ARBITRATION COMMITTEE ESTABLISHED PURSUANT TO ARTICLE I, SECTION 11 OF THE *MENDOCINO COAST* RY., INC. - LEASE AND OPERATE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD

(*Mendocino Coast* Benefit Entitlement For Displaced Employees In Months Not Worked)

I. QUESTION AT ISSUE

As agreed by the parties (Car. Submission at 1; Org. Submission at 2), the issue in this matter is:

> Does the Carrier have right to suspend Section 5 of Article 1 of *Mendocino* protection provided in October 30, 1992 Agreement when Claimants identified in paragraph 3 do not perform work in a given month?

II. OPINION OF BOARD

A. Facts

On April 1, 1991, the Interstate Commerce Commission in *Finance Docket 31754* authorized the Kyle Railroad Company's lease of approximately 347 miles of the Carrier's trackage in Northern Kansas on the Concordia Branch (MP 409.119 to MP 580.626), Lenora Branch (MP 623.60 to MP 538.72), Solomon Branch (MP 0.93 to MP 57.89) and Burr Oak Branch (MP 496.30 to 529.70) as well as trackage rights between MP 173.14 at Solomon, Kansas and MP 186.00 at Salina, Kansas. Employee protective conditions were provided as set forth in *Mendocino Coast Railway, Inc. - Lease and Operate*, modified, 354 I.C.C. 732 (1978), and 360 I.C.C. 653 (1980); and in *Norfolk & Western Railway Co. - Trackage Rights - BN*, 354 I.C.C. 605 (1978); as clarified in *Wilmington Term. R.R. Inc. Pur. Lease - CSX Transportation, Inc.*, 6 I.C.C. 2nd 799 (1990). Consistent therewith, the Carrier and the Organization signed an implementing agreement dated October 25, 1991. *See* Org. Exh. 6; Car. Exh. M.

Thereafter, the process of identifying protected employees commenced. For purposes of this proceeding, the relevant letter between the parties is dated October 30, 1992 which was signed by the parties as an agreement. *See* Org. Exh. 12; Car. Exh. A:

> This has reference to our discussion in conference on Thursday, May 21, 1992,

concerning claims that have been submitted in connection with the leasing of approximately 347 miles of track commonly referred to as Northern Kansas Grain Lines.

During our discussion, we reviewed the claims submitted on behalf of Messrs. M. H. Hennigh, M. W. Schmidt, T. Stephenson, M. F. Hillyard, J. W. McGraw, R. R. Duckworth, S. D. Smith, R. Z. Duran, M. W. Wilbum, and J. R. Hutchens. As indicated in our discussion, the abolishment notices posted on May 27, 1991, involved eight (8) positions; however, seven (7) positions were filled at the time of the abolishment and the remaining position was assigned to Mr. D. A. Bergman who was not working due to disability. Two (2) employees, Messrs. J. T. Smith and G. E. Breen, elected to take separation allowance resulting in the remaining five (5) employees exercising their seniority.

In addition to the protection being afforded to employees indicated in Mr. Heaton's letter of December 12, 1991, it was decided that in view of the circumstances involved, displacement allowances pursuant to Section 5 of Article I of Mendocino would be allowed to Messrs. K. G. Fossenburger, M. F. Petesch, F. L. Museler, J. S. Horton, M. T. White, N. R. Simmers, J. B. Van Nortwick, J. S. Kreifel, D. B. Wilson, J. L. Guatney, K. E. Handke, T. D. Clark, P. B. Benshoof, and R. L. Shorb commencing July 1, 1991.[1]

In addition to those identified in Mr. Heaton's letter of December 12, 1991, it was agreed that Mr. O. W. Bowers would also be eligible for protection effective July 1, 1991, on the same basis as those identified in Mr. Heaton's letter of December 12, 1991.

It is further understood that the pending claims on behalf of Messrs. E. D. Sammons, R. D. Smith, J. A. Musgrove, L. D. Johnson, L. L. Wiese, D. W. Kern, R. D. Underwood and M. L. Fitzgerald, would be dismissed.

As was indicated in our discussion, the above understanding is made on an amicable basis in order to resolve our differences on the issues involved. Furthermore, it was understood that this handling would not be considered as a precedent nor be cited in future handling of similar cases.

* * *

The narrow dispute before this Board is whether certain displaced employees are entitled to *Mendocino Coast* benefits for months in which they do not work. The Organization asserts they are so entitled. The Carrier argues that no such entitlement exists.[2]

B. Discussion

Thus, the narrow and specific question before this Board is whether a displaced employee under Article I, Section 5 of *Mendocino Coast* is entitled to benefits for months in which that employee does not work. For reasons discussed below, we find that if a displaced employee does not work in a given month, the employee's benefits under *Mendocino*

[1] The Carrier's Manager Protection Administration K. G. Heaton's December 12, 1991 letter (Org. Exh. 8; Car. Exh. O) identifies ten employees on the Northern Kansas Lines (M. W. Wilburn, M. H. Hennigh, T. Stephenson, M. F. Hillyard, J. M. McGraw, R. R. Duckworth, S. D. Smith, J. R. Hutchens, M. W. Schmidt and R. Z. Duran) considered to be protected effective July 1, 1991 and two employees on the Wichita Grain Lines (R. W. Higgenbothom and B. K. Morgan) considered to be protected effective April 15, 1991.

[2] The parties agreed that Claimant M. T. White would be considered as the lead Claimant in this dispute and that other claims would be held in abeyance pending the outcome of this matter.

cannot be suspended.

1. The Relevant Language

The relevant provisions of *Mendocino Coast* are as follows:

Article I

1. Definitions —(a) "Transaction" means acquisition by a railroad of trackage rights over, joint ownership in, or joint use of, any railroad line or lines owned or operated by any other railroad, and terminals incidental thereto.

(b) "Displaced employee" means an employee of the railroads 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 railroads who, as a result of a transaction is deprived of employment with the railroads 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.

* * *

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, 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 form which we 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 a 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.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carriers a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances —(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and

continuing during his protective period, equivalent to one-twelth [sic] of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroads shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, or failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

2. The Parties' Positions

The Carrier's argument that the employee must work in a month in order to receive benefits is succinctly set forth in its Submission at 3:

> ... Mendocino is explicit in that the employee eligible for "displacement allowances" is an employee being compensated on a Carrier position. Otherwise, there would not be any need for reference to wording such as "position in which he is retained," "in his retained position," "retained position" and "position which he elects to retain." In the instant case, the question at issue deals with a situation in which the employee is not occupying a position and is not receiving any compensation from the Carrier. Thus, the employee has not met the criteria for a "displaced employee" and for "displacement allowances." Therefore, Mr. White is not eligible for any benefits of Article I, Section 5, when he does not perform work in a given month.

Thus, the Carrier keys upon the use of the phrase "retained position" and the like in Article I, Section 5 of *Mendocino Coast* to argue that a displaced employee must actually work in a month to receive protective benefits. The Organization argues that employees are entitled protective benefits irrespective of whether they work in a given month.

The resolution of the dispute turns upon the application of traditional rules of contract construction.

3. Is The Governing Language Clear and Unambiguous?

The threshold inquiry goes to the question of whether the language is clear and unambiguous.[3] If the language is

[3] *I-T-E Imperial Corp.*, 67 LA 354, 355 (Weiss, 1976) ("The threshold question in this

clear, there is no need to utilize the tools of contract construction in an attempt to ascertain the intent of the drafters.[4] Therefore, the question now is whether the language in Article I, Section 5 of *Mendocino Coast* is sufficiently clear so as to support either party's position on whether a displaced employee must work during a month in order to receive protective benefits.

"... [A]n agreement is ambiguous if 'plausible contentions may be made for conflicting interpretations' thereof."[5] We find that conflicting plausible interpretations exist in Article I, Section 5. The opening sentence in Section 5(a) states that "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 ...." Under that language, and consistent with the Organization's position, if a displaced employee does not work in a given month, then the employee is "unable ... to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced ...." and therefore "he shall ... be paid a monthly displacement allowance ...." But, on the other hand and consistent with the Carrier's position, in the last part of the first sentence in Section 5(a) as well as found throughout Section 5, the relevant language requires that the measure is against "the position in which he is retained". Consistent with the Carrier's position, then, to receive benefits the language appears to require that the employee be "retained" in a "position". Stated differently, if the employee does not work, he has not been "retained" and would not be entitled to protective benefits for that month.

Both interpretations are therefore plausible. If an employee does not work in a month, he has not been able to "obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced" and would therefore arguably be entitled to benefits. But yet, the displaced employee's pay is measured against "the position in which

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case is whether the language of ... the collective bargaining agreement is so clear and unambiguous that I need go no further to resolve the issue herein.").

4 Elkouri and Elkouri, *How Arbitration Works* (BNA, 4th ed.), 342 ("If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators.").

5 *How Arbitration Works, supra* at 342.

he is retained" and, if he does not work, he is not "retained". Thus, the language is not clear. The rules of contract construction can therefore be applied.

4. Application Of The Rules Of Contract Construction

Application of the rules of contract construction favors the Organization's position.[6]

First, it is axiomatic that "[w]hen one interpretation of an ambiguous contract would lead to harsh ... or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used."[7] Taken to its logical extent, the Carrier's position that an employee must work in a given month in order to receive protective benefits leads to a harsh and illogical result.

A hypothetical illustrates the point. Assume that Employee "A" with 30 years of service is affected by a "transaction" but is able to exercise that substantial seniority to obtain a position elsewhere in the Carrier's system. Also assume that Employee "B" who has six years of service is affected by the same transaction, but, because of his relatively low seniority, cannot similarly find a position. Under *Mendocino Coast*, Employee "A" is a "displaced" employee under Article I, Section 1(b) and is entitled to benefits under Article I, Section 5 and Employee "B" is a "dismissed" employee" under Article I, Section 1(c) and is entitled to benefits under Article I, Section 6.

For the sake of discussion, further assume that displaced Employee "A" can only retain his new position for a portion of one month after his displacement. Also assume that Employee "B" is unable to return to service due to his low seniority. According to the logical extent of the Carrier's position, because Employee "A" who has 30 years of seniority only worked in one month, that displaced employee is entitled to only one month's protective benefits and is precluded from receipt of protective benefits for the balance of the six year protective period.[8]

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6 Very often in ascertaining the meaning of ambiguous language, useful tools are bargaining history (*see How Arbitration Works, supra* at 357—"Precontract negotiations frequently provide a valuable aid in the interpretation of ambiguous provisions") and past practice (*id.* at 360—"One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is that of custom or past practice of the parties."). That kind of evidence does not exist in this record. Moreover, the parties advise this Board that they were unable to find authoritative awards precisely on point. Therefore, the other rules of contract construction must be applied.

7 *How Arbitration Works, supra* at 354.

8 *See* Article I, Section 1(d) ("'Protective period" means that 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 em-

On the other hand, Employee "B", who has 24 years *less* seniority than Employee "A", would be entitled as a dismissed employee to the *full* six years of protective benefits.[9]

That end result of the Carrier's position is harsh and not logical. Indeed, for all purposes, the logical end result of the Carrier's position totally ignores the entire concept of seniority. Under the Carrier's interpretation, the far junior employee who could not obtain a position through the exercise of seniority is immensely better protected as a dismissed employee than is the senior employee who could only retain a position as a displaced employee for a short period of time. On the other hand, the Organization's position does not similarly undermine the concept of seniority and provides for the basic intent of *Mendocino Coast*—the protection of employees adversely affected by a transaction giving due deference to the exercise of their seniority.

Second, "[i]f an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture."[10] The Carrier's position works as a forfeiture of protective benefits for the displaced employee. The Organization's position does not.

Third, "[f]requently arbitrators apply the principle that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others ... [t]o expressly state certain exceptions indicates that there are no other exceptions."[11] In Article I, Section 5(c), the language states that "The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause." Missing from those stated explicit provisions is the condition advanced by the Carrier in this case that the displacement allowance should also cease

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ployee was in the employ of the railroads prior to the date of his displacement or his dismissal."). *See also*, Article 1, Section 6 where dismissed employees receive the differential between the computed earnings of the monthly average in the year prior to dismissal and other earnings received.

9 *See also, C&NW and ATDA, Case 1* (Fishgold, May 20, 1988) at 6 quoting a May 27, 1986 award of Referee Marx ("In an award dated May 27, 1986, Referee Herbert Marx determined that employees who became extra dispatchers subsequent to the transfer of work and who had received displacement allowances for several months could not subsequently convert the displacement allowances to dismissal allowances") thereby precluding a change of status for the displaced employee to that of a dismissed employee. If correct, that interpretation by the cited award finding an inability to convert from a displaced employee to a dismissed employee locks the senior employee who could find a position after a transaction into a displaced status. *Compare* Article I, Section 6(b) which provides that a dismissed employee who returns to service "shall be entitled to protection in accordance with the provisions of section 5 [*i.e.*, for displaced employees]."

10 *How Arbitration Works, supra* at 356.

11 *How Arbitration Works, supra* at 355.

when the displaced employee does not work in a given month. Under this rule of contract construction, it is therefore fair to conclude that such a condition for the cessation of benefits was not intended. Given that cessation of displacement allowances was explicitly provided for in Article I, Section 5(c), had the intent been that lack of work in a given month was also one of those conditions cutting off benefits, that condition could have easily been stated. The silence of that section on this issue coupled with the explicitly stated conditions under which benefits cease lead to a conclusion that the Carrier's position was not intended.

The rules of contract construction therefore favor the Organization's position.

5. The Carrier's Other Arguments

The Carrier's other well-framed arguments do not change the result.

First, the fact that the Carrier may have extended protection to more employees than the number of abolished positions (Car. Submission at 7-8) does not require a different outcome. In the October 30, 1992 Agreement, the parties specifically agreed in the third paragraph that "displacement allowances pursuant to Section 5 of Article I of Mendocino would be allowed ...." to the specifically named individuals. That application of the provisions of *Mendocino Coast* to those named individuals was without any stated exceptions. This Board does not have the authority to change the terms of the October 30, 1992 Agreement. By agreeing to apply the terms of *Mendocino Coast* to the named employees without exception or limitation, the Carrier cannot now impose a limitation of entitlements to those named individuals because of the fact that there were more employees named than there were positions abolished by the transaction leading to the imposition of protective benefits. In light of the execution of the October 30, 1992 Agreement, the reasons for the Carrier's extension of *Mendocino Coast* protection to the number of employees are therefore not material. For whatever reasons, the Carrier agreed to provide that protection. As a matter of contract, those protections fully apply to the named employees.

Second, the Carrier seeks to require a demonstration of a transaction other than the lease and operate to Kyle Railroad which was the subject of *Finance Docket 31754* dated April 1, 1991. *See* Car. Submission at 8-9, *et. seq.* ("In the case before us, there has been no evidence developed by the Organization nor the Claimant to substantiate the lack of compensation in a given month is a result of a 'transaction'."). But the October 30, 1992 Agreement is clear. In that Agreement, the parties identified the

transaction as "the leasing of approximately 347 miles of track commonly referred to as Northern Kansas Grain Lines"—*i.e.*, the same "transaction" discussed in *Finance Docket 31754* which triggered the application of protective benefits. In the October 30, 1992 Agreement, the parties then agreed to apply the *Mendocino Coast* conditions to the named employees. No further demonstration of a "transaction" is necessary. In the October 30, 1992 Agreement, the parties agreed that a transaction had occurred and that *Mendocino Coast* was applicable to the named affected employees.[12]

Third, the Carrier argues (Car. Submission at 7) that the benefits sought by the Organization are commensurate with dismissal allowances under Article I, Section 6 and not displacement allowances under Article I, Section 5 and had the parties intended dismissal allowances would be applicable, they would have agreed to that type of benefit which was not done in the October 30, 1992 Agreement. But that argument assumes that the Carrier's position on the suspension of protective benefits under Article I, Section 5 for a displaced employee who does not work in a given month is a correct position. However, as set forth above, notwithstanding the Carrier's strong arguments, the rules of contract construction require a finding that the Carrier's position is not correct. Our conclusion in this matter is that this case involves displacement allowances and that for such allowances under Article I, Section 5, a displaced employee's inability to work in a month does not suspend the receipt of benefits.

Fourth, the Carrier argues that specific circumstances concerning Claimant White precluded his receipt of benefits. *See* Car. Submission at 12-13. Similarly, the Organization contends that certain employees who were paid benefits were not paid at the appropriate level. But, these kinds of individual questions are not properly before this Board. By agreement of the parties and given how the question at issue was formulated, the only question properly before this Board is the entitlement of employees to benefits in months where no work was performed. We therefore cannot address

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[12] The awards cited by the Carrier (Car. Submission at 8-13) which require the Organization to show a causal nexus between a transaction and an employee's being placed in a worse position with respect to his employment are distinguishable. In those cases, no nexus was found to the lessened employment opportunities and a "transaction" as defined in the operative protective agreement. Here, the October 30, 1992 Agreement identifies the transaction as the "leasing of approximately 347 miles of track commonly referred to as Northern Kansas Grain Lines" and then the parties agreed that "in view of the circumstances involved, ... displacement allowances pursuant to Section 5 of Article I of Mendocino would be allowed." Here, the parties therefore agreed that a causal nexus existed between the lessened employment opportunities and the leasing transaction. No further showing by the Organization is necessary.

these individual-type questions.

III. AWARD

A displaced employee's benefits under *Mendocino Coast* cannot be suspended if that employee does not work in a given month. The answer to the posed question is therefore in the negative.

Edwin H. Benn
Neutral Member

W. E. Naro
Carrier Member

S. A. Hammons, Jr.
Organization Member

Dated: June 1, 1994