In the Matter of Arbitration Between BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and BURLINGTON NORTHERN RAILROAD Regarding D. I. Warren, D. W. Thorson, V. J. Rokusek, J. R. Klemetsrud, and R. T. Wingle	OPINION AND AWARD Before an Article I, Section 11 Arbitration Committee, Nicholas H. Zumas, Neutral.

BACKGROUND

The undersigned Neutral was selected Chairman of an Arbitration Committee established pursuant to Article I, Section 11 of ICC Finance Docket No. 28250 (hereinafter "New York Dock" or "NYD"). Hearing was held November 14, 1988 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 Employes (hereinafter "BMWE" or "Organization") was represented by Vice President S. W. Waldeier and the Burlington Northern Railroad Company (hereinafter "BN" or "Carrier") was represented by Director of Labor Relations Wendell A. Bell.

STATEMENT OF FACTS

In Matter of Milwaukee, St. Paul & Pacific Railroad, 713 F.2d 274 (7th Cir. 1983) cert. denied sub. nom. RLEA v. Ogilvie, 465 U.S. 1100 (1984), the Seventh Circuit, speaking through Judge Posner states cogently the histori-

cal context of the matter before this Board:

Briefly, the Milwaukee, which by 1977 was the seventh largest railroad in the country, went broke that year and, not for the first time, sought shelter under section 77 of the Bankruptcy Act of 1898, 11 U.S.C. section 205 (1952 ed.), which though since repealed remains applicable to cases filed under it. Bankruptcy Reform Act of 1978, Pub. L. 95-598, section 403(a), 92 Stat. 2683. It soon became clear that to avoid complete collapse the railroad would have to get rid of about two-thirds of its lines. There were some potential purchasers but the sticking point was that under the Interstate Commerce Commission's rules any purchaser would have to assume potentially astronomical obligations to the workers made redundant by the purchase. In fact, in the name of "labor protection," each such worker would be entitled to six years of full pay. See 658 F.2d at 1156. With thousands of the Milwaukee's workers likely to be discharged, the total cost of protection would have been hundreds of millions of dollars, see id.--far more than the lines were worth to prospective purchasers. It seemed that the only way out was for the reorganization court to "embargo" (authorize cessation of operations on) the lines the Milwaukee wanted to get rid of; the hope was that an embargo would not require the ICC's authorization and hence no labor-protection conditions would be imposed. When we held that such an embargo would be proper in the circumstances, In re Chicago, Milwaukee, St. Paul & Pac. R.R., 611 F.2d 662, 668-70 (7th Cir. 1979) (per curiam), not only was a major shutdown of rail transportation imminent but thousands of railroad employees could look forward to being laid off permanently with no severance pay. See H.Rep. No. 225, 96th Cong., 1st Sess. 2-3 (1979).

At this point Congress stepped in and passed the Milwaukee Railroad Restructuring Act, 45 U.S.C. sections 901 et seq., in 1979. Among other things the Act transferred primary authority over sales of the Milwaukee's lines from the ICC to the reorganization court, but provided in section 5(b)(1), 45 U.S.C. section 904(b)(1), that in authorizing any such sale "the court shall provide a fair arrangement at least as protective of the interests of the employees as that required under" 49 U.S.C. section 11347. If Congress had stopped there, however, it would not have achieved its purpose of averting the Milwaukee's collapse, for it is under the aegis of 49 U.S.C. section 11347 and its predecessor provisions that the ICC has devised the incredibly expensive labor-protection arrangements that the Milwaukee Railroad could not afford to pay. See New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). Congress therefore went on to require, in section 9 of the Milwaukee Act, 45 U.S.C. section 908, that the unions and the Milwaukee negotiate a labor-protection arrangement the benefits under which would be treated as administrative expenses of the bankrupt estate (section 9(d)).

Under principles of equity receivership, which govern railroad reorganizations, see 11 U.S.C. section 205(b) (1952 ed.); In re Chicago & N.W. R. Co., 110 F.2d 425, 430 (7th Cir. 1940), such benefits would be entitled to highest priority, cf. 3 Collier on Bankruptcy section 507.04[1] (15th ed. 1983), and hence as a practical matter would be payable immediately. Section 13 of the Milwaukee Act, 45 U.S.C. section 912, required each employee to choose between receiving benefits under the section 9 agreement and receiving statutory (that is, section 5(b)(1)) benefits.

A section 9 agreement was negotiated--the agreement of March 4, 1980--and it provided for severance pay equal to 80 percent of a worker's pay for three years. Faced with a choice between this bird in the hand and more than two birds (100 percent for six years) in a very remote bush, almost all of the Milwaukee's employees chose the section 9 benefits, thus waiving, by virtue of section 13, any right to section 5(b)(1) benefits.

BN was a signatory to the March 4, 1980 labor protective agreement and it acquired the right to use and purchase various portions of the Milwaukee including the property here in dispute. Article III, Section 1 of the March 4 agreement provides:

Article III. Monthly Compensation Guarantee
1. Coverage -- A purchasing carrier will provide a monthly compensation guarantee, as hereafter provided, only to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and to its own employees who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs.

By letter dated March 25, 1982, BN elected to commingle work on the Milwaukee with work on its existing seniority districts. Pursuant to Article II, Section 9, BN and BMWE entered into an Implementing Agreement on June 14, 1982 which reaffirmed the election to commingle and by which the parties agreed:

1. Milwaukee employees, other than those hired for the

rehabilitation project, hired by BN pursuant to the March 4th Agreement and this Implementing Agreement will be placed on the applicable BN seniority roster for the rank in which hired with a seniority date which will be the same as their seniority dates as shown on the Milwaukee's seniority roster for that class.

2. (A) A former Milwaukee employee hired to fill a position, higher in rank than the lowest rank in the subdepartment, on the additional job assignments, will be given a seniority date in the lower ranks and rosters which will be the same as his seniority date as shown on the Milwaukee's seniority roster for that class.

(B) For sectionmen, the territories as described above shall be subdivided into "home subdistricts," each of which will have geographical limits coextensive with new Roadmaster territories which are: 1. The entire 14th Sub-division of the Yellowstone Division from west switch at Mobridge (M.P. 806.0) to Terry (M.P. 1080.6); 2. The entire 28th Subdivision of the Minnesota Division from Ortonville (M.P. 600.7) to west switch at Mobridge (M.P. 806.0) and the 25th Subdivision thereof from Aberdeen (M.P. 778.6) to Tulare (M.P. 727.7); 3. The entire 26th Subdivision from Beresford Jct. to Beresford and 27th Subdivision from Canton (M.P. 294.7) to Chamberlain (M.P. 440.5) of the Minnesota Division and the 25th Subdivision thereof from Sioux City (M.P. 513.1) to Tulare (M.P. 727.7).

BN is organized into seniority districts. A seniority district is subdivided into subdistricts or Roadmaster's territories. Roadmaster's territories are apparently the geographic area while subdistricts are the characterization of the geographic area for personnel purposes. By letter dated June 23, 1983, BN stated:

The Carrier must insist, contrary to your contention, that the claimants were not working in the same seniority district in the zone or working district of the acquired property (the Roadmaster's home subdistrict). The claimants were working at the following locations when furloughed:

T. R. Even	-	Sioux City, Iowa
J. R. Klemetsrud	-	St. Paul, Minnesota
V. J. Rokusek	-	Redfield, South Dakota
D. I. Warren	-	St. Cloud, Minnesota
D. W. Thorson	-	Morris, Minnesota

As you can see from the above locations, none of the claimants were working, at the time of their furlough, on the new Roadmaster's territories created on the Terry to Ortonville line in paragraph 3 of the June 14, 1982 Implementing Agreement. Contrary to your contention, these are the "working district[s] of the acquired property" -- not Seniority District No. 11 in its entirety. It does not, then, make any difference that "the seniority of the former Milwaukee Employes' was dovetailed into the seniority roster on Seniority District No. 11." Although this was also provided for by the June 14, 1982 Implementing Agreement, it did not serve to expand the zone or working district as provided in the March 4, 1980 Agreement from the Roadmaster's territories to that of the whole seniority district. The two are entirely separate items and it has always been recognized by the parties that the language quoted above from Article III 1. of the March 4, 1980 Agreement referred to the Roadmaster's territories or "home sub-districts" as they are otherwise known.

This dispute is the combined claim of five BN employes allegedly affected by the transaction described above. All were employes of BN (i.e., a "purchasing carrier"). As of April 20, 1982, the date that interim operations began, BN had not yet purchased the Milwaukee property, but rather was operating on the property through a lease with option to buy arrangement from the State of South Dakota. When interim operations commenced, all five Claimants were in active service somewhere within BN system. BN states in its brief:

On April 5, 1982, [Klemetsrud] was awarded a temporary position...on Roadmaster's Subdistrict #26. On April 21, 1982, he was awarded a permanent position at Willmar, Minnesota.

On April 5, 1982, [Rokusek] was awarded a temporary position... within Roadmaster's Subdistrict #26. On June 30, 1982, he was awarded [a position]...at Redfield, South Dakota.

On February 19, 1982, [Warren] was awarded a permanent sectionman's position...on Roadmaster's Subdistrict #26. On February 26, 1983,...[he] was furloughed.

On April 1, 1982, [Thorson] returned from furlough to a sectionman's position...on Roadmaster's Subdistrict #6 [sic #26]...on February 25, 1983, he was furloughed....

On April 5, 1982, [Wingle was] awarded a temporary position... on Roadmaster's Subdistrict #26. [He was furloughed on August 1, 1983.]

POSITION OF BMWE

BMWE contends that the Claimants were adversely affected by the purchase of the Milwaukee property between Ortonville, MN and Terry, MT and that they are therefore entitled to the labor protection benefits guaranteed by the March 4, 1980 labor protective agreement. BMWE maintains that each Claimant was displaced or "bumped" from his position by either a former employe of Milwaukee whose seniority was dovetailed into that of BN or by a BN employe displaced as part of a chain reaction started by a Milwaukee employe dovetailing into the BN system. BMWE contends that Claimants are within the coverage of the March 4 agreement as defined by Article III, Section 1 of that agreement. Specifically, BMWE argues that the phrase "(1) working in the same seniority district in the zone or working district of the acquired property" means a covered employe needs to have been working in Seniority District No. 11 in order to be eligible for the wage guarantee set forth in the March 4 agreement. In addition, BMWE points out that Claimants were "in active service on Seniority District No. 11 when BN began operations on the former Milwaukee trackage..." and cites the records provided by BN to show that active service.

POSITION OF BN

BN contends that Claimants are not eligible to receive labor protection benefits in the form of wage guarantees created by the March 4, 1980 labor protective agreement because they were not "working in the same seniority district in the zone or working district of the acquired property" and because they were not adversely affected by the transaction involved. BN maintains that Judge Posner's decision makes it clear that the March 4 agreement and the June 14, 1982 implementation agreement are fair within the standards established in the Milwaukee Railroad Restructuring Act and that the benefits established in the March 4, 1980 agreement are the only labor protection benefits available to Claimants.

BN rejects BMWE's contention that Claimants are within the definition of covered employes in Article III, Section 1 arguing that BMWE has wrongly asserted that an employe need only be in Seniority District No. 11 to be "working in the same seniority district in the zone or working district of the acquired property" and therefore covered by the March 4 agreement. Rather, BN insists that an employe must have been working in Roadmaster's Subdistrict #28. BN notes that some Claimants "later made voluntary seniority moves [by] which they placed themselves in that Subdistrict [#28], that working district, but that voluntary action did not serve to add them to the limited and fixed population of purchasing carrier employes who had met the Article III, Section 1 (a) criteria." BN does not state what that "limited and fixed population" would be.

BN also rejects BMWE's contention that Claimants were adversely affected, asserting that Claimants were either not affected by the dovetailing of Milwaukee employes or that the effect was so remote as to be insignificant. Further, BN argues that BMWE never fully or consistently explained how each Claimant was adversely affected and, by implication, maintains that BMWE has failed to fulfill its burden of proof.

FINDINGS AND CONCLUSIONS

The question to be resolved is whether Claimants were properly denied the wage guarantees provided in the March 4, 1980 labor protective agreement which guarantee was created as a result of a transaction approved by the ICC. If not, the wage guarantee claimed should be awarded.

Speaking through Judge Posner, the Seventh Circuit found that the statutory benefits provided by the Milwaukee Railroad Restructuring Act required the deferral of the benefits ordinarily available under NYD. See 713 F.2d at 279. Further, the court found that the March 4 agreement was expressly authorized by the MRRA. The court goes on to conclude it has jurisdiction to interpret the March 4 agreement. It observes:

> Having concluded that we have jurisdiction to interpret the March 4 agreement, we must next determine whether the agreement was intended to bar a claim to statutory benefits by any Burlington employee not entitled to benefits under the agreement. The agreement itself is ambiguous. On the one hand it is labeled an agreement "between railroads parties hereto involved in midwest rail restructuring and employees of such railroads," and thus would seem to have an intended scope going beyond the Milwaukee's own employees. And it not only makes provision for other railroads' employees, including employees of the Burlington, which was

one of the parties to the agreement, but implies in one passage that that provision is exclusive: "A purchasing carrier [such as the Burlington] will provide a monthly compensation guarantee, as hereafter provided, only to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and to its own employees who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs." On the other hand, the preamble of the agreement states that its "scope and purpose ...are to provide...a fair and equitable and complete arrangement for protection of Milwaukee...workers," and later the agreement states that its provisions "shall constitute the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employees who are taken into its employe because of a transaction." The employees in the Burlington group are not employees of the Milwaukee, the bankrupt carrier.

And the court concludes:

The remaining question is whether, even if the March 4 agreement was intended to extinguish any claims to statutory benefits by these employees, the employees can claim those benefits anyway, since section 5(b)(1) requires the Commission to make a fair arrangement that will give the workers at least the benefits they would have under 49 U.S.C. section 11347. They cannot get to first base with this argument unless they are employees within the meaning of the Milwaukee Act, which defines "employees" to include any employees of the Milwaukee Railroad "who worked on a line of such railroad the sale of which became effective on October 1, 1979," but to exclude certain executive officers. 45 U.S.C. section 902(4). Although this definition may not be comprehensive, every specific reference in the Act to "employee" is to an employee of the Milwaukee or occasionally of some other bankrupt railroad; section 9, for example, is explicitly limited to agreements with employees of the Milwaukee. Still, it has long been the practice in railroad acquisitions to impose protective conditions for the benefit of workers of the purchasing as well as of the purchased line, and given the solicitude for labor that suffuses the Act it is implausible that Congress meant to deny the workers of the acquiring railroads any statutory protection.

So the question is whether the March 4 agreement as interpreted to exclude these Burlington workers from any protection from adverse consequences of the acquisition can still be deemed a "fair arrangement" at least as protective of the interests of the employees as is required by 49 U.S.C. section 11347. That section, after also defining minimum labor-protection conditions

in terms of a "fair arrangement," states: "Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees." This implies at least some deference to voluntarily negotiated labor-management agreements such as the March 4 agreement. And what is "fair" under section 5(b)(1) must have some reference to the background and purposes of the Milwaukee Act. The overriding purpose was to avert a complete shutdown of the railroad by providing affected workers with immediate payments in substitution for the overly generous statutory benefits to which they would otherwise have been entitled but which might actually have been completely worthless to them because, if claimed, they would have plunged the railroad into the abyss. See 658 F.2d at 1156 n. 9. Although the main concern was with benefits for the Milwaukee's own employees, it would have been difficult to get the purchasing railroads to agree to purchase the Milwaukee's surplus lines if they could not have bought off all labor-protection claims at once--not only the Milwaukee's workers' claims but their own workers' claims. An arrangement that accomplishes this is "fair" even though some workers, rather remotely connected to the transaction, get no protection.

Based on the persuasive reasoning of the court, this Arbitrator concludes that the labor protective provisions and implementing agreement are applicable and the labor protection provisions of the March 4 agreement are the sole relief available to Claimants here.

To apply the protective provisions, it is then necessary to consider whether or not Claimants come within the definition of covered employes and whether they were adversely affected.

According to Article III, Section 1 of the March 4 agreement, covered employes had to be in active service on the earlier of the dates interim operations commenced or the purchase occurred. On April 20, 1982, interim operations commenced and the purchase had not yet occurred. That, therefore, is the critical date. On that date, all Claimants, except Thorson, were in service on what would become Roadmaster's Subdistrict #26.

Continuing with the conditions set forth in Article III, Section 1, all Claimants were in the same seniority district as the one in which the employes of the bankrupt carrier (i.e., the Milwaukee) had worked. This must be so because of the geographic location of the Milwaukee property in question and also because it is only as a result of their presence in the same seniority district as the Milwaukee employes that Claimants could possibly have been affected.

Turning to the requirement that the covered employe had to be working "in the zone or working district of the acquired property," this means that a covered employe must have worked in a Roadmaster's Subdistrict in which the acquired property (i.e., that of the Milwaukee) existed. BMWE's apparent assertion that an employe need only have worked in the same seniority district is not correct. The second requirement of Article III, Section 1 clearly is designed to add a refinement to the definition of what constitutes a covered employe, not merely clarify the language to encompass all possible terms used in the railroad industry. In that regard, BN is correct that all the terms of the contract should be given their plain meaning.

According to the language of the June 14, 1982 Implementing Agreement, Milwaukee employes whose seniority dovetailed into BN seniority were brought into the BN system in "Roadmaster territories" #14, #26 and #28. All Claimants herein were within those territories at the critical date--April 20, 1982. The only question that remains is that of adverse effect. All

the Claimants except Wingle were displaced or "bumped" directly or by chain reactions initiated by former Milwaukee employes before or during March 1983. This is a reasonable time within which to have the effects of the dovetailing of seniority still be responsible for displacements in the workforce. However, Wingle claims to have been affected far out of the period December 1983-March 1984. This period is simply too remote for the dovetailing to still be held responsible for the displacement.

AWARD

For the foregoing reasons, this Arbitrator finds that Claimants Warren, Thorson, Rokusek and Klemetsrud are eligible to receive the guaranteed wage payment created in the March 4, 1980 labor protective agreement in the amounts proper to their pay rates for the periods claimed; Claimant Wingle is not eligible to receive the guaranteed wage payment.

Nicholas H. Zumas
Chairman and Neutral

Date: March 14, 1989