

## IN THE MATTER OF THE ARBITRATION BETWEEN:

BROTHERHOOD OF MAINTENANCE	)	
OF WAY EMPLOYES,	)	
	)	Alan J. Fisher
and	)	Arbitrator
	)	
SOO LINE RAILROAD COMPANY	)	

## INTRODUCTION

An arbitration hearing between the parties was held in Minneapolis, Minnesota on April 22, 1992. Both parties filed prehearing submissions. At the Arbitrator's request, the parties waived the time limits for issuing this decision.

The Brotherhood of Maintenance of Way Employees (the "Organization") was represented by Ernest L. Torske, Vice President of the Northwestern Region, and Mark W. Wimmer, General Chairman. The Soo Line Railroad Company (the "Carrier") was represented by Michael R. Kluska, Manager Labor Relations.

## STATEMENT OF CLAIM

Based on the briefs submitted by the parties, the Arbitrator has summarized the Statement of Claim as follows:

Claim on behalf of Herbert P. Anthony, Jack W. Dickey, Vincent A. Donovan and Kerry W. Scott, Crossing Watchmen at Dubuque, Iowa, for protective benefits pursuant to the Norfolk and Western Ry. Co.-- Trackage Rights -- BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. -- Lease and Operate, 360 I.C.C. 653 (1980), as related to the Carrier's acquisition of trackage rights on the Chicago Central and Pacific Railroad.

## STATEMENT OF FACTS

The record shows that on January 31, 1989, the Carrier entered into an agreement with the Iowa Department of Transportation to provide for the "functional relocation of the Carrier's track in consideration for the required right of way for construction of relocated U.S. (Highway) 61 project in Dubuque, Iowa."

The Carrier entered into a Trackage Rights Agreement with the Chicago Central and Pacific Railroad ("CC&P") on March 9, 1989, for the operation of its trains over the CC&P. On March 22, 1989, the Carrier filed a Notice of Exemption under 49 CFR 1180.2 (d) (5) with the Interstate Commerce Commission for the acquisition of overhead trackage rights over the line of the CC&P at Dubuque. The I.C.C. issued its Notice of Exemption on March 29, with a service date of April 15, 1989, in Finance Docket No. 31437, conditioned on the appropriate labor protection.

On November 28, 1990, the Carrier gave notice to abolish all positions of Crossing Watchmen at Dubuque, Iowa. Thereafter, on December 4, 5 and 7, 1990, the Claimants initiated claims in accordance with Article I, Section 7 of the Protective Conditions of Mendocino Coast which states, in pertinent part:

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

The Carrier denied the claims submitted on behalf of the four Claimants in a letter dated December 10, 1990, advising the Claimants that their positions as Crossing Watchman were abolished as a result of the elimination and automation of crossing signals.

In a letter dated January 3, 1991, the Organization notified the Carrier that the overhead trackage rights acquired by the Carrier to operate over the CC&P at Dubuque, Iowa impacted the positions of the four crossing watchmen and therefore, requested the Carrier to enter into "negotiations for the purpose of reaching an agreement with respect to the application of the terms and conditions of Article I, Section 4 to provide for the appropriate employee protection and implementing agreement."

The Carrier denied the request in a letter dated March 14, 1991. The Carrier stated that there was no need for negotiations because its position was that no transaction occurred.

The parties failed to achieve a settlement of the grievance at the various steps of the grievance procedure. Hence, the grievance was processed to arbitration.

## ORGANIZATION'S POSITION

In summary, there is no dispute that the trackage rights agreement approved by the I.C.C. imposed the employee protective conditions of Norfolk and Western Railway Co. as modified by Mendocino Coast Railway. The Organization argued that the acquisition of the trackage rights over the CC&P by the Carrier constituted a transaction as defined in Article I, Section 1 (a). Due to the fact that at the time their positions were abolished, the Claimants were unable to obtain a position in the normal exercise of their seniority rights under existing agreements, rules and practices, the Claimants became dismissed employees as defined in Section 1 (c) of the Norfolk and Western Railway Co. employee protective conditions as modified by the Mendocino Coast Railway. Once the employee was dismissed, he had the option of electing a dismissal allowance or a separation allowance. In this case, each employee elected in a timely manner to take a separation allowance.

The provisions state in pertinent part:

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.

(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 a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, of his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

The Organization argued that 1) the Carrier entered into an agreement with the Iowa Department of Transportation that required the Carrier to reach a Trackage Rights Agreement with the CC&P; 2) the agreement provided that the crossings at First, Second, Third and Fourth Streets would be removed; 3) affected employees would be governed by protective conditions; 4) as a result of the Trackage Rights

Agreement the manually controlled road crossings were removed and the Claimants' positions were abolished; and thus, 5) the Claimants were affected by the Trackage Rights Agreement and are now entitled to the Norfolk and Western Railway Co. employee protective conditions as modified by the Mendocino Coast Railway.

### CARRIER'S POSITION

The Carrier argued that the Organization failed to meet its burden of proof that the Claimants were adversely affected as a result of the Trackage Rights Agreement with the CC&P or placed in a "worse position". The Carrier asserted that the Organization must establish a direct link or the required causal nexus, and it failed to do so. The approval of the acquisition of overhead trackage rights over the CC&P line did not grant unconditional protection to the Claimants.

It is the Carrier's position that the Claimants' work positions were abolished by the elimination and automation of crossing signals within the Dubuque Joint Interlocking Facility in conjunction with the U.S. Highway 61 project. The crossings were modernized consistent with other projects on the Carrier's property. Although there is no dispute that the positions were abolished at the time the Trackage Rights Agreement became operative, the Carrier purposely delayed the abolishment of the positions to coincide with the highway project. As evidence in support of its position, the Carrier declared that although four crossings were eliminated, Fifth Street Crossing is a new crossing constructed as part of the project within the physical boundaries of the area the Claimants had controlled previously, and it is now electronically controlled.

The Carrier asserted to the Arbitrator that the Carrier had planned to eliminate the Claimants' positions five years earlier under a modernization project, similar to projects completed at LaCrosse, Wisconsin and Clinton, Iowa. However, the pending highway project preserved their positions because it did not make economic sense to modernize crossings that would eventually be removed. Hence, the positions were abolished as a result of the automation of crossing signals which could have been accomplished without I.C.C. authority, not the Joint Trackage Agreement.

The Carrier further argued to the Arbitrator that the Organization had forfeited any rights it had to pursue benefits for the Claimants under Section 4 because the Organization had not complied with the time limits set forth in that section.

## DISCUSSION

The grievance involves a determination by the Arbitrator whether the Claimants are entitled to employee protective benefits. The Arbitrator has reviewed and considered the submissions and skillful arguments presented by the parties at the arbitration hearing. The Arbitrator has also reviewed the cited arbitration awards in addition to numerous decisions and other authority regarding employee protective conditions. The burden is upon the Organization in this case to show how the employees were affected by the Trackage Rights Agreement.

First, the Arbitrator finds no support in the record that the Organization did not comply with the established time limits. Accordingly, the case will be decided on the facts of the case and the merits of the arguments presented at the hearing.

It is clear from the evidence that as a condition precedent to the acquisition of the Carrier's right-of-way in downtown Dubuque, Iowa by the Iowa Department of Transportation and commencement of the highway construction project, the Carrier and the CC&P were required to enter into a trackage rights agreement for the functional relocation of the Carrier's line. Further, there is no dispute that any trackage agreement would contain the necessary employee protective conditions afforded to affected employees. The record shows that the Organization maintained at all times that the trackage agreement with the CC&P was a transaction as defined by the applicable protective conditions, and the Carrier recognized the Organization's position in its letter of March 9, 1992, to General Chairman Mark Wimmer. Accordingly, under these circumstances, if an employee was dismissed as a result of the transaction, the employee would be entitled to protective benefits.

The Carrier wrote in its submission and vigorously argued at the hearing that the Claimants' positions were abolished due to the elimination and modernization of crossing signals rather than the direct result of the trackage agreement. Further, the positions had been preserved for more than five years pending the construction of the relocated U.S. Highway 61 project. While the evidence of record shows that the Carrier, and its predecessor, had planned, discussed and negotiated for more than 15 years prior to the signing of the Trackage Rights Agreement with the CC&P to modernize the crossing signals, no actual work was ever commenced in this regard until after the agreement was signed and the Carrier began to operate its trains over the CC&P line in 1991. Although the Carrier declared at the hearing that it made no economic sense to modernize the crossings when they would be removed at a later date, the record supports the Organization's argument that the


Carrier would have realized substantial labor cost savings had the crossings been modernized when the project was first discussed.

The Carrier further argued that the crossings could have been automated at any time and the positions involved eliminated without the Trackage Rights Agreement with the CC&P. Hence, the Organization had not established the abolishment of the positions were the result of the agreement. The Arbitrator finds that this argument is not relevant based on the facts of this case. The evidence of record shows that the Carrier took no action concerning the elimination and automation of the crossings, and construction of the highway relocation project was not initiated, until after the Trackage Rights Agreement became operative. The Arbitrator further notes that the crossings that were previously protected by the Claimants were not modernized but eliminated as part of the highway project.

Accordingly, based on the unrefuted facts and evidence of record, the Arbitrator finds that the Claimants' positions were abolished as a result of the transaction and not the elimination and modernization of crossing signals. The Claimants are entitled to employee protective benefits.

### AWARD

The grievance is sustained.

  
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Alan J. Fisher  
Arbitrator

  
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Organization Member

Dated: August 10, 1992  
Elgin, Illinois

  
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Carrier Member