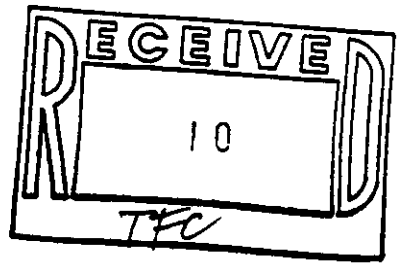
In the Matter of the Arbitration Between

AMERICAN TRAIN DISPATCHERS
ASSOCIATION

-and-

BOSTON & MAINE CORPORATION
SPRINGFIELD TERMINAL RAILWAY COMPANY




Arbitration Committee

David P. Twomey, Neutral Arbitrator
Thomas F. Coughlan, Jr., Organization Member
Roland E. Densmore, Carrier Member

The above-entitled matter came to be heard before the Arbitration Committee at the Carrier's conference room in North Billerica, Massachusetts on October 14, 1992, witnesses testifying before the Committee, exhibits being received and arguments being heard. The proceedings were declared closed after receipt of the post-hearing positions of the parties by November 10, 1992.

## I

## INTRODUCTION AND CONTENTIONS

### A. INTRODUCTION

1.

The parties mutually agreed to establish this Arbitration Committee pursuant to Article I, Section 11, of the Mendocino Coast conditions to hear and decide disputes submitted by the Carriers and the American Train Dispatchers Association (ATDA) concerning the employee protective conditions imposed by the Interstate Commerce Commission (ICC) in Finance Docket 30965 et. al., (Delaware and Hudson Railway Company--Lease and

> It is further necessary to be clear on the scope of employee rights under the implementing agreement we are requiring. Between the time that ST and GTI first implemented one of their transactions and the date of this decision, numerous employees in the GTI family have been required to make employment choices on what appears to have been unsatisfactory information. RLEA has argued that the "Opportunity to know what their employment options are before they are required to exercise (them)" is the "essential difference" for employees between New York Dock conditions (the conditions that labor has sought consistently throughout this proceeding) and Mendocino Coast. (Post-Hearing Brief, at 28.) We agree with this assessment, and we have decided that the transactions undertaken by GTI cannot be fairly accomplished without respecting this essential difference. Consequently, any implementing plan, agreed to or arrived at through arbitration, shall provide that the employees of the several GTI railroads as of the date of the first such transaction under 49 U.S.C. §1180.2(d)(3) shall not be deemed to have forfeited any rights or benefits as a consequence of decisions made prior to the development of such an implementing plan.
>
> (4 I.C.C. 2d 331, 332)

The parties were not able to agree on an implementing agreement in 1988 and Arbitrator Richard K. Kasher was selected to impose an agreement. Arbitrator Kasher issued an implementing agreement on June 15, 1988. The ICC vacated part of that award on January 10, 1989.

Robert O. Harris served as the successor Arbitrator and, on March 13, 1990 this Arbitrator issued an award and implementing agreement. He stated his intent to include dispatchers within the scope of his decision as follows:

> Without getting into the question of whether the former dispatchers are now properly classified as management employees, it will be necessary to determine whether their former status entitles them to Mendocino Coast labor protection conditions. If they are so entitled, it will become a factual question as to whether, on an individual basis, as an affected employee, any loss was suffered as a result of the transaction. Accordingly, while not deciding the

dispatcher a nonagreement position with the ST. Claimants Barry, Paras, Poppe, and Reid refused the nonagreement ST employment, and filed claims for separation allowance, which the Carrier denied on the grounds that the claimants refused comparable employment. Claimants Margeson and Wakefield elected to separate from the B&M and their claims were denied. Each accepted nonagreement positions with the ST, but Mr. Margeson was later demoted and dismissed and Mr. Wakefield later was demoted. Springfield Terminal calls its dispatchers "train operations managers," and the Carrier asserts that these individuals were management officials.

Under the Harris arbitration the dispatchers' situation was discussed by Mr. Harris as follows:

> The individuals who were employed as dispatchers present a unique situation. These individuals, who had formerly been represented by the American Train Dispatchers Association (ATDA) were "promoted" to management when the lease transaction occurred. As such, they are paid on a monthly basis and do not receive overtime. All but four of the dispatchers were transferred to ST and "promoted." The four were laid off because of a decline in business. When Larry Ferguson, Director of Train Operations, testified he indicated that dispatchers had the power to go out in the field and relieve a trainmaster. He indicated that this power had never been utilized to his knowledge. He also indicated that dispatchers could "highball" a train past a scheduled pick up if they believed this advisable and that they could give rules examinations. Mr. Ferguson admitted that dispatchers under the old B&M and MEC contracts had all these powers, but that they were never exercised. Mr. Ferguson also indicated that the dispatcher could deal directly with a signal maintainer whereas prior to the lease he would have had to advise his assistant director, who then could do so. Finally, he indicated that dispatchers had the responsibility for reading the hot box detectors, although he admitted that there were no hot box detectors on the MEC.
>
> (Harris, p. 26)

if a party has refused to abide by the essential of the award; (2) the terms of the awards presuppose that the affected employees will be allowed to follow their work to the ST with their seniority rights and other collective bargaining rights preserved; and (3) Guilford is equitably estopped from reliance on the awards because it has accepted the benefits of the lease transactions but has failed to apply the implementing arrangement to the dispatchers craft or class.

2. Summary of the Carrier's Contentions. The Carrier states that the ICC, in its Order of February 17, 1988, clearly and unequivocally stated that employees must accept comparable positions with ST or forfeit labor protection benefits. In the cases at issue the Carrier states the Organization has taken the opposite position. The Carrier states that employees cannot refuse employment and be considered deprived of that employment. It states that the ST employment was a betterment because management employees have a better benefit in the form of a pension plan.

The Carrier contends that each of the claimants involved has been afforded their full rights under the protective conditions of the Harris award and the various ICC Orders. It states that each claimant has been properly offered employment by the ST and that the four claimants who have never worked for ST have refused employment thereby relinquishing their rights to labor protection. The Carrier states they are not "dismissed employees" and have not been deprived of employment. And, the Carrier states that the two claimants who accepted employment with ST left active service for reasons that do not serve to trigger protective benefits, that is dismissal and retirement.

The Carrier requests that the six claims for separation allowances be denied.

As a result, these individuals were included within his decision. It was not his intent to require the ST to apply the B&M/ATDA rates of pay, rules and working conditions in operating the leased lines as part of the fall 1990 implementing agreement.

The Organization's contentions that Guilford is equitably estopped from reliance on the Award because it has accepted the benefits of the lease transaction but has failed to apply the implementing agreement to the dispatcher craft or class must be rejected as being based on an erroneous reading of the Harris award. The Organization's assertion about this presupposition in the Harris award that the dispatchers be allowed to follow their work to the ST with collective bargaining rights preserved is contrary to the determination of the Harris award, page 54.

B. Disposition of Time Limit Issues

The ICC affirmed the Harris award and arbitrated implementing agreement on August 14, 1990 at a voting conference; and the ST began preparation and commenced implementation of the award soon thereafter. On August 31, 1990 the Carrier made offers of employment to certain of the claimants.

Section 5 of the Harris implementing agreement award states in part:

> (c) All claims for separation allowance under Article I, Section 7 of the Mendocino Coast conditions must also be filed with Mr. R. Akins at the above address, within seven (7) days of the effective date of this implementing arrangement, or of the date of the employee's dismissal, whichever is later.
>
> (d) GTI must notify the separation allowance claimant in writing within ten (10) days of

2. Gary S. Poppe

By letter dated September 7, 1990, amended by letter of September 10, 1990, Claimant Poppe filed claim for a separation allowance. The claim was acknowledged and denied by the Carrier in a letter dated September 26, 1990. In this letter the Carrier informed Mr. Poppe that his claim was filed prematurely and clearly notified him that the Carrier was willing to treat the claim as filed on what was then perceived to be the effective date of the implementing agreement, October 4, 1990; and the Carrier then went on to deny the claim, thus the claim would be considered denied as of the October 4, 1990 date. In the September 26, 1990 letter the Carrier also stated that the General Chairman was informed that the effective date of the Harris arrangement was October 4, 1990. This assertion by the Carrier was not denied in the proceedings before the Committee.

By letter dated January 2, 1991 Mr. Poppe appealed the denial. Section 5(j) of the Harris implementing agreement, which this Committee is bound to follow, requires that any claim denied in accordance with Section 5 shall be final and binding unless the claimant or his or her representative invokes the appropriate arbitration provisions of Article I, Sections 11 or 12 of the Mendocino Coast conditions "within sixty (60) days of the date on which the claim was denied." Since neither Mr. Poppe nor the Organization objected to the Carrier's handling of the premature claim, then according to the terms of the September 26, 1990 letter, the claim must be deemed denied as of October 4, 1990.

This Committee has no authority to rewrite the Harris implementing agreement award by applying a different measure of the time limits for

The Carrier asserts that the claims of Mr. Paras and Mr. Reid were abandoned due to a long period of inactivity. The Carrier has not met its burden of proof in regard to these contentions; and they are rejected.

C. Summary of Testimony at the October 14, 1992 Hearing

Mr. Gary S. Poppe, a former B&M dispatcher who did not accept an employment offer with the ST in October of 1987, testified that he did not do so in 1987 because prior to the notice of September 25, 1987 he observed management doing a lot of duties that they were not qualified to do; and he testified, that management was a revolving door. He testified further that if as a manager he was forced to do something, and he did it wrong, it would be unsafe and would be an insecure position.

Mr. Thomas Coughlan, Jr., a former employee of B&M and Deputy Vice President of ATDA, testified about the terms and conditions of employment under the B&M/ATDA agreement prior to the lease, and the terms and conditions for individuals who performed dispatching duties after the lease to ST.

He testified that before the lease, while working under the B&M/ ATDA agreement, there could be no discipline without a fair and impartial hearing; and any discipline assessed was subject to appeal to the Third Division of the NRAB. He testified that dispatchers would not be demoted without a hearing and appeal rights.

Mr. Coughlan testified that under the ST operations, the Carrier has demoted or dismissed dispatchers at the whim of the Carrier, without a hearing or opportunity to grieve dismissal. Mr. Coughlan re-

Mr. Coughlan testified that vacations were granted on a seniority preference basis before the lease; but it has been changed lately to being granted based on seniority and participating in training programs, one's attendance record and willingness to work extra days. Mr. Coughlan also testified about a 1937 decision that gave dispatchers the right to challenge "overload conditions" through expedited arbitration, which he states is no longer applicable.

The Carrier's representative responded that Mr. Coughlan brought up in his testimony the names of individuals not part of the instant case who are new subjects to the Carrier's representative. Concerning Mr. Margeson the Carrier states that he was moved from dispatcher to assistant manager for transportation; that it was for health reasons, not disciplinary reasons. Concerning Kevin Ryan, the representative stated that he was not familiar with his facts or how it applies to the current case. And, the representative was not familiar with Mr. Vecchio's case. The Carrier's representative states that Mr. Wakefield was given every due process available. And, the Carrier states that a collective bargaining agreement is not a guarantee of future job security.

D. Disposition of the "Comparable Positions" Issue

In deciding whether positions are comparable this Committee has considered all factors of record, including comparable skill and responsibility factors as well as matters of comparable compensation and employment rights. Arbitrator Harris established that the train dispatchers "promoted" to management on the ST continued to operate in the same manner and with approximately the same responsibilities as dispatchers prior to the lease transactions. Clearly, skill and

Section 4. Individual Employee Rights

No employee of the B&M, MEC or PT shall be deemed to have forfeited any rights or benefits under the Mendocino Coast conditions or existing collective bargaining agreements, as a consequence of any decision made, in reference to that employee's employment with any GTI subsidiary, during the period beginning when first affected by a lease and ending with the effective date of this implementing arrangement.

Mr. E.A. Wakefield filed a claim for a separation allowance on October 1, 1987, which was denied by the Carrier. He was offered and accepted a nonagreement position with the ST performing train dispatcher functions. In May of 1988 Mr. Wakefield was demoted to work as a clerk-agent (assistant transportation supervisor) and held other positions that paid less than a train dispatcher until his retirement on April 7, 1989. Mr. Wakefield filed and collected monthly displacement allowances (MDA) under the Mendocino Coast labor protection conditions, calculated as though he were receiving the higher dispatcher position rate of pay because the Carrier determined he was directly responsible for losing his dispatcher position and therefore to pay the MDA at the lower paying clerk position would subsidize his demotion.

In accordance with the Harris award, Mr. Wakefield was extended an offer of employment in conjunction with the implementation of that award in the fall of 1990. And, Mr. Wakefield filed for a separation allowance. Section 4 of the Harris implementing agreement award stipulates that no employee of the B&M shall be deemed to have forfeited any rights or benefits under the Mendocino Coast conditions as a consequence of any decision made in reference to that employee's employment with any GTI subsidiary during the period of October 1, 1987 through to the effective date of the Harris implementing agreement

The Carrier's dismissal of Mr. Margeson during the above set forth period cannot serve as a forfeiture of Mr. Margeson's rights under the Mendocino Coast conditions according to the clear language of Section 4 of the Harris implementing agreement. Since the Carrier did not offer Mr. Margeson any position in the fall of 1990 under the implementing agreement, Mr. Margeson qualifies as a dismissed employee entitled to separation allowance under Article I, Section 7 of the Mendocino Coast protective conditions.

## AWARD

The claims of Mr. Paras, Mr. Reid, Mr. Wakefield and Mr. Margeson are sustained to the extent set forth in the Findings. The claims of Ms. Barry and Mr. Poppe are denied.

ORDER: The Carrier is ordered to comply with this Award within thirty days from the date of this Award.

David P. Twomey
Arbitrator

DATED: 12/5/92