

In the Matter of Arbitration:

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|--------------------------------|---|------------------------------|
| BOSTON AND MAINE CORPORATION |) | |
| MAINE CENTRAL RAILROAD COMPANY |) | Pursuant to Section 4(a) of |
| |) | the New York Dock Conditions |
| and |) | |
| |) | ICC Finance Docket No. 29720 |
| BROTHERHOOD OF RAILWAY CARMEN |) | |
| OF THE UNITED STATES AND |) | |
| CANADA |) | |

REFEREE: Bernard Cushman, Esq.

APPEARANCES:

For the Boston and Maine Corporation:
Daniel J. Kozak, Staff Officer, Labor Relations
Robert F. Lamphier, Manager, Labor Relations
B. E. Rice, Jr., Vice President, Human Resources

For Maine Central Railroad Company:
B. L. Peters

For the Organization:
William G. Fairchild, General Vice President
Earl A. Jones, General Chairman

OPINION AND AWARD

Background

On April 2, 1984 the National Mediation Board appointed the undersigned Neutral to serve as Referee pursuant to the Board's authority in accordance with Section 4(a) of the New York Dock Conditions, 360 ICC 60, imposed in ICC Finance Docket No. 29720 concerning a dispute arising from the issuance of a Section 4 notice by Boston and Maine Corporation and Maine Central Railraod Company hereinafter referred to as "the Carrier"

and the Brotherhood of Railway Carmen hereinafter referred to as "the Organization." The Referee set a hearing date of April 19, 1984. Both the Organization and the Carrier requested the Referee to hold the hearing on May 10, 1984. The Referee granted the request and a hearing was held on that date at Boston, Massachusetts. May 10, therefore, becomes the date of the commencement of the hearing for the purpose of computation of the thirty (30) days within which the decision of the Referee must be rendered. At the hearing both parties presented written submissions and made oral statements, all of which have been carefully considered.

Guilford Transportation Industries acquired the Maine Central Railroad Company on June 16, 1981. On April 23, 1982 the ICC approved Guilford's acquisition of the Boston and Maine Corporation and in Finance Docket No. 29729 (Sub. No. 1) imposed the New York Dock labor protective conditions. On November 1, 1983 the Carrier posted a notice, copies of which were sent to the representatives of the employees, pursuant to Section 4 of the New York Dock Labor Conditions, stating in relevant part:

. . .

The Maine Central Railroad Company will perform start to finish paint work of Boston and Maine locomotives, freight cars and cabooses at the Waterville Shop of the Maine Central Railroad Company. The particular work to be performed involves surface preparation, priming, painting and stenciling. Spot painting and touch up painting will continue to be performed at various

locations on the Maine Central and Boston and Maine Railroads as required.

Currently no employees exclusively perform start to finish paint work on the Boston and Maine Railroad. Thus, it is anticipated that no employees will be adversely affected by this transaction.

Conferences were held thereafter between the Organization and the Carrier on November 10, 1983 and January 19, February 2, February 16 and March 15, 1984. No agreement was reached and these arbitration proceedings were invoked. The parties were unable to agree on the selection of a Referee within the period prescribed in the New York Dock Conditions and, as stated above, the National Mediation Board on April 2, 1984 appointed the undersigned, Bernard Cushman, Esq., as the Referee to arbitrate the dispute.

Contentions of the Parties

The Organization contends that the Boston and Maine Corporation, hereinafter called "B&M," rearranged or adjusted its Carmen forces in anticipation of the transaction proposed on November 1, 1983 with the purpose or effect of depriving affected employees of protective benefits under the New York Dock Conditions. The Organization also contends that six Carmen who were on furlough will be adversely affected by the transfer of painting work to the Maine Central Railroad and are entitled to the protective benefits of the New York Dock Conditions.

At the outset the Carrier asserts that the Organization claim of rearrangement of forces by B&M raises an issue that cannot properly be subject to arbitration in a Section 4 proceeding. Without prejudice to that position the Carrier denies that it rearranged its forces in anticipation of the transaction.

During the years 1981, 1982 and early 1983 the Boston and Maine Corporation had a program involving painting from start to finish at Billerica, Massachusetts, East Deerfield, Massachusetts and Mechanicville, New York. The Organization claims that in each of the Massachusetts locations there were two Carmen positions for the purpose of preparation and painting of B&M locomotives on a full time basis which were abolished in January and April of 1983. The Organization also claims that the Carrier employed two Carmen positions painting from start to finish cabooses at Mechanicville, New York. A total of six of these Carmen were furloughed by April of 1983. There is a dispute between the Carrier and the Organization on the issue as to whether six Carmen or Carmen Helpers performed start to finish painting full time during this time period. The Carrier states that two Carmen/Carmen Helpers primarily performed this work during this time period and that an additional four Carmen/Carmen Helpers occasionally performed work during that period. The Carrier claims that start to finish

painting was ended in March of 1983 for economic reasons. As of the date of the November 1, 1983 notice no employees were engaged in start to finish paint work on the B&M. The Organization contended that the anticipated institution of the start to finish paint work at Waterville is work which belongs to the Carmen who previously performed that work on B&M and they are entitled to follow that work. The Organization contended that employees on the B&M Carmen seniority roster had a vested right to the painting work that was transferred and that despite the fact that no Carmen on the B&M were currently performing or assigned to such work such Carmen as were on the B&M seniority roster would be adversely affected when B&M's painting work begins on Maine Central at the Waterville shop. According to the Organization the transfer of the work to the Maine Central Railroad constitutes a transaction as defined in Section 1(a) of the New York Dock Conditions. The Organization contends further that when work on B&M equipment commences on Maine Central at the Waterville Shop and a newly established position is bulletined to the employees on a dovetailed list of B&M and Maine Central employees a Boston and Maine employee accepting the position as the senior bidder must be considered as a "displaced employee" as that term is defined in Article I, Section 1(b) of the New York Dock Conditions as of the date of return to service and should thereafter be afforded a displacement

allowance under Section 5 of the New York Dock Conditions. The Organization also contends that such an employee would be entitled to the allowance for the protective period set forth in Article 1, Section 1(d) of the New York Dock Conditions and to the moving and relocation provisions provided in the New York Dock Conditions.

The Carrier contends employees who are on furlough or inactive status at the time of a transaction are not adversely affected by a transaction. They are therefore ineligible to collect displacement, dismissal or separation allowances pursuant to the New York Dock Conditions for the particular transaction. The Carrier argues that the definitions of "displaced employee" and "dismissed employee" in Sections 1(b) and 1(c) of the New York Dock Conditions "link adverse effect with a 'transaction' as defined in Section 1(a)." According to the Carrier employees on furlough or inactive status because of causes other than a transaction such as business declines are not affected by a transaction and are therefore not "dismissed" or "displaced" employees under the terms of the New York Dock

¹
 Conditions. The Carrier states, however, that an employee on furlough or inactive status at the time of a transaction possesses equity rights to consolidated work if and when the services of such employees are required to perform such work. Such equity rights do not, however, says the ~~Carrier~~, include monetary benefits under the New York Dock Conditions. CARRIER

¹The New York Dock Conditions defines "transaction," "displaced employee" and "dismissed employee" as follows:

1. Definitions.-(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

Discussion, Findings and Conclusions

We turn first to the contention of the Carrier as to the Referee's lack of jurisdiction with regard to the Organization's claim that the Boston and Maine rearranged its Carmen forces in anticipation of the transaction proposed on November 1, 1983 with the purpose or effect of depriving affected employees of protected benefits under the New York Dock Conditions. That claim of the Organization is bottomed on Section 10 of the New York Dock Conditions which reads:

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

Section 11 of the New York Dock Conditions expressly excepts from its coverage Section 4. In pertinent part Section 11 reads:

11. Arbitration of disputes.-(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved

labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

. . .

The Referee notes that Section 11 is broad in scope and applies to any dispute or controversy with respect to the interpretation or application of any provision of the New York Dock Conditions except Sections 4 and 12. The plain meaning of this language is that Section 10 issues are included within the scope of Section 11 and are, therefore, not within the scope of Section 4. This conclusion is reinforced by the differentiation in structure between Sections 4 and 11. Section 4 provides for the appointment of a neutral referee and for a specific expedited time schedule. Section 11 provides for a tripartite Committee and sets forth its own time schedule to determine disputes arising under that Section. The opinion of the ICC in Finance Docket No. 28250 which initially imposed the New York Dock Conditions referred to Article I, Section 4 as, in effect, an individualized provision specifically structured for disputes within its orbit. The opinion stated at page 18:

We note here that Article I, Section 4, embodies a highly structured plan with specified time limits for notice, negotiation, arbitration, and decision. This is so, to assure that the parties reach the necessary agreement prior to consummation but within a reasonable period so as not to delay unduly consummation of the transaction.

The Referee is, therefore, compelled to the conclusion that the "in anticipation of" issue raised by the Organization may not be raised in a Section 4 proceeding but must be raised before a Committee as provided in Section 11. The Referee, therefore, has no jurisdiction over that issue.

We turn next to the issue as to whether six furloughed B&M Carmen are entitled to the full panoply of New York Dock benefits. Some history of the development and the conferences between the parties is necessary as background. Originally the parties were in dispute as to seniority rights involved in any performance of start to finish painting work at Waterville on the Maine Central property on B&M equipment or consolidated work at Waterville. The parties were also in dispute as to the number of B&M Carmen or Carmen/Helpers which should be placed on any dovetailed seniority roster. During the course of the conferences the Carrier made two proposals on the terms of an implementing agreement. In the first proposal the Carrier offered to allow an opportunity to obtain future consolidated paint work at Waterville to one B&M Carman/Carman Helper on furlough status or not holding a regular assignment on the

B&M system Carmen roster or the B&M system Carmen Helper roster. The Carrier claimed that two Carmen/Carmen Helpers at Billerica had been spending 50 percent of their time performing start to finish paint work in March 1983 when that program was terminated in March 1983. Both the seniority aspects of the Carrier proposal and the limitation to one position were rejected by the Carmen. On March 15, 1984 the Carrier made a second proposal offering to dovetail six B&M Carmen/Carmen Helpers either on furlough or not holding regular positions with furloughed Maine Central employees on the Carmen Helpers (paint shop) roster at the Waterville shop. With regard to the first offer the Carmen were concerned because the B&M Journeymen Carmen who were on system seniority would be dovetailed into a Carman Helpers seniority roster at Waterville covering Helpers assignment to painting duties. The Carmen also anticipated difficulties if B&M Journeymen Carmen were dovetailed onto a Journeyman Painters seniority roster at Waterville because Carmen and Painters are on a separate seniority roster on the Maine Central. The Carmen also rejected the second Carrier proposal. How much part the seniority aspect of the second Carrier offer played in the Carmen decision to reject is unclear. At the hearing, however, the Carmen stated that there was no disagreement on interblending of seniority. Both the Carmen's proposal for an implementing agreement and the Carrier's second proposal contain

a Section 3 which is identical and reads:

As of the date of this agreement, the names of six (6) Boston and Maine carmen and/or carmen helpers on the Boston and Maine System Carmen Roster and/or the Boston and Maine System Carmen Helpers' Roster either not holding regular assignments or on furlough will be dovetailed in seniority order with the names of all carmen helpers either not holding regular assignments or on furlough on the Seniority Roster of Carmen Helpers (Paint Shop), Waterville Shop, Maine Central Railroad Company.

The work envisaged at Waterville is presumably consolidated work, not only B&M work. Under all the circumstances the Carrier proposal to dovetail six B&M Carmen and/or Carmen Helpers in the manner detailed in its second proposal appears equitable and will be incorporated in the implementing agreement.

There is no dispute between the parties that the proposed establishment of start to finish paint work at Waterville constitutes a "transaction" within the meaning of the New York Conditions. Where the parties come to sharp issue, however, is the applicability of the monetary protections provided under the New York Conditions. The leading arbitral decisions stress necessary relationships of cause and effect between the "transaction" and the adverse effect for an employee to achieve entitlement to the whole spectrum of benefits under the New York Conditions. This Referee agrees with Referee Zumas in the American Train Dispatchers Association and the Missouri Railroad Company case and Referee Seidenberg in his award in

Public Law Board No. 818, Award No. 8 (UTU and PRR-PRSL) as well as with other arbitrators that there must be a causal connection between the transactions and the claimed adverse effect upon employees. No such "causal nexus" was shown to exist on the record in this case insofar as displacement or dismissal benefits are concerned. The employees claimed to be affected are employees on furlough or inactive status. Thus, at the time of the transaction causal connection relating to dismissal or displacement benefits is not apparent. Furloughed employees are not, however, completely foreclosed under Section 4. Opportunities to return to future service are one example. Referee Seidenberg's decision in the New York Dock case involving the Baltimore and Ohio Railroad Company, the Newburgh South Shore Railway Company and the Brotherhood of Maintenance of Way Employees, ICC Finance Docket No. 30095, makes it clear that furloughed employees have some rights under Section 4 of the New York Dock Conditions. In that case Referee Seidenberg stated:

When we next turn to the putative contractual relation between the B&O and the N&SS employees whom the B&O did not want to add to its work force, or who were in a furloughed status at the time the ICC approved the application for purchase, we conclude that all the N&SS employees were involved in the transaction and had viable rights that should be protected and not vitiated by this proceeding. While it is unquestioned that the B&O has the sole discretion to determine the size of the work force it wants to use from N&SS forces. No Neutral can prescribe the size of the work force that must be

utilized. However, this does not mean that the B&O can, or should be permitted, unilaterally to extinguish the vested seniority and pension rights of inactive N&SS employees. The B&O intends to operate on N&SS property and it is inappropriate for the B&O to take action that would cause the N&SS to lose permanently their recall rights to work on N&SS territory, if the exigencies of operations should warrant such a happy state. . . .

There seems little doubt on the basis of the various arbitral decisions and on this Referee's reading of the New York Conditions that, while the Carrier does have sole discretion to determine the size of the work force, employees on furlough at the time of a transaction have an interest or a right in future consolidated work that may emerge pursuant to a transaction where that work includes work previously performed by the furloughed employees. Here furloughed B&M Carmen/Carmen Helpers would when the opportunity arises in one sense follow the work of their craft to Waterville although the work would presumably be consolidated with Maine Central work.

The Referee has carefully considered the implementing agreements proposed by the Carrier and that proposed by the Organization. The remaining serious point of difference seems to lie in the Organization's insistence in Paragraph 6 of its proposal that the employees who may be returned to service be considered displaced employees as of the date of return to service and afforded a displacement allowance under Section 5 of the New York Dock Conditions. Under the circumstances of this

case the Organization's claim for such a displacement allowance for employees who were on furlough or inactive status at the time of the transaction is not supported by the record. The second proposal made by the Carrier appears to be a fair and equitable proposal. It provides for the opportunity, as work becomes available, for six furloughed B&M employees to work at Waterville on the Maine Central and participate in the consolidated work opportunities at the Waterville shop of the Maine Central. As stated above, the seniority rights of furloughed Boston and Maine employees have been given cognizance under the dovetailing proposal as have the seniority rights of Maine Central employees in the same status and the moving and relocation provisions provided in the New York Dock Conditions are made applicable. The Referee will adopt the Carrier's second proposal in the implementing agreement.

The attached implementing agreement which is hereby made a part of this Decision and Award, constitutes the Referee's determination under Article I, Section 4 of the New York Dock Conditions as to the appropriate basis for the selection and rearrangement of forces pursuant to the notice or transaction which gave rise to this proceeding. This Decision and Award and attached implementing agreement are intended to resolve all outstanding issues, as provided for by Article I, Section 4, of the New York Dock Conditions.

AWARD

1. The Referee has no jurisdiction over and lacks the authority to entertain the Organization's claim that the Boston and Maine rearranged its Carmen forces in anticipation of the transaction proposed on November 1, 1983 with the purpose or effect of depriving affected employees of protected benefits under the New York Dock Conditions.

2. The parties are directed to execute the attached Implementing Agreement to effect appropriate selection of forces resulting from the transaction.

3. This Decision and Award and attached Implementing Agreement are intended to resolve all outstanding issues, as provided for by Article I, Section 4 of the New York Dock Conditions.

May 30, 1984

Bernard Cushman

Bernard Cushman
Referee

IMPLEMENTING AGREEMENT
BETWEEN
BOSTON AND MAINE CORPORATION,
MAINE CENTRAL RAILROAD COMPANY
AND

BROTHERHOOD OF RAILWAY CARMEN OF THE U.S. AND CANADA

WHEREAS, this transaction is made pursuant to Interstate Commerce Commission decision in Finance Docket No. 29720 (Sub. No. 1), and

WHEREAS, the Boston and Maine Corporation and the Maine Central Railroad Company, hereinafter designated respectively as "B&M" and "MeC," give notice in accordance with Article I, Section 4(a) of the conditions for the protection of employees enunciated in New York Dock Railway - Control - Brooklyn Eastern District, 360 ICC 60 (1979) hereinafter designated as "New York Dock Conditions" of the intent of the B&M to transfer start-to-finish paint work from its Billerica Shop to the Waterville Shop of the MeC,

NOW, THEREFORE, it is determined:

1. The labor protective conditions as set forth in the New York Doc Conditions which, by reference hereto, are incorporated herein and made a part hereof, shall be applicable to this transaction.
2. As a result of this transaction the B&M will transfer start-to-finish paint work that formerly was performed in its Billerica Shop to the Waterville Shop of the MeC. Start-to-finish paint work is understood to be surface preparation, priming, painting and stencilling. Start-to-finish paint work does not include spot painting and touch-up painting which will continue to be performed at various locations on the B&M and MeC as required.
3. As of the date of this agreement, the names of six (6) Boston and Maine carmen and/or carmen helpers on the Boston and Maine System Carmen Roster and/or the Boston and Maine System Carmen Helpers' Roster either not holding regular assignments or on furlough will be dovetailed in seniority order with the names of all carmen helpers either not holding regular assignments or on furlough on the Seniority Roster of Carmen Helpers (Paint Shop), Waterville Shop, Maine Central Railroad Company.

4. When a position must be filled on the Seniority Roster of Carmen Helpers (Paint Shop) Waterville Shop work will accrue to the dovetailed list of Boston and Maine and Maine Central employees described in Section 3.

5. A newly established position on the Seniority Roster of Carmen Helpers (Paint Shop) Waterville Shop will be bulletined for a period of ten (10) days. Employees described in Section 3 of this agreement will be eligible to bid on said position until said position is filled.

(a) If a Maine Central employee is the senior bidder on the bulletined position, he will be assigned the position according to the terms and conditions of the schedule agreement between the Brotherhood Railway Carmen and the Maine Central Railroad Company.

(b) If a Boston and Maine employee is the senior bidder on the bulletined position, he will be assigned the position according to the following:

(i) The Boston and Maine employee may elect to accept the bulletined position at Waterville Shop or to remain in an unassigned/furlough status on the Boston and Maine Railroad. If the Boston and Maine employee elects to accept the bulletined position at Waterville Shop, the remainder of this Section 5(b) will be applicable.

(ii) The B&M employee accepting the position at Waterville on the MeC will have his/her seniority date, as it appears on the B&M System Carmen's Roster or the B&M System Carmen Helper's Roster, dovetailed into the roster of Carmen Helpers (Paint Shop) upon reporting to work, and his/her name will be removed from the Boston and Maine System Carmen's Roster or the Boston and Maine System Carmen Helper's Roster, whichever is applicable.

(iii) The B&M employee accepting the position at Waterville will be assigned his/her position in accordance with the bulletin advertising the position; and in accordance with the preceding Section (a); thereafter, changes in the coordinated operation in the filling of vacancies, abolishing or creating positions and reduction or restoration of forces will be governed by application of the MeC schedule agreement.

(iv) The B&M employee accepting the herein described Waterville position will become a MeC employee subject to the rules of agreement between the Maine Central Railroad and the Brotherhood Railway Carmen of the United States and Canada.

(v) The moving and relocation provisions provided in the "New York Dock Conditions" will be applicable.

6. As to employees covered by this agreement, it is clearly understood that the provisions of the New York Dock Conditions will apply only to those employees affected by a "transaction" as defined in Article I, Section 1(a) of the New York Dock Conditions.

7. This agreement will become effective upon ten (10) days advance notice to the representative of the Brotherhood Railway Carmen of the United States and Canada.

Signed at North Billerica, Massachusetts this ____ day of ____ 1984.

BROTHERHOOD RAILWAY CARMEN OF THE
UNITED STATES AND CANADA

BOSTON AND MAIN CORPORATION

E. D. JONES
General Chairman

J. J. CRONIN
Director-Labor Relations

MAINE CENTRAL RAILROAD COMPANY

B. L. PETERS
Director-Human Resources

Approved:

B. E. RICE, JR.
Vice President-Human Resources

BERNARD CUSHMAN

Arbitrator

9203 SUMMIT ROAD
SILVER SPRING, MD. 20910

June 5, 1984

Mr. Daniel J. Kozak
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North Billerica, MA 01862

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Brotherhood of Railway Carmen
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Mr. B. L. Peters
Director, Human Resources
Maine Central Railroad Company
242 St. John Street
Portland, ME 04102

Mr. E. D. Jones
General Chairman
Brotherhood of Railway Carmen
West Scarboro, ME 04074

Re: Boston and Maine Corporation
Maine Central Railroad Company
and
Brotherhood of Railway Carmen
Pursuant to Section 4(a) of the New York Dock
Conditions, ICC Finance Docket No. 29720

Gentlemen:

There is a typographical error at page 7 of my Opinion in the above referenced case. The word "Carrier" should be substituted for the word "Carmen" in the 5th line from the top of the page. Please note the Opinion as corrected accordingly and attach a copy of this letter to the Award.

Very truly yours,

Bernard Cushman

Bernard Cushman

BC/eh

cc: B. E. Rice, Jr.
Robert F. Lamphier