AWARD NO. 1
CASE NO. 1

ARBITRATION COMMITTEE
ESTABLISHED PURSUANT TO ARTICLE 1, SECTION 11 OF THE
MENDOCINO COAST LINE EMPLOYEE PROTECTION CONDITIONS
(ICC FINANCE DOCKET NO. 30965, ET AL)

In the matter of an arbitration between: UNITED TRANSPORTATION UNION and BOSTON AND MAINE CORPORATION MAINE CENTRAL RAILROAD COMPANY PORTLAND TERMINAL COMPANY SPRINGFIELD TERMINAL RAILWAY COMPANY	FINDINGS AND AWARD

QUESTION AT ISSUE:

"How should the hourly equivalent of the total compensation be computed for affected train and engine employees?

BACKGROUND:

The Interstate Commerce Commission (the ICC or the Commission), in a Decision with a service date of February 19, 1988 in Finance Docket No. 30965, which decision embraced, as enumerated therein, several other ICC Finance Docket decisions involving applications filed for lease and trackage rights exemptions for the Boston and Maine Corporation (B&M), Maine Central Railroad Company (MEC), the Portland Terminal Company (PT), and the Springfield Terminal Railway Company (ST), stated, in part, as follows:

"SUMMARY

These proceedings involve use of the notice of exemption procedures set forth at 49 CFR 1180.4(g) in connection with transactions within a corporate family. . . . .

The labor protective conditions typically imposed as the minimum protection in lease and trackage rights transactions as set forth in Mendocino Coast Ry. Inc. - Lease and Operate, 354 I.C.C. 732 (1978) and 360 I.C.C. 653

(1980) and Norfolk and Western Ry. Co. - Trackage Rights - BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast, supra, 360 I.C.C. 653 (1980), adequately protect the interests of rail employees in normal lease and trackage rights situations and have been found to satisfy the statutory requirement of 49 U.S.C. 11347 that carriers involved in transactions under 49 U.S.C. 11344 provide fair arrangements for protection of their employees. Here, however, the Railway Labor Executives' Association (RLEA) and the Brotherhood of Locomotive Engineers (BLE) have sought revocation of the exemptions, or a change in the conditions for exemption, arguing that the labor protective conditions that were imposed in all of the cases are inadequate, and they seek a greater level of employee protection. They argue that the labor protective conditions developed by the Commission in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), are more appropriate for these transactions and should be imposed in lieu of the Mendocino Coast and Norfolk and Western conditions. They argue in the alternative that the exemption is not appropriate and should be revoked for these transactions. The GTI carriers, on the other hand, believe that their actions were correct and that the proper labor conditions have already been imposed.

Upon review of the record, we chose to fashion a remedy appropriate to the circumstances, and provide the opportunity for effective adjustment and resolution of disputes in this unusual situation. Thus, we conclude that imposition of extraordinary conditions, rather than ordering revocation, would better ensure that rail employees and services are adequately protected in this particular instance.

Recognizing that various transactional activities have transpired over the period of time since October, 1986, we believe that ordering revocation at this time may be counterproductive. Moreover, noting the substantive benefits of conditions under New York Dock, Mendocino Coast and Norfolk and Western, are virtually identical, albeit with significant procedural distinctions, we find it possible to use elements of those substantive benefits and tailor the procedures to fit the particular circumstances of this case.

We, therefore, direct that: . . . .

DISCUSSION AND CONCLUSIONS

1. EMPLOYEE PROTECTION

We find that imposition of appropriate labor protective

conditions, rather than ordering revocation, is warranted in this case. . . . .

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Upon review of the evidence, we are unable to conclude that the transactions are the equivalent of a merger, consolidation or acquisition of control. Nevertheless, we are persuaded that the impact of these transactions is very close to that of a merger or consolidation. There are, for example, a large number of employees who have been or would be affected by related transactions consummated within a short period of time. . . . .

The workforces of B&M, MEC and, D&H are aligned along the traditional crafts of the railroad industry. Employee members of the different crafts are represented by various unions and have pay rates and work rules established through collective bargaining with those unions. ST's workforce, on the other hand, consists of one craft, the so-called 'railroader.' ST's railroaders perform all of the various tasks that on other railroads are separated along craft lines. ST's railroaders are paid, on the average, less than are the employees of the other GTI carriers. In addition, ST's work rules are more favorable to the carrier than are those of the other carriers. Indeed, a major reason GTI is shifting its operations to ST is to realize the economies afforded by the railroader concept and the ST work rules.

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Thus, we are persuaded that employees affected by the ST transactions should be provided more than the standard protections that accompany lease transactions. While the Mendocino Coast protections have proven quite satisfactory for the normal case, it has always been understood that they are minima -- that additional protections could be provided in the exceptional case. Because of the system-wide impact of the present arrangement and the substantial impact on numerous rail employees, the need for an implementing agreement prior to any further reorganization is established.

In order fairly to protect rail employees in these unusual circumstances, we will require an implementing agreement (and binding arbitration, if necessary to achieve that agreement) that includes ST, the surviving operating entity, as a participant, along with B&M, D&M, MEC, and PT, and the employees of ST, B&M, D&H, MEC, and PT. This modification of the usual conditions will provide a basis for the fair selection of a workforce for the surviving entity.

> Including ST and the representatives of the UTU on the ST lines as participants will remedy two problems identified by labor. First, inclusion of all concerned will allow recognition and negotiation of seniority more fairly. To date, and particularly with regard to the MEC employees affected by the early leases, the manner in which GTI has proceeded is unacceptable. Secondly, inclusion of all parties simultaneously will permit proper consideration of the extent to which the ST can and should provide for the respected practice that employees be permitted to 'follow their jobs.' This issue will be complicated because of the need to accommodate employment to the new operational structure on the surviving ST line. However, we are certain that these issues will be more fairly addressed by full-party negotiation or arbitration than they have been to date.
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> While we believe that the circumstances present in this case require that we impose extraordinary labor protection, we conclude that the exemption should stand, subject to the partial revocation necessary to impost that level of protection. Full revocation is not justified and, in any event, return to the status quo ante at this time would risk paralyzing the process of resolving an exceedingly complex series of problems. Partial revocation as ordered here, on the other hand, is consistent with the public interest and will further national transportation goals and policies by simultaneously promoting safe and efficient rail transportation services and fair treatment of employees in the railroad industry."

Accordingly, the ICC held that the appropriate level of employee protection for the authorized intracorporate transactions is that set forth in the above-mentioned Mendocino Coast Railway conditions for the lease transactions and the Norfolk and Western Railway - Trackage Rights - BN conditions, as modified in Mendocino Coast, with respect to the trackage rights transactions.

The dispute here at issue involves the computation of a covered employee's test period earnings, or average monthly compensation based upon "total compensation received by the employee and the total time for which he was paid" during the applicable 12-month test period and the extent to which, if any, varied elements of total compensation are to be assigned an hourly equivalent in determining the total time for which an employee was paid during such test period in application of Section 5, Article X, Displacement Allowances, of the Mendocino Coast conditions as imposed by the ICC in its approval of transactions related to FD No. 30965.

Section 5 of the Mendocino Coast conditions read as follows:

> "(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.
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> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.
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> If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position."

When the parties were unable to resolve the question at issue they agreed to place such dispute to this Arbitration Committee pursuant to the disputes procedures set forth in the Mendocino Coast conditions.

In addition to presenting ex parte submissions regarding their respective positions on the dispute, the parties also offered oral argument at this Board's hearing on the dispute on June 29, 1990. On this same date, June 29, 1990, since the parties had previously exchanged submissions, the Employees filed a rebuttal brief to the Carrier's submission. Thereafter, each party, under date of July 27, 1990, filed a post-hearing.

POSITION OF THE EMPLOYEES:

The Employees contend that the Carrier, in calculating a test period average (TPA) for total compensation and total time for which a displaced employee was paid during the 12 months in which he had performed service has wrongfully factored in an hourly equivalent for mileage run in road service and for certain arbitrary or contractual payments made to such employees.

It is the position of the Employees that the calculation of a TPA is restricted to time actually under pay for performing service for the Carrier.

In this regard, the Employees assert that Section 5(a) of the Mendocino Coast conditions, supra, calls for the calculation of the average time worked and not for miles run by an affected employee.

Further, the Employees urge that there is no equitable rationale for the conversion of miles and arbitraries into an hourly equivalent because, unlike prior work rules agreements, no corresponding mileage or overtime conversion factors and arbitraries exist under those work rules currently imposed on the employees by the Carrier. Instead, the Employees submit, affected employees are required to work on a straight hourly basis, with overtime only coming after 40 hours in a work-week. There is no opportunity, as in some past instances, for employees to receive eight hours pay for six hours work or to receive additional compensation in the form of arbitraries and special allowances.

Therefore, the Employees maintain it would not be proper to hold an affected employee accountable for TPA time or hours that were formulated as a result of work rule agreements that are no longer in effect. It offers that such action would place an affected employee in a worse position with respect to their employment in violation of those provisions of Section 405(b)(3) of the Rail Passenger Service Act which state that such protective arrangements as may be necessary shall include "the protection of such individual employees against a worsening of their position with respect to their employment."

The Employees also take the position that the ICC had modified the Mendocino Coast conditions to more specifically protect the affected employees because it had recognized that the employees were adversely affected prior to an implementing agreement being agreed upon or imposed through arbitration.

POSITION OF THE CARRIER:

The Carrier offers that calculation of a TPA under Section 5(a) of the Mendocino Coast conditions was intended to balance the equities of both the affected employees and the carriers.

It says the affected employees have benefit of all compensation received by them during the test period, whether such compensation was in fact related to payment of a minimum basic day's pay, an arbitrary, or a special allowance.

Conversely, the Carrier says it has a right to include in "total time" for which an affected employee was paid an hourly component factor related to each element of total compensation received by an affected employee, or, principally, a right to convert into total time all elements of compensation received by an affected employee as an arbitrary or special allowance.

In support of its position the Carrier submits that Section 5(a) specifies two criteria for a TPA, i.e.: 1) total compensation received, and 2) total time for which an employee was paid. This second component, the Carrier argues, does not specify "time actually worked" or "time on duty," but rather, "total time" for which an employee was paid. Therefore, the Carrier says it must be recognized that it was intended that total time include a time factor for all arbitraries and special allowances which are included in the total compensation of an affected employee's TPA.

The Carrier says that was a part of the quid pro quo of labor protection, and that to deprive it of an ability to offset compensation by including a time factor for those various elements which are included as a part of total compensation would create a "windfall situation" for the employee. It says that not to do so would be tantamount to having monetary payments included in the TPA that could not be reduced through an affected employee being required to work an equivalent number of hours to offset all such elements of total compensation.

It says such an interpretation of Section 5(a) would be both inequitable and counter to the intent of labor protection conditions dating back to the Washington Job Protection Agreement of 1936 and the application of other protective conditions over the intervening years.

Thus, the Carrier asserts that the dispute here at issue is not a case of first impression, but is, rather, an issue which has been resolved in a series of past awards under what is commonly known as the Amtrak C-1 Labor Protection conditions. Accordingly, the Carrier offers, it would compute test period hours no differently than other major railroads that have been involved in mergers and consolidations over the past years.

THE ARBITRATION COMMITTEE'S FINDINGS:

In the light of the unusual nature of the lease and trackage rights exemptions sought by and granted the Carrier in an application filed with the ICC, and out of which circumstance this dispute arises, i.e., how should the hourly equivalent of the total compensation be computed for affected train and engine employees, the ICC, in approving such application, imposed, what it termed, extraordinary labor protective conditions for affected employees. The ICC said it was imposing protective conditions that are different from those imposed in the usual lease and trackage rights transactions, or, principally, what it termed a modified version of the Mendocino Coast conditions.

In this latter regard, it is significant that, as the ICC points up, although the Mendocino Coast conditions have proven quite satisfactory in the normal case, it was here necessary that the covered employees be provided additional protection. The Commission said that there was need to "fashion a remedy appropriate to the circumstances" because it was persuaded that the impact of these transactions is very close to that of a merger or consolidation and that a large number of employees would be affected by related transactions.

The Mendocino Coast conditions, as with other generally recognized ICC-imposed labor protective conditions, are intended to protect a covered employee "against a worsening of their position with respect to their employment." These labor protection conditions are designed to provide equitable and fair treatment to affected employees for a specified protective period by granting such employees benefit of a level of income not unlike that which would have obtained for such employees had a transaction, merger or consolidation not been put into effect. Certainly, the very purpose of an employee protective allowance is to provide income security for covered employees against an abnormal employment relationship following the implementation of an ICC-authorized transaction.

The basic form of this income protection imposed for the covered employees is here set forth in Section 5 of the Mendocino Coast conditions, supra. It calls for the computation of a test period average (TPA) of "total compensation" and "total time for which an employee was paid" during the last 12 months in which the covered employee performed service prior to the ICC-authorized transaction. If the displaced employee's post-transaction compensation in a position for any month is less than the TPA, then that employee is entitled to a displacement allowance based upon the aforementioned TPA, less compensation for time lost on account of any voluntary absences. If the employee works in any month in excess of the TPA monthly time paid for, the affected employee is to be additionally compensated for such excess time

at the rate of pay of the retained position.

In the opinion of this Arbitration Committee, we think that in the establishment of employee protection conditions that it was generally anticipated that although a transaction, merger or consolidation would bring about some changes in work rules, that there would continue to exist a substantial relationship between the prior and surviving rule works, especially with respect to the duties, number of hours worked, and the rates of pay for covered employees, and that these and other work rules would only be changed or modified in an implementing agreement accomplished through collective bargaining or arbitration.

The ICC, as this Arbitration Committee views it, recognized the broader nature and impact that an implementing agreement and collective bargaining agreements (CBA's) would, in particular, have on both the Carrier and the affected employees in this case. We believe that this is demonstrated by the Commission's statements in another decision involving the transactions out of which the basis for the dispute here before us arises, i.e., FD No. 30965, with a service date of October 26, 1989. In this decision, the ICC held that the "then in effect" Carrier-implemented ST/UTU CBA did not provide "a fair and workable arrangement" to cover those employees who transferred to ST. Further, the ICC recognized, in this same decision, the distinction between the limited purpose of an implementing agreement and the broader scope of a CBA, and said that the ST/UTU CBA "is not an implementing agreement." The Commission's statements, in review of prior decisions related to the transactions, read as follows:

> "In addressing the work rules issues, we stated our view that an implementing arrangement must be consistent with the essential terms of an authorized transaction and with the objectives sought to be obtained through the transaction. We concluded that the arbitrator's imposition of the collective bargaining agreements of the lessors -- B&M, MEC, and PT -- effectively foreclosed the transaction authorized by the Commission. We, therefore, did not affirm the arbitrator as to the rates of pay and work rules that would apply to the ST's operation of the other carriers' lines. While we rejected mandatory application of the lessors' work rules to the expanded ST operations, we were not prepared to conclude that the work rules then in effect on the ST provided a fair and workable arrangement to cover employees who had transferred to ST or who would be transferring to the ST. We said that a 'more comprehensive understanding of the existing rules and the current implementation is crucial to long term resolution that protects the legitimate interests of all sides.' (January decision, p. 8.). . . .
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> [We] also generally approved the arbitrator's efforts to allow employees to 'follow their jobs' to the extent possible. Because the arbitrator's selection of force provisions were based upon his imposition of the lessor carriers' work rules and bargaining agreements, we also stated that final resolution of force selection and 'follow the jobs' issues would have to await adoption of work rules for the ST. . . .
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> We have recognized the distinction between the limited purpose of implementing agreements and the broader scope of collective bargaining agreements (CBA's). An implementing agreement traditionally focuses on and provides for the selection of forces from employees of all carriers involved. Such an agreement may be mutually formulated through negotiation, or if necessary, established through arbitration. Use of one or both of these procedures is required by the labor protective conditions imposed on the transaction approved under the Interstate Commerce Act (ICA). By contrast, a collective bargaining agreement represents a mutual agreement negotiated between a carrier-employer and its employees encompassing terms and conditions of employment from a broad range of subject matter recognized as bargainable under the Railway Labor Act (RLA). The ST/UTU agreement is not an implementing agreement."

It is also significant that as concerns the scope or nature of an implementing agreement and collective bargaining agreement, that the ICC, in its January 10, 1989 Decision, said: "Our labor protective conditions, to be sure, provide generally that working conditions and collective bargaining agreements are to be preserved," albeit the Commission went on to say, "the terms of these conditions must be read in conjunction with our decision authorizing the transaction and the public interest factors upon which it is based." Further, the ICC said that an "implementing arrangement" should be fashioned in collective bargaining or arbitration in such as manner that it "will reconcile worker protections with the terms and objectives of the transaction that we approved." In this regard, and more fully, the ICC made the following observations and determinations about such matter:

> "Under the employee protective conditions we imposed in Springfield Terminal, we gave the parties 90 days to reach an implementing agreement . . . If the parties failed to reach agreement, they were to submit the matter to arbitration. The parties failed to negotiate an implementing agreement, and the issue was submitted to arbitration. The neutral arbitrator, Richard R. Kasher, issued an award on June 12, 1988, entitled In the Matter of an Implementing Agreement Arbitration (Springfield

Terminal Railway Company and Guilford Transportation Industries, Inc., and the Railway Labor Executives' Association and the United Transportation Union) (herein referred to as the Kasher award, the arbitral award, or the arbitration decision).

The Kasher award proposed an implementing arrangement providing that: (1) no employee shall be deemed to have forfeited any rights or benefits arising from labor protections as a result of any decision made during the period commencing with the first lease up to the time of the arbitrator's award; (2) seniority on the ST shall be governed by the seniority of employees on the leased lines over which ST seeks to operate; and (3) that the ST workforce, in operating the leased lines, should operate under the rates of pay, rules, and working conditions required by collective bargaining agreements between the four lessor carriers and their employees.

ST, B&M, MEC, and PT filed a petition for administrative review of the arbitrator's decision on July 25, 1988.

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We will discuss the petitions to revoke and reopen and the petition for review of the Kasher award in turn.

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II. REVIEW OF ARBITRATOR KASHER'S DECISION

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The arbitral decision. The arbitrator's award may be broken down into three components: (1) the 'make whole' provisions; (2) the rates of pay and work rule issues; and (3) the selection of forces issues. We will address each of these components in turn.

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2. Rates of pay and work rules. In the February 19 decision we required renewed negotiation (with the possibility of arbitration) on these issues. Arbitrator Kasher found that, in the absence of an unequivocal statement from this Commission, he would not 'mandate that the ST-UTU agreement apply to the lessor carrier's employees.' He noted that both the GTI carriers and RLEA argued that he did not have the authority to 'amend or modify existing collective bargaining agreements,' Kasher at 55, and he described his attempt to do so as futile. He decided, therefore, that the collective bargaining agreements that were in place on the properties

of the MEC, the D&H, the PT, and the B&M should continue to be the collective bargaining agreements in force on the ST when employees are offered comparable employment. As noted above, this would have the effect of transferring to the ST (which is organized exclusively by the UTU) agreements with several unions representing crafts not found on the ST. It would preserve pre-existing rates of pay and work rules, vitiating one major purpose of the underlying leases.

We believe that in so doing, the arbitrator proceeded from a flawed premise regarding the nature of our labor protective conditions and the scope and purpose of arbitration ordered by the Commission. The purpose of labor protective conditions is to cushion the effect on employees of transactions approved or exempted by us as in the public interest by providing up to 6 years' protection for affected employees. The conditions were not intended to foreclose change, streamlining, and modernization of the rail industry, but rather were intended to ensure that the economies and efficiencies sought by the industry through consolidations were not achieved at the sole expense of rail employees. Finance Docket No. 31088, Southern Railway Company and Norfolk Southern Corporation -- Purchase -- Illinois Central Trackage Rights -- Illinois Central Railroad Company Line Between United States v. Lowden, 308 U.S. 225, 238-39 (1939); Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F.2d 424, 430-31 (8th Cir.) cert. denied, 375 U.S. 819 (1963).

Our labor protective conditions, to be sure, provide generally that working conditions and collective bargaining agreements are to be preserved. However, the terms of these conditions must be read in conjunction with our decision authorizing the transaction and the public interest factors upon which it is based. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to its implementation. See Finance Docket No. 30,000 (Sub-No. 18), Denver & R. G. W. RR Co. - Trackage Rights - Missouri Pac. RR between Pueblo, CO. and Kansas City, MO (not printed), served October 25, 1983.

The labor protective conditions that we impose uniformly require the development of an agreement to implement the transaction, which is to be arrived at by a mutual agreement between labor and management, or in the absence of a negotiated agreement, by binding arbitration. The arbitrator's duty, simply stated, is to fashion an implementing arrangement that will reconcile worker protections with the terms and the objectives of the

transaction that we approved. If those terms and objectives cannot be achieved without modification of existing work rules and collective bargaining arrangements, he clearly has the authority to modify such arrangements to the extent necessary to carry out his mandate. On the other hand, it may not be possible for the arbitrator to reconcile completely labor's legitimate interests with all features of the carrier's initial plan. Railroads seeking approval of transactions to which mandatory labor protection applies, are on notice that they must negotiate an implementing agreement or submit to arbitration, and their transactions are subject to some degree of modification. What is essential is that the implementing arrangement be consistent with the essential terms of the transaction and the objective sought to be obtained.

An important objective to be achieved by the GTI restructuring is the economies afforded by application of the more flexible ST work rules to the entire GTI system. By imposing the lessor's collective bargaining agreements, the arbitrator effectively foreclosed the transactions we authorized. Consequently, we will not affirm the arbitrator's decision to impose the rates of pay and work rules of the lessor carriers.

We are left, however, with the question of whether the ST work rules should apply to ST's operation of the GTI system. There is much disagreement among the parties as to the scope and nature of those rules. GTI argues that we have already approved its use of the ST work rules, nd that these rules are the essence of its plan for modernization and competitive service. Labor argues that evidence has demonstrated that ST can operate the GTI properties using the collective bargaining agreements of the lessor lines and that the Commission's understanding of the so-called 'railroader' concept is mistaken. Labor believes the ST work rules are incompatible with maintaining seniority and job entitlement for the employees of the B&M, D&H and MEC because of over-broad prerogatives of management in reassignment.

As to the specifics of implementation of the ST/UTU agreement, certain facts are known. The ST is operating under a collective bargaining agreement that offers considerable discretion to management in work assignment. That management discretion has produced considerable flexibility in work rules compared to agreements characterized by strict craft lines. Yet, the agreement is a generalized one and we recognize the possibility that, without further interpretation, it might not serve as a satisfactory basis for stable, long term operations. Accordingly, a more comprehensive understanding of the

> existing rules and the current implementation is crucial to long term resolution that protects the legitimate interests of all sides. Consequently, we will return these issues to the arbitrator with instruction to undertake a fact finding determination of: (1) the elements of the existing UTU/Springfield agreements; and (2) the methods and practices by which it is presently implemented.
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> The arbitrator is also requested to offer his services as mediator to assist the parties affected by the lease transaction in reaching an implementing agreement. Failing mediation, the arbitrator is directed to undertake further binding arbitration. Review of this arbitration will be confined to the issue of consistency with the Commission's instructions and other such matters as permitted under IBEW v. ICC, supra. The arbitrator is requested to fashion a reasonable schedule for this undertaking and to inform the Commission of the proposed date for completion."

Thus, in imposing a modified version of the Mendocino Coast conditions in the case at issue, the ICC said that it will require that the parties engage in dispute resolution through negotiation of an implementing agreement between all of the GTI (ST) carriers and the employees of all the carriers, and, if necessary, binding arbitration as concerned the scope of the then existing ST/UTU CBA. This, notwithstanding that at page 9 of its October 26, 1989 Decision, the ICC acknowledged that, as the Carrier had already done, the transaction could be implemented prior to the effectiveness of an implementing agreement. In this regard the ICC said:

> "In the case of the typical transaction governed by Mendocino conditions, the transaction may be implemented prior to the effectiveness of an implementing agreement and the affected employee made whole for a period of up to six years from the date of adverse impact."

As indicated above, the Carrier had, in an exercise of the above mentioned right, restructured its operations through a series of leases and trackage rights arrangements and transferred employees from the separate carriers to the ST and the ST/UTU CBA without benefit of an implementing agreement being in place or effective.

The above mentioned ICC determination that an arbitrator "fashion a reasonable schedule" or CBA in an "implementing arrangement" has meantime gone to arbitration. Basically, as we understand it, the findings of this latest arbitration proceeding are that ST work rules which the Carrier had unilaterally placed in effect in application of the the ICC-approved transaction are to be replaced by work rules not unlike those rules which had obtained on each of the separate carrier properties, with some modifications,

as related to each craft or class of affected employees.

Up to the date of the Carrier implementation of the ICC-approved transaction, service and compensation rules applicable to the employees on their respective properties involved homogeneous occupational groupings or job classifications, or, as concerned the employees in this case, work historically recognized as train and engine service. Rates of pay, rules and working conditions were, at that time, among other things, subject to a daily, dual basis of pay, i.e., miles and hours, with overtime based on a mileage component, and with arbitraries and special allowances attaching to the performance of certain specified job functions.

On the date of implementation of the ICC-approved transaction, the Carrier, as indicated above, and following ICC mandated notice requirements, but without agreement with the unions, or, as here, the Organization, on an implementing agreement, placed the transferred employees from the lessor carriers in one uniform job classification, and to which position any kind of work or duty could be assigned by the Carrier. This position has come to be commonly referred to as a "railroader."

Compensation for work performed in this railroader position, pursuant to the ST/UTU CBA, is at the hourly rate of pay for all services performed, with overtime for any service beyond 40 hours in a work-week at the time and one-half rate of pay. The ST/UTU CBA makes no provision whatever for the additional payment of arbitraries or special allowances for any individual work function.

It would therefore seem to this Arbitration Committee, that when the Carrier, mindful of the traditional separation of crafts or classes of employees and the differing nature of the rules of the various CBA's, did knowingly make a clear and substantial change in regular job content, compensation, and work rules, absent an implementing agreement or implementing arrangement being in effect, that it foreclosed its right to argue that the creation of such a situation has caused an imbalance with respect to the calculation and offsetting of compensation and time factors which are a part of a covered employee's protective allowance.

In our view, since the Carrier unilaterally elected to severely disrupt the contractual relationship between the manner in which time is worked and compensation is earned, it must bear the principal burden of any abnormal financial relationship which stems from that action as concerns a covered employee's entitlement to a protective allowance.

Calculation of a TPA in the manner urged by the Carrier, i.e., the converting into total time of all elements of compensation received by an affected employee would, therefore, in the light of the particular nature of the work rules in the ST/UTU CBA, be contrary to the intent of the ICC-imposed modified Mendocino Coast conditions. The Carrier's desired method of computation

would place an affected employee in a worsened position relative to their employment as a result of the transaction. It would wrongfully inflate a TPA with respect to total time worked by attaching a time factor to varied elements of compensation which are not present or separately compensated for under the ST/UTU CBA.

In making this determination the Arbitration Committee recognizes that an employee who had received additional compensation for the performance of certain work to which a penalty attached, i.e., such things as the coupling of air hoses or throwing a switch for another train, may well have performed such work function within the normal or regular hours of an assignment. Thus, compensation allowed for such service, while a payment in addition to base pay, may not have necessarily required the employee to work any additional time beyond a normal work day. Moreover, as indicated above, such work functions are not, in any event, separate compensable factors under the all services rendered concept of a work day under the ST/UTU CBA.

This Arbitration Committee is also mindful that in some respects the Carrier is receiving certain other time related benefits under the ST/UTU CBA as presently in effect. Under prior work and pay rules, the employees had benefit of each day being considered an entity in itself. They had occasion to work assignments which at times called for less than eight hours work, yet remain entitled to a guaranteed eight hours pay for such assignment. The employees had a prior benefit of overtime payment on a daily basis rather than on a 40-hour weekly basis, as under the ST/UTU CBA. They also had benefit of additional payment for the performance of work considered to be traditionally outside the scope of their own craft or class of service and, additional payment account employees of another class or craft of service performing work contractually or traditionally recognized as work belong exclusively to their own craft or class of service.

Therefore, that the Carrier determined, in its prerogative, to unilaterally change the service and compensation system for the affected employees while waiting to negotiate or arbitrate an implementing agreement, may not now be looked upon as giving the Carrier a right to assign an hourly wage factor to each separate element of past work on the theory that any compensation from whatever source paid by the Carrier to the covered employee should have a time factor attached to it and thereby considered an offset against a protective allowance.

The above determinations notwithstanding, this Arbitration Committee does find reason to believe that once an implementing agreement or arrangement is in place and effective, that the Carrier should then have the right to offset the varied elements of TPA compensation with a time factor since, as we understand it, and as indicated above, this implementing agreement will provide that the covered employees work under CBA's that are, with some

modification, not unlike those under which they had earned their TPA. Therefore, it would seem to be order that at that time the Carrier should have the right to recompute the TPA's to include the total time paid a covered employee. This computation should be in accordance with the manner in which all such time is reported as total time worked on ICC report forms.

In this latter regard, the Arbitration Committee believes that there is reason to hold that the ICC references in Section 6 of the Mendocino Coast conditions, as in other protection conditions mandated by the ICC, to "total compensation received" and "total time for which he was paid," are in fact related to and stem from the ICC promulgated "Rules Governing the Classification of Railroad Employees and Reports of Their Service and Compensation." These reporting rules had been in effect for many years prior to the first imposition of labor protective provisions in mergers and consolidations, or as mandated by section 5(2)(f) of the Interstate Commerce Act of 1940. It would seem logical to presume, therefore, that the ICC had in mind the manner in which compensation and hours were already being computed and reported when it decided to make reference in the employee protection conditions to compensation and time in an abstract rather than direct manner.

In this regard, the Arbitration Committee would here note, for example, that rules as promulgated by the ICC in an Order effective January 1, 1951, and in which it mandated certain amendments to reporting rules which had been in effect at that time since at least 1921, and which governed, in particular, the reporting of service hours for train and engine service employees, are found to have read as follows:

> "(d) Service hours. - The number of hours on duty, or held for duty, and the number of hours paid for are to be ascertained and recorded for every class of employee. For enginemen and trainmen, the actual number of miles run and miles paid for but not run are to be recorded, as well as the number of hours on duty and the number of hours paid for. (The service time of all classes of employees shall be recorded in hours instead of days or hours as heretofore.)
>
> Whenever an employee works at more that one occupation, or in more than one class of service, both the number of hours worked and the compensation paid, should be separated and reported under the proper Reporting Divisions.
>
> If an employee is paid a day's wage for a smaller number of hours than constitutes a day's work, the number of hours paid for as well as the actual number of hours the employee is on duty should be ascertained and recorded. Time allowed for meals, part holidays, holidays, ab-

sences on leave, vacations, etc., should be excluded from time actually worked, but if such time is paid for it should be appropriately reported as 'Time paid for but not worked' on Form A or as a 'constructive allowance' on Form B. These requirements apply to enginemen and trainmen paid on the basis of trips or of miles run, and to employees paid at piece rates, as well as to employees paid on hourly, daily, weekly, monthly, or other time basis. Service hours for officers and employees who do not receive payment for overtime should be reported as the number of hours in each month at 8 hours per day contemplated for the position."

In this same connection, it is also worthy of note that in setting forth its explanatory instructions pertaining to Form A, that the ICC, in this same January 1, 1951 order, stated, in part here pertinent, the following:

"Column 6. -- Enter the totals of time paid for and not worked, such as payment for part holidays, holidays, absence on definite leave, vacations, miscellaneous time paid for but not worked, such as pay for attending court, suspensions, sickness, time allowed for meals, and other time that can properly be considered constructive, such as allowance to complete a minimum day when less than a minimum day is worked.

Where vacation allowances are based on compensation earned in previous year, the hours should be computed as in note to Column 7, Form B.

* * * * * * *

[Explanatory instructions pertaining to Form B]

Column 7. -- Enter the number of constructive hours allowed which does not represent actual train service and for which mileage is not allowed, such as vacation time, pay for 'Held away from home terminal' rule, called and not used, runaround, deadheading, attending court, suspensions, investigations, and claim and safety meetings.

Note: The total dollar amount of vacation allowance in a particular month, for each reporting division, should be divided by the average straight time hourly rate of such reporting division, to determine the constructive vacation hours paid for. The straight time hourly rate for each such reporting division should be determined by dividing the 'Compensation-Straight Time Paid For' by 'Service Hours-Straight Time Paid For' for the

latest available month."

The ICC has also published numerous illustrative examples as to how time and compensation are to be reported on its Forms A and B. Among such published examples are the following from one of its "Rules for Reporting Information on Railroad Employees":

> "A freight engineer is called and upon reporting at the enginehouse is notified that he is not wanted. Rule of schedule provides an allowance of three hours when called and not used. Enter three hours in column 7. Should schedule provide for allowance of 50 miles, enter four hours in column 7, which is the equivalent of 50 miles on speed basis of 12-1/2 miles per hour."
>
> "For allowances in connection with 'run arounds,' 'attending court,' 'suspensions,' 'investigations,' and 'Claim and Safety meetings,' where the remuneration is based upon time actually lost, the time lost should be converted into its equivalent in hours and entered in column 7. Where the remuneration is based upon a flat rate per day the hours constituting the minimum day of the employee when in regular train service should be considered the hours paid for per day and the total number of days allowed should be multiplied by the number of hours and the product entered in column 7."

The findings in this decision are applicable only to the particular dispute at issue. They are justified on the following grounds: 1) In its decision of February 17, 1988, the ICC said that because of the unusual circumstances found to exist in this particular transaction, it was imposing extraordinary labor protective conditions in order to fairly protect the affected employees. 2) It is necessary to deviate from the usual application of the labor protective conditions so as to assure the affected employees are not placed in a worsening position with respect to their compensation. 3) It is necessary that a TPA be calculated in a manner that will protect the past levels of income for affected employees from being improperly absorbed or offset in a payroll system where, as the ICC recognized, the affected employees, as ST employees working under the ST/UTU CBA, occupying one common position called a railroader, are paid, on the average, less than are the employees of the lessor carriers where the affected employees previously worked. 4) It is necessary to recognize, as did the ICC, that the ST work rules are more favorable to the Carrier than are those of the lessor carriers under which the affected employees had worked and earned their compensation. 5) The Carrier, as the ICC also recognized, by having shifted its operations to the ST will realize the economies afforded by the railroader concept and the ST/UTU CBA work rules. 6) The Carrier is entitled to benefit of a TPA being calculated and offset in a more established and recognized manner when the arbitral implementing agreement becomes effective.

For the above reasons, this Arbitration Committee makes the following award.

AWARD:

The Carrier request to include in "total time" for which an affected employee was paid, an hourly component factor related to each element of total compensation received by an affected employee is denied as concerns the period of time from the date that such covered employee is adversely affected to the date that an implementing agreement becomes effective. On the date that the implementing agreement becomes effective, the Carrier shall have the right to recompute an affected employee's TPA. At that time it shall include, for the balance of that employee's protective period, an hourly equivalent to varied elements of compensation paid which were in addition to basic compensation and overtime compensation. The elements of total compensation to which such a time factor shall apply will be those elements of compensation which were in fact computed and reported as time factors on ICC report forms.

Robert E. Peterson, Chairman
and Neutral Member

Daniel J. Kozak
Carrier Member

Eugene F. Lyden
Organization Member

Boston, MA
September 17, 1990