In the Matter of Arbitration Between BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES And CSX TRANSPORTATION, INC.	OPINION AND AWARD Before an Article I, Section 11, Arbitration Committee Nicholas H. Zumas, Neutral

BACKGROUND

The undersigned Neutral was selected as Chairman of an Arbitration Committee established pursuant to Article I, Section 11 of Appendix I of I.C.C. Finance Docket No. 28250 (hereinafter "New York Dock" or "NYD.") Hearing was held on October 17, 1990 in Washington, D.C. at which time exhibits were offered and received into evidence and oral argument was heard. The parties presented pre-hearing submissions. The Brotherhood of Maintenance of Way Employees (hereinafter "BMWE" or "Organization") was represented by L. Pat Wynn, Esquire with John O'B. Clarke, Jr., Esquire on brief, and the CSX Transportation, Inc. (hereinafter "CSX" or "Carrier") was represented by Robert Kirk with J. T. Williams on brief.

STATEMENT OF THE FACTS

On or about October 5, 1988, CSX served notice on the BMWE that it intended to sell its line between Bad Axe and Saginaw, Michigan to the Huron and Eastern Railway Company, Inc. The I.C.C. imposed NYD labor protective

conditions on the Carrier in its order dated December 19, 1988. CSX and the BMWE entered into an Implementing Agreement dated December 14, 1988 that provided NYD labor protection benefits for employees adversely affected as a result of the sale of the line. The sale was effective December 23, 1988.

Both parties agree that effective December 28, 1988, three BMWE-represented positions were abolished as a result of the line sale. The incumbents in the positions were Frank Huron, Sr., Robert Foster, and Kenneth Nowiski. These three employees displaced into other positions, which precipitated a series of displacements set forth in the record. The balance of the 14 Claimants in this case are those employees in the displacement chain.

The Carrier concedes that J. A. Brasfield, M. Rivera and J.C. Roscoe were furloughed and C. Kimble was forced to a lower rated position as a result of the displacements. CSX submitted test period averages ("TPA") to the BMWE in order to form the basis of NYD protection benefits. By letter of December 14, 1989, the Carrier took the position that the other Claimants had exercised their seniority to an identical position and therefore did not meet the criteria for certification as displaced employees under NYD. The Carrier further stated that the remaining Claimants had worked in the same foreman or trackman positions, at the same rate of pay and in the same seniority district both before and after the line sale and were therefore not entitled to NYD benefits.

In commenting on the TPAs of the 10 Claimants in dispute, the BMWE notes:

> Although a number of the Claimants have furnished their payroll statements for a number of the months of the protective period, it is impossible to precisely calculate their monthly earnings because the payroll statements do not necessarily coincide with the end of the calendar month. Also, the payroll statements do not permit comparison based on test period hours.

NYD Appendix I provides as follows:

> 1. Definitions. -(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
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> (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.
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> (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.
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> (d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.
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> 5. Displacement allowances.-(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, 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.

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.

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.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinenet facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

ISSUE

The question to be resolved is whether Claimants are "displaced" or "dismissed" employees within the meaning of the NYD conditions. If so, then the labor protection benefits claimed should be awarded.

POSITION OF THE BMWE

The BMWE maintains Claimants are entitled to labor protection benefits according to the NYD conditions.

The BMWE contends that there is no dispute that Claimants changed positions as a direct result of an I.C.C.-approved transaction.

The BMWE rejects CSX's position that an employee is not placed in a "worse position" under NYD so long as the employee obtains a position with the same rate of pay and in the same seniority district as the position from which the employee was displaced. Moreover, the BMWE rejects CSX's position that there is not necessarily an "adverse affect" as a result of a "transaction" in a situation where an employee who has been displaced earns less money per month because many factors unrelated to the transaction affect the amount of compensation in any given month.

The BMWE relies heavily on the so-called Bernstein decisions between the BRAC and the Chesapeake and Ohio Railway Company, which appear in the record. Particular reliance is placed on Docket No. 62, in which Referee Bernstein rejected the carrier's argument that, "...so long as an employee has a position -- full time position -- with a rate of pay equal to or greater than that he received at the time of the coordination, he cannot be eligible for a displacement allowance."

The BMWE further maintains that the computation referred to in NYD Article I, Section 5 for determining loss of compensation is the TPA and any month's earnings below the TPA makes an affected employee eligible for NYD benefits. The BMWE contends that this interpretation represents the literal meaning of the language of NYD. The BMWE, again relying on the Bernstein reasoning, urges that the focus of the inquiry as to eligibility for NYD benefits should be loss of compensation, not a negative change in the rate of pay.

POSITION OF CSX

CSX contends that Claimants, hereinafter excepting the four specifically admitted and cited, are not entitled to labor protection benefits under NYD because they were not adversely affected by any I.C.C.-approved transaction.

Citing Article I, Section 11(e), the Carrier argues that the burden of proving that Claimants are in a worse position as to compensation as a result of a transaction is on the Organization and it has failed to sustain its burden of proof. CSX rejects the BMWE's position that Claimants were placed in a worse position as a result of the transaction, and therefore rejects the Organization's contention that they are "displaced" or "dismissed" employees under NYD. CSX maintains that Claimants continued to hold positions after the transaction with "comparable earnings" to those held before the transaction.

CSX contends that Claimants have not suffered any "adverse effect" as a result of a transaction and that the burden has not shifted to CSX to prove that causes other than a transaction negatively affected Claimants' earnings. CSX further maintains that the BMWE has not proved that Claimants' "overall earnings potential was reduced following the transaction..." therefore rendering moot the question of causation. The Carrier argues that the BMWE is seeking "automatic certification for a displacement allowance and/or test period averages to certain employees merely because an abandonment occurred."

Finally, the Carrier contends that even if Claimants are found to have lost earnings, that loss of earnings was caused by an intervening factor, not the transaction at issue. Therefore, Claimants are still not entitled to NYD labor protection benefits. The Carrier maintains that the BMWE has not sustained its burden of proving a causal nexus between any presumed adverse affect and the transaction. CSX argues that an employee's earnings fluctuate for many reasons not related to a transaction. CSX maintains that if there was any fluctuation in the earnings of Claimants, it was due to "factors such as the number [of] work days in the month, the amount of overtime required and the overall level of business." The Carrier also notes that routine business fluctuations occur regularly and these would have occurred whether or not the transaction occurred. Nonetheless, these fluctuations do not give rise to the payment of NYD labor protection benefits.

FINDINGS AND CONCLUSIONS

It is clearly settled that the Organization carries the burden for proving the entitlement to NYD benefits. Here, the BMWE must show that Claimants were placed in a worse position by the actions of the Carrier and that those actions were related to an identified I.C.C.-approved transaction. Actual harm to Claimants must be shown as well. On the facts presented in the record, the Organization has sustained its burden of proof.

Although there is arbitral authority for the Carrier's position that rate of pay is a valid factor to examine in considering the potential harm to a claimant and whether or not he is in a worse position as to compensation, the more appropriate analysis was enunciated by Referee Bernstein. In Docket No. 62, Bernstein found:

> "From this discussion it may be seen that neither 'rate of pay' nor the 'test period' average earnings is dispositive. The Agreement makes 'compensation' the test of 'worse(ned) position' and the test period formula provides the normal and usual yardstick of compensation. But, the eligibility of an employee for an allowance depends upon whether any of the difference in compensation is a result of the coordination. Once the eligibility is shown all the difference between a month's compensation after the coordination and the 'test period' average is due the employee. By adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur."

Even the fluctuations inherent in the ordinary course of business, make the rate of pay only a useful but not determinative criterion to examine.

It is the compensation filtered through the TPA that shows whether or not an employee has been placed in a worse position.

The decline in Claimants' compensations coincided in time and place with the transaction in question which was approved by the I.C.C. This proximity, and the absence of proof of an intervening factor, establishes the causal nexus between the transaction and the loss of compensation to Claimants. The change in compensation clearly constitutes a harm to Claimants, thus satisfying all the elements necessary for applying the NYD benefits.

AWARD

This Board finds that the employee protective conditions of NYD are applicable to Claimants herein and directs that Claimants be paid the difference between the TPA and their actual compensation, where applicable. If an exact correlation cannot be established, the Board directs that the parties make their best efforts to establish in good faith the amount of compensation owing within 30 days.

Nicholas H. Zumas
Chairman and Neutral

Date: 2-21-91