern Principle

For over 80 years, the pattern principle has been one of the most important considerations in resolving labor disputes in the railroad industry.[3] In essence, the pattern principle provides that, in any round of national handling, once a large union or a group of unions and a multi-carrier group reach agreement, the terms of that agreement should, absent unusual and compelling circumstances, set the parameters for further agreements with the non-settling unions.

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[3] *See* Report of Emergency Board No. 131 (July 8, 1960) at 5 ("[I]t is an inescapable fact that pattern settlements, despite sporadic deviations, have been characteristic of the industry for many years, so much so that any deviation from an established pattern during a current wage movement would be likely to have serious repercussions . . . ."); *see also, e.g.,* Report of Emergency Board No. 231 (Aug. 16, 1996) at 7-8; Report of Emergency Board No. 220 (May 28, 1992) at 9-10; Report of Emergency Board No. 211 (Aug. 14, 1986) at 10-11; Report of Emergency Board No. 195 (Aug. 20, 1982) at 5-6; Report of Emergency Board No. 187 (Oct. 10, 1975) at 15-16; Report of Emergency Board No. 186 (May 23, 1975) at 8-9; Report of Emergency Board No. 181 (April 30, 1972) at 8-9; Report of Emergency Board No. 174 (Feb. 12, 1969) at 5; Report of Emergency Board No. 169 (Mar. 10, 1967) at 6; Report of Emergency Board No. 157 (Dec. 23, 1963) at 11-12; Report of Emergency Board No. 137 (July 10, 1961) at 8-9; Report of Emergency Board No. 116 (Mar. 15, 1957) at 13; Report of Emergency Board No. 114 (Dec. 12, 1955) at 22; *Soo Line Railroad v. Brotherhood of Locomotive Engineers & Trainmen*, Board No. 585, NMB Case No. A-13320 (Jan. 26, 2006) (Eischen, Arb.) (Ex. 17) at 5, 10.

Indeed, following a pattern is critical to the long-term stability of railroad industry labor relations. *See* Report of Emergency Board No. 242 (Dec. 30, 2007) at 14-15. This is so for several reasons:

(1) Under the Railway Labor Act ("RLA"), representation is on a craft-by-craft basis. This has led to a high degree of fragmentation in union representation, with a total of 13 major freight rail union organizations. Rivalries among these organizations directly impact labor relations – no union wants to be outdone by its peers. *See* Report of Emergency Board No. 220 (May 28, 1992) at 9 ("[C]ompetition between and among unions for supremacy of benefits, with its ineluctably destabilizing consequences, is damaging to the public interest.").

(2) Likewise, employees in the various crafts all work together, side-by-side, and so are bound to compare their wages and other benefits. Morale and cooperation – and therefore the Carrier's operations – suffer when one group edges ahead. *See* Report of Emergency Board No. 169 (Mar. 10, 1967) at 6 (departure from the pattern "would probably nurture employee dissatisfaction and catch-up demands, and hamper collective bargaining and the negotiation of future contracts.").

(3) Failure to follow a pattern would discourage early settlements. In fact, it would encourage each organization to wait, hoping to better the gains achieved by the others. It would also lead to leap-frog bargaining between rounds, as any union that fell behind in one round would attempt to outdo the others in the next. The end result would be a destabilizing spiral, undermining the bargaining process. *See* Report of Emergency Board No. 186 (May 23, 1975) at 8-9 ("To revert back to the days of continual crisis

bargaining between the Carriers and thirteen or more unions, each seeking to piggy-back and improve upon the gains made by the others, is unthinkable.").

(4) The pattern provides a reliable indicator of the fair and reasonable terms for an agreement under nearly identical circumstances. This is especially true where the pattern has emerged from the same bargaining round. "[A]bsent changed circumstances sufficient to break the pattern, they provide an objective indicator of the terms that should result from arm's length, good faith bargaining between the parties in the same industry, attempting to set wages and working conditions in similar jobs, at the same points in time." Report of Emergency Board No. 242 (Dec. 30, 2007) at 15; *see also* Report of Emergency Board No. 174 (Feb. 12, 1969) at 5 ("[T]he fact that a large number of other unions have accepted a particular settlement is a fact of which the Board must take cognizance. A wage increase acceptable to the majority of major railroad unions . . . is presumptively not grossly unfair or inadequate.").

For these reasons, "it is an inescapable fact that pattern settlements, despite sporadic deviations, have been characteristic of the industry for many years, so much so that any deviation from an established pattern during a current wage movement would be likely to have serious repercussions." Report of Emergency Board No. 131 (July 8, 1960) at 5. Indeed, it is well settled that departures from a pattern are inherently "destructive of the broader system of collective bargaining." Report of Emergency Board No. 176 (Nov. 2, 1969) at 8. *See also* Report of Emergency Board No. 194 (Aug. 19, 1982) at 6 (following a pattern is necessary "if stability of labor-management relations is to be preserved in this industry.").

B. The Carriers' Proposal Is the Pattern

In this case, there is no debate that a pattern exists. Twelve unions – representing approximately 95 percent of the unionized workforce – have either agreed to the same terms or had those terms imposed through arbitration. These agreements cover both operating and non-operating crafts, provide the same economic and non-economic terms, and apply to far more than a majority of the employees covered by the National Plan. Thus, even by the most stringent definition, there is clearly a pattern here. *See, e.g.,* Report of Emergency Board No. 186 (May 23, 1975) at 4, 8 (pattern exists when just 59.4 percent of workers are covered). Indeed, IAM's officers have conceded this point. *See* Oct. 5, 2017 Letter from John Lacey to IAM Membership (Ex. 18) (noting that the agreement reached between the Carriers and the CBG "will undoubtedly form the basis of any agreement we are able to reach.").

Each element of the Carriers' proposed agreement in Appendix B mirrors the pattern terms. In particular, the Carriers' proposal includes the same 12.5 percent GWI over five years that every other union received. It also includes the same healthcare cost-savings, the same new benefit features, and the same freeze on employee contributions. The Carriers' proposal is, therefore, strongly supported by the pattern principles outlined above. As numerous Boards have recognized over more than 80 years' worth of awards, application of the pattern terms is essential to preventing disruptive competition among unions and promoting efficient and orderly bargaining. *See, e.g.*, Report of Emergency Board No. 186 (May 23, 1975) at 8-9; Report of Emergency Board No. 169 (Mar. 10, 1967) at 6. The same is true in this case.

C. The "True-Up" Is Part of the Pattern

The implementation date for the Pattern Plan Design – and the associated savings in 2018 – is a critical part of the overall pattern. Of the nine unions that reached voluntary agreements, three have an effective implementation date of February 1, and the remaining six unions have an even earlier date (January 1). Thus, the underlying bargain reflected in the pattern agreements includes ***a minimum*** of 11 months of health care savings for the Carriers in 2018, amounting to at least $73.24 per-employee per-month, or a total of $585.92 per employee between February 1 and October 1. Failure to include those savings would violate the pattern principle, encourage leap-frogging and hold-outs, and destabilize the process of national handling in future rounds of bargaining. If unions can reduce cost-sharing by delay, they would have every reason to drag out settlement in order to get a better deal than their peers.

Imposition of a true-up under the pattern principle is especially appropriate where, as here, the IAM has accepted all other aspects of the healthcare pattern. In particular, IAM wants the freeze on employee contributions, as well as the new health care benefit features, including telemedicine services, expert second opinion, health advocacy, an expanded "centers of excellence" program, improved vision plan benefits, and enhanced flexible spending account benefits. Yet it is seeking to avoid a key element of the pattern that inures to the Carriers' benefit. It would be deeply inconsistent with the pattern principle to allow a union to accept parts of the pattern it prefers, but reject one that it does not like. Signing on to a pattern means taking the good with the bad – neither side gets to pick and choose.

II. PRECEDENT SUPPORTS THE CARRIERS' PROPOSAL

As noted above, two other interest arbitration panels have already addressed the terms that should be imposed in this round of bargaining. Before Board Nos. 602 and 603, the Carriers argued that under the pattern principle, BMWED, SMART-Mechanical, and IBEW should accept the same healthcare terms, including a true-up to account for the delay in implementation of the Pattern Plan Design. The unions, by contrast, argued that the pattern should be rejected and/or that a true-up was unwarranted. Award of Board No. 602 (Ex. 11) at 12; Award of Board No. 603 (Ex. 16) at 10-12.

In both cases, the Boards agreed with the Carriers. In the Award of Board No. 603, the neutral member, Mr. Javits, started from the proposition that a pattern, once set, must be followed:

> 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 other Unions could be treated better than they in subsequent deals. The virtue and vices of pattern bargaining may be debated, but it is the recognized and generally accepted *modus operando* 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.

Award of Board No. 603 (Ex. 16) at 11. The Board went on to find that

> ***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.

Id. at 9 (emphasis added).

Board No. 603 also held that the pattern necessarily included the healthcare implementation date, and therefore required a "true-up." As the Board observed:

> 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. . . . 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.

Id. at 11-12. The Board noted that "[f]our months [of delayed implementation] cannot be said to be such an insignificant amount of time that it should be disregarded," noting that a union certainly would not tolerate a deviation of four months in retroactive wages. *Id.* at 16. The Board concluded that "[i]t would be hard to argue that one Union should be exempt from such charges for a period of four months while the others paid such expenses." *Id.*

The neutral member of Board No. 602 reached the same conclusions. He took a somewhat different approach to the formal definition of "pattern," suggesting that while other union settlements are not an "iron mold," they do provide "objective guidance independent of our own personal values." Award of Board No. 602 (Ex. 11) at 21. Mr. Vernon emphasized that the other agreements are important because they reflect the other unions' judgment of "a fair balancing of all the relevant facts and circumstances surrounding this round of national bargaining." *Id.*

Based on those considerations, Board No. 602 concluded that all of the Carriers' proposed healthcare terms were appropriate and should be awarded. The neutral noted that "a total of 70% of the industry's Unionized work force ratified by an average margin of 83%," and "there is, on balance, no convincing basis in this record to conclusively say those other workers were wrong." *Id.* at 22. He also held that the Carriers were entitled to an adjustment to account for delay in the implementation of the healthcare terms, explaining as follows:

> [T]he "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 specifically 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 the retroactive wages.

Id.

On the specific issue of true-up, the recent awards of Board Nos. 602 and 603 are consistent with a line of decisions holding that when implementation of an agreement is delayed, the terms should be adjusted to account for such delays. In *Soo Line Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen*, Board No. 585, NMB Case No. A-13320 (Jan. 26, 2006) (Ex. 17), the railroad had reached agreements with all of its unions except for BLET. *Id.* at 2. Those agreements included "benefit design cost containment features." *Id.* at 3. The BLET had tentatively agreed to the same terms, but the agreement was voted down by the membership (twice). *Id.* at 2. Arbitrator Eischen awarded the pattern terms sought by the carrier. *Id.* at 11. His award also included a "retroactive contribution" from the employees to account for the delay in implementation

of the plan design changes:

> [T]here is a recognizable difference between the laudable exercise of democratic rights and recalcitrant rejection of fair and reasonable contract terms achieved through hard bargaining by responsible labor leaders. In the final analysis, such unreasonable intransigence not only goes unrewarded but it also bears a cost. For that reason, the Agreement imposed in my Award includes an additional one-time per capita "retroactive contribution" of $400, as offset for the time-lag in H&W benefits design implementation. This cost to the employees is justified in this case because unjustified membership rejection of the palpably fair and reasonable terms . . . resulted in Soo losing forever the time-value of those changes . . . .

Id. at 11-12. *See also, e.g.*, Report of Emergency Board No. 133 (Dec. 10, 1960), at 5-7 (retroactive wage increase should be adjusted to account for fact that, by settling later than other crafts, union had captured additional cost-of-living increase);

The reasoning of these decisions is directly applicable in this case. As Mr. Javits observed, "one Union" should not be "exempt" from a pattern that applies to everyone else. Award of Board No. 603 (Ex. 16) at 16. That is true regardless of whether the "one Union" happens to be the IBEW or the IAM. Just as in the IBEW case, the IAM unequivocally recommended the pattern terms to its members, and yet they chose to vote it down, despite the fact that 70 percent of the workforce had already ratified the agreements by overwhelming margins. "The consequences of the . . . ratification failure should have been apparent to the members." *Id.*

That is especially so with respect to the true-up. As both Board 602 and Board 603 held, a true-up is clearly appropriate to account for delay in the implementation of the healthcare savings. The reasoning of those Boards applies in every respect to IAM as well.

III. EQUITY SUPPORTS THE CARRIERS' PROPOSAL

Aside from pattern and precedent, the Carriers' proposal is also justified by considerations of fairness, both for the Carriers and for the unions that settled earlier. Like the other employees, the IAM's members had the chance to accept the Pattern Agreement when it was first presented. Voting against an agreement bargained and recommended by their own union may be the employees' prerogative, but that decision came at a substantial cost to the Carriers, who have been unable, to this point, to implement the healthcare savings they bargained for. But notwithstanding the IAM's inexplicable recalcitrance in the face of a clear pattern, the Carriers are still offering the same terms that every other union received. It would be unfair to the Carriers to award anything else.

More importantly, awarding the Carriers' proposal is the only equitable outcome for the other unions and the employees they represent. Several of those unions – including most of the other unions in the CRU – did the necessary work to sell the pattern agreement to their members. It would be deeply unfair to all of those unions to allow the IAM – which was unable to obtain a ratification – to achieve a different result simply because it was less effective or persuasive in handling the ratification process. *See* Award of Board No. 559 (Ex. 2) at 7. Nor is there anything unique or special about the IAM that would justify treating its members differently than all other railroad employees. The unions who settled early (as well as those who arbitrated and lost this issue) reasonably expect that the IAM will receive the same as everyone else, and will not benefit from delay.

IV. THE UNION'S PROPOSAL SHOULD BE REJECTED

Because the Carriers' proposal is plainly justified, the Board need not go on to consider the relative merits of the IAM's competing proposal. But if it did, it should find that the IAM proposal is *not* justified. It is well-settled that a union which seeks to deviate from a strong internal pattern faces a heavy burden to show clear and compelling proof that special circumstances warrant different treatment. *See* Report of Emergency Board No. 242 (Dec. 30, 2007) at 25-26; Report of Emergency Board No. 169 (Mar. 10, 1967) at 11 (absent a "clear showing of an existing inequity, the Board adheres to the pattern"); Report of Emergency Board No. 181 (Apr. 30, 1972) at 13 (union must "clearly demonstrate an inequity or a rational and convincing basis for" deviating from the pattern); Report of Emergency Board No. 221 (May 28, 1992) at 8 (pattern terms are "presumptively applicable"). No such proof exists in this case. Indeed, as discussed below, each one of the IAM's three proposed deviations from pattern is independently flawed – any one of them alone would be sufficient reason to reject the union's position. In combination, the IAM's proposal is obviously excessive.

A. The Union Is Not Entitled To An Extra GWI

At a superficial level, the IAM appears to be saying that it is willing to accept the pattern agreement GWIs. Its proposal reflects the same 12.5 percent uncompounded increase for the 2015-2019 period. However, the union's proposal adds a 3 percent increase effective January 1, 2020. The IAM seems to be suggesting that this proposal for a sixth GWI would not violate the pattern principle because it does not increase the pattern GWIs for the 2015-19 period.

That is not so. The IAM's proposal for a sixth year of wage increases violates the pattern principle in at least two respects. *First*, it is clear that contract duration itself is an intrinsic and important part of any pattern. A five year term is substantively different than a six year term, and parties may have differing views on the need for or wisdom of the longer period. For example, one side may believe that inflation is likely to remain low, or that demand for rail transportation may change, or that the economy could go into recession. Any of those factors may affect that party's judgment about whether a longer term is acceptable or not.

In this case, several unions initially asked for six years of GWIs. However, all of the unions ultimately made a determination that five years was a sufficient duration, leaving their options open for 2020 and beyond. The railroads and the other unions will, for example, have the flexibility to agree to lump sums instead of GWIs, or to backload any wage increases in the next contract. The IAM proposal would eliminate that flexibility – it provides that the proposed January 1, 2020 increase "is intended to constitute a complete resolution of the compensation adjustment issue for calendar year 2020." Arbitration Agreement (Ex. 1) at App. C. As such, there is no plausible argument that the IAM wage proposal is consistent with the pattern.

Second, even if duration were not an important aspect of the pattern, the IAM's sixth year GWI would still be inappropriate because it lacks any offsetting healthcare savings. As Mr. Javits noted in the Award of Board No. 603, the "central trade-off" in recent rounds of national handling "has been that general wage increases . . . are provided in exchange for health care changes," which reduce plan costs. Ex. 16 at 11. That is

certainly true in the 2014 round – the GWIs provided were offset by adjustments to healthcare plan design that stabilize the actuarial value ("AV') of the plan (the percentage of cost paid by the employer) at 90 percent, but only through the end of 2019. After that, further adjustments will be required to maintain a 90 percent AV. *See* Report of David Scofield (Ex. 4) at 9-10. Yet the IAM proposal for a 3 percent GWI in 2020 includes no such adjustment. And if the railroads are already committed to a wage increase in 2020, it will, of course, undermine their ability to bargain for any countervailing adjustments.

B. The Union Is Not Entitled To An Extra Wage Adjustment

In addition to a sixth year of general wage increases, the IAM also wants a $1.00 per hour "wage responsibility" adjustment for all IAM-represented employees, effective January 1, 2019. Regardless of how it is labelled, this is, of course, just another form of wage increase. IAM-represented employees worked a total of 14,261,149 hours in 2017 (the most recent full year in which such data are available). Accordingly, the total cost of a $1.00 per hour increase in base pay would be roughly $14,260,000. Given the total IAM-represented employee payroll, that is equivalent to an extra 2.62 percent GWI. In other words, the IAM is asking for an uncompounded total GWI of 15.12 percent over five years, versus the pattern GWI of 12.50 percent.

Again, this proposal is unjustified for multiple reasons. *First*, it is patently inconsistent with the pattern. A 15.12 percent GWI is higher than a 12.50 percent GWI. The other unions would certainly seek a "catch-up" in the next round of bargaining, retroactive to the same date. The estimated cost of such an increase, as applied to the other crafts, would exceed $300 million.

Second, there is no equitable basis for a "responsibility" adjustment. The jobs performed by IAM members have not undergone any sort of radical metamorphosis in recent years – they continue to do the same basic tasks as in the past. Moreover, any incremental increase in the skill or effort required for machinist jobs is matched by similar changes in other railroad jobs, and is fully compensated by the GWIs that all employees receive. Machinists do not, therefore, have any legitimate claim to a special compensation increase.

Third, machinists employees already earn, on average, more than employees in many of the crafts that have ratified the pattern agreement. *See* Coalition Employees – Average Annual Compensation by Union (2015) (Ex. 19). Thus, there is no basis for arguing that the pattern GWIs are insufficient. Indeed, as a number of interest arbitration panels have observed, even if the employee group in question earns less than the average, that still would not be a basis for deviating from the pattern or adding an extra compensation increase.[4]

Fourth, railroad machinists are hardly underpaid vis-à-vis their peers in other industries. As of 2015 (the start of the bargaining round), IAM-represented railroad

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[4] *See, e.g.*, Report of Emergency Board No. 194 (Aug. 19, 1982) at 6 (fact that cost-of-living increase was less valuable to higher-paid employees than it was to lower-paid employees was not grounds to deviate from pattern); Report of Emergency Board No. 231 (Aug. 16, 1996) at 8 (internal wage compression that affected hold-out union more than others was not grounds to deviate from pattern); Report of Emergency Board No. 131 (July 8, 1960) at 5-8 (inter-craft wage inequity was not unique to hold-out union and therefore was not grounds to deviate from pattern). It is unsurprising, therefore, that similar "wage equity" proposals by other unions in past bargaining rounds have been rejected. *See* Report of Emergency Board No. 243 (Nov. 5, 2011) at 85-86 (rejecting craft-specific "wage equalization" proposals).

employees earned an average of $30.54 per hour. Railroad Compensation (Ex. 20). Machinists working in all other industries earned an average of $24.42 per hour. *Id*. Thus, even before any increases provided by the new CBA, railroad employees enjoyed a 25 percent premium in compensation. The same is true if we compare maximum rates. The average maximum hourly rate for railroad machinists under the last contract was $33.95. *See* Benchmark Report (Ex. 21). The market average maximum rate for unionized machinists in other industries was $29.58. *Id.* In short, there is no plausible argument that railroad machinists are underpaid.

Fifth, as Presidential Emergency Board No. 242 observed, it is inappropriate to come to arbitration with proposals for significant changes that have not been subjected to the "crucible of good faith bargaining." Report of Emergency Board No. 242 (Dec. 30, 2007) at 56. The IAM never asked for a "responsibility" adjustment in its Section 6 notice. *See* IAM Section 6 Notice (Nov. 26, 2014) (Ex. 22). Nor did it ever raise this issue during direct bargaining or in mediation (either before or after the failed ratification vote). It cannot raise the issue for the first time in arbitration, without ever giving the Carriers the chance to debate the issue at the table.

Sixth, several other unions ***did*** expressly ask for similar compensation adjustments, and none of them received one. BRS, NCF&O, and IBB all sought various kinds of craft-specific wage adjustments during this bargaining round. *See* Exs. 23-25 (BRS, NCFO, and IBB Section 6 Notices). Those proposals were all withdrawn as part of the pattern settlement. Just as with the sixth year of wage increases, if the other unions did not receive special adjustments, the IAM should not either.

C. The Union Cannot Evade the True-Up

Finally, the IAM insists that its members should not have to pay the true-up, meaning that the union wants its members to pay less than other employees for healthcare for the eight month period from February to October 2018. For all of the reasons discussed above, *see supra* at 15-20, there is no merit to that position. To equalize healthcare costs, IAM members should pay the true-up, just as was required for members of IBB, BMWED, SMART-Mechanical, and IBEW.

CONCLUSION

For the foregoing reasons, the Carriers respectfully request that the Board adopt the Carriers' proposed agreement terms – as set forth in Appendix B of the Arbitration Agreement – as the Board's award.

Respectfully submitted,

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