



**NATIONAL MEDIATION BOARD**

WASHINGTON, DC 20572

(202) 692-5000

33 NMB No. 15  
February 1, 2006

Craig R. Richey  
General Counsel  
Pat Cedenno, COO-Central  
South Kansas & Oklahoma  
Railroad  
315 West 3<sup>rd</sup> Street  
Pittsburgh, KS 66762

Jo A. DeRoche  
Counsel for South Kansas &  
Oklahoma Railroad  
Weiner Brodsky Sidman  
Kider PC  
1300 19<sup>th</sup> Street, NW.  
Fifth Floor  
Washington, DC 20036-  
1609

Mark Hemphill  
General Chairman  
ATSF System Federation  
P.O. Box 746  
521 S.E. 10<sup>th</sup> Street  
Newton, KS 67114-0746

Timothy McCall  
Director of Organizing  
BMWE-IBT  
3121 Plantation Key Drive  
Baton Rouge, LA 70816

Donald Griffin  
Director of Strategic  
Coordination & Research  
BMWE-IBT  
10 G Street, NE, Suite 460  
Washington, DC 20002

Re: NMB Case No. R-7065  
South Kansas and Oklahoma Railroad

Gentlemen and Ms. DeRoche:

This determination addresses the January 20, 2006 appeal filed by the Brotherhood of Maintenance of Way Employes Division-IBT (BMWE-IBT or Organization) of Investigators Cristina A. Bonaca's and Kendrah L. Davis' eligibility ruling. For the reason discussed below, the appeal is denied.

## **I. Procedural Background**

On December 5, 2005, the BMW-IBT filed an application pursuant to the Railway Labor Act (RLA or Act), 45 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a representation dispute involving the Maintenance of Way and Structure Employees of South Kansas and Oklahoma Railroad (SKOL or Carrier). On December 19, 2005, the Carrier provided a Potential List of Eligible Voters (List). The Board found that a dispute existed and authorized an election with a tally set for February 3, 2006.

On, January 5, 2006, the Organization filed its challenges to the List. The BMW-IBT argued that Daniel Salmon and Robert Hilton share a community of interest with the Maintenance of Way and Structure Employees of SKOL and should be added to the List. On January 12, 2006, the Carrier responded, arguing that Salmon and Hilton are not current employees of SKOL, but instead are employed by Watco Transportation Services (WTS) and should remain off the List. On January 13, 2006, both participants supplemented their responses to the Board.

On January 17, 2006, the Investigators ruled on the Organization's challenges, and held that as Salmon and Hilton are employees of WTS, not SKOL, they remain properly off the List.

## **II. Investigators' Ruling**

The BMW-IBT challenged the exclusion of Salmon and Hilton from the List, contending that they share a community of interest with other SKOL Maintenance of Way Employees. The Organization argued that these employees: were originally hired by SKOL; perform Maintenance of Way duties for SKOL; receive daily work instructions from SKOL supervisors Dorr and White; and were "unilaterally transferred" to Watco Transportation Services (WTS). (WTS and SKOL are both wholly-owned subsidiaries of Watco Companies, Inc.). While conceding that Salmon and Hilton are paid by WTS instead of

SKOL, the BMW-IBT urged the Board to rely on a Railroad Retirement Board (RRB) decision for support that WTS is a covered employer under the Railroad Retirement Act (RRA). *See RRB Decision B.C.D. 03-20* (2003). While the Organization acknowledged that RRB decisions are not controlling upon the Board, it contends that the RRB and RLA share a similar definition of a “carrier,” and further that the RRB and NMB are “sister” agencies governing employees of the railroad industry. The Organization provided declarations and a Form BA-6 RRB Service and Compensation Record for Salmon.

In SKOL’s January 12, 2006 response, the Carrier provided documentary evidence showing that neither Salmon nor Hilton were current employees of SKOL. The Carrier stated that Salmon was transferred to WTS in February 2004 and provided a wage increase form, a time-off work slip, and a vacation request form showing WTS as his employer and Harry Smith as his WTS supervisor. Additionally, the Carrier asserted that Hilton has been an employee of WTS since February 2005 and provided a wage increase form showing Harry Smith as his supervisor.

The Investigators ruled that Salmon and Hilton were employed by WTS, not SKOL. Since Salmon and Hilton are not employees of SKOL, they were ruled ineligible and appropriately off the List.

### **III. BMW-IBT’s Appeal and SKOL’s Response**

In its January 20, 2006 appeal, the Organization again argues that Salmon and Hilton share a community of interest with the Maintenance of Way Employees of SKOL. The Organization restates its assertion that these employees: were unilaterally transferred to WTS; receive daily instructions from SKOL supervisors Dorr and White; and work alongside and perform the same functions as other SKOL Maintenance of Way Employees. Additionally, the BMW-IBT makes a new argument, relying on Salmon’s Form BA-6, which lists his reporting employers for 2004 as both SKOL and WTS, as

evidence that Salmon and Hilton are “joint” employees of SKOL and WTS.

The Carrier responded to the Organization’s appeal on January 25, 2006. First, SKOL notes that this is the first time the Organization has raised the “joint” employee argument, commenting: “An appeal is not an opportunity to raise new arguments and new theories. But even if it were, no authority is cited . . . for the proposition that someone who is jointly employed by two entities would be entitled to full voting rights on either of them.” The Carrier goes on to point out that as Salmon was transferred from SKOL to WTS in February of 2004, the RRB Form BA-6 correctly lists both entities as reporting employers for 2004. SKOL writes: “Mr. Salmon’s earnings for January and part of February 2004 would have been reported by SKOL; his earnings after the transfer would have been reported by WTS. Nothing on that form suggests that the two employers were compensating him simultaneously . . . .” The Carrier concludes by again pointing out that Salmon has been working for WTS for two years, and Hilton has been working for WTS for one year. Further, when the List was provided to the NMB in December 2005, neither Hilton nor Salmon were part of the SKOL section gang, nor do they have any reasonable expectation of ever being part of the SKOL section gang. Accordingly, they should remain off the List.

#### **IV. Discussion**

The evidence establishes that Daniel Salmon and Robert Hilton are employed by WTS, not SKOL, and accordingly should remain off the List.

Manual Section 10.2 provides, in relevant part, that: “Absent extraordinary circumstances, evidence submitted on appeal will not be considered by the NMB unless it was submitted to the Investigator.”

The Organization’s new argument that Salmon and Hilton are “joint” employees was not raised in their initial challenge, even though it relies on evidence submitted in the

initial challenge. *See* Manual Section 10.2; *See also USA Jet Airlines*, 31 NMB 139-40 (2004) (Board found no extraordinary circumstances existed to warrant consideration of new evidence offered by the carrier in its appeal).

Regardless, the evidence supplied by both the BMW-IBT and SKOL shows that Salmon and Hilton were transferred to WTS in February 2004 and February 2005 respectively. Salmon and Hilton receive pay checks from WTS and are supervised and evaluated by WTS employees. Therefore, as Salmon and Hilton are employees of WTS, rather than SKOL, they were properly found ineligible and will remain off the List.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson".

Mary L. Johnson  
General Counsel