IMPLEMENTING AGREEMENT ARBITRATION
CONDUCTED PURSUANT TO DECISION OF THE
INTERSTATE COMMERCE COMMISSION
FINANCE DOCKET NOS. 31393,
ROBERT O. HARRIS, ARBITRATOR
APRIL 1990

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CSX TRANSPORTATION, INC. and *
BRANDYWINE VALLEY RAILROAD COMPANY *
*
and *
*
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *
BROTHERHOOD OF RAILROAD SIGNALMEN, *
TRANSPORTATION COMMUNICATIONS UNION, AND *
UNITED TRANSPORTATION UNION *
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Hearings Held: January 16 and 17, and
March 14, 1990, in Washington DC.

Appearances:

For CSX Transportation Inc.,
Nicholas S. Yovanovic, Esquire,
Senior Counsel, Jacksonville FL;

For Brandywine Valley Railroad
Jeffrey S. Berlin, Esquire,
Richardson, Berlin & Morvillo,
Washington, DC;

For Railway Organizations
John O'B. Clarke, Jr., Esquire,
L. Pat Wynns, Esquire,
Highsaw, Mahoney & Clarke, P.C.,
Washington, DC.

Appointment

The ICC proposed to approve of the sale of the Sebring line of CSXT to Brandywine Valley Railroad Company (hereinafter BVRY[1]), as a minor transaction on March 8, 1989. After comments by interested parties, the ICC reviewed the transaction and on August 11, 1989, issued its decision, reported at 5 I.C.C.2d 764, which approved the transaction and imposed labor protective conditions on the transaction. The ICC noted in its decision that:

> Although this is a sale of a line which results in transfer of that line from one railroad to another and not a consolidation which creates an ongoing relationship among the parties thereto of the sort to which the New York Dock, supra, conditions, based as they are upon the Washington Job Protection Agreement, were designed to apply, we find the same result to be acceptable here. Therefore BVRC as well as CSX should participate in the negotiations leading to an implementing agreement with the CSX employees represented by RLEA and BVRC employees.

The parties were unable to negotiate an implementing agreement and were also unable to agree upon an arbitrator. On October 23, 1989, the carriers requested the National Mediation Board (NMB) to appoint an arbitrator. On October 26, 1989, the NMB appointed Robert O. Harris to hear the dispute and to decide whether the proposed implementing agreement of the carriers meets the

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[1]/ In its decision, the ICC refers to BVRC; however, the Company prefers the BVRY designation and it will be used in this decision.

requirements of Article I, Section 4 of the New York Dock conditions, and if not, what additional provisions are required.

Briefs were submitted by the carriers, and jointly by the five organizations involved in the proceeding: Brotherhood of Locomotive Engineers, Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen, Transportation Communications Union, and United Transportation Union, hereinafter referred to as "Rail Labor" or the organizations. Hearings were held in Washington DC, on January 16 and 17 and March 14, 1990, at which the parties had the opportunity to present evidence and oral argument. The matter is now ready for decision.

Facts

On January 26, 1989, the carriers entered into a purchase and sale agreement involving the right-of-way from Sebring, FL to Palmdale, FL; from Palmdale to Lake Harbor, FL; and from Keela, FL, to Cane, FL (hereinafter referred to as the Sebring line). Included in that agreement were the following provisions regarding employees:

> 10. Employee Provisions -
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> A. BVRY will make bona fide offers to hire approximately six (6) of CSXT's employees who were actively employed upon the Subject Property prior to the sale or were affected thereby. To the extent that BVRY requires employees on the Line on the Closing and for a twelve (12) month

period thereafter, BVRY shall first make a bona fide offer on a preferential basis to those qualified CSXT employees whose names and addresses shall have been furnished in writing to BVRY during a period beginning no later than two (2) weeks prior to Closing and ending three (3) months after Closing (the "Listed CSXT Employees"). To the extent that BVRY has jobs, it shall mail, certified mail, return receipt requested, to listed CSXT employees an offer for a job interview to be scheduled no sooner than seven (7) days after the mailing date. Failure of an employee prospect to respond to such offer or to complete the application/interview process shall be deemed to be a refusal of an offer of employment and BVRY shall make a written report of such refusals to David W. Hemphill, 500 Water Street, J200, Jacksonville, FL 32202. If a CSXT employee refuses an actual offer of employment from BVRY, BVRY shall make a written report to David W. Hemphill detailing the position offered, the rate of pay including fringe benefits and the circumstances surrounding the refusal. A bona fide employment offer to a listed CSXT employee shall be an offer of employment made under the same terms and conditions as BVRY would make to non-CSXT employee prospects who qualify for like or similar jobs on the Line. Nothing contained in this Agreement shall be construed as requiring BVRY to assume CSXT's collective bargaining agreements with respect to any CSXT employees hired by BVRY. BVRY shall be deemed to have fulfilled the obligations under this Section 10A upon the earlier of the date (i) BVRY has hired six (6) of the Listed CSXT Employees or (ii) BVRY has extended to all the Listed CSXT Employees offers for interviews and bona fide job offers to those CSXT employees who complete the interview process and otherwise qualify for the job being filled, whether or not any CSXT employee actually accepts a job.

B. In the event that BVRY has job openings and does not make bona fide offers of employment to CSXT employees prior to the Closing Date, the CSXT shall have the unilateral right to terminate and rescind this Agreement without liability or further obligation thereunder by giving written notice of termination to BVRY. To the extent that BVRY has job openings in the twelve (12) month period following the Closing

Date and does not make bona fide offers as aforesaid, CSXT shall not have a right of rescission but shall be entitled to seek an appropriate remedy for breach of this Agreement.

C. It is understood between the parties that from and after Closing each of CSXT's employees hired by BVRY shall be the sole responsibility of BVRY. BVRY shall indemnify, defend and hold harmless CSXT from and against any and all loss, liability, damage or expense connected with or arising out of any claim, demand, suit or action by any such employee hired by BVRY arising out of or relating to the terms and conditions of his employment with BVRY. CSXT shall indemnify, defend and hold harmless BVRY against any claim with respect to or arising out of the terms and conditions of any person's employment with CSXT prior to the Closing Date, including but not limited to those claims arising out of protective conditions or agreements, whether now existing or resulting from this transaction, payment required thereunder, liability under any pension, profit sharing, or other employee benefit plan, or any liability with respect to any disease, injury or physical condition to the extent attributable to employment by CSXT prior to the Closing.

* * *

17. Termination - In addition to CSXT's right of termination pursuant to Section 10 hereof, this Agreement may be terminated prior to the Closing Date by either BVRY or CSXT, without further liability or obligation to either of them (except that CSXT shall refund the deposit in accordance with the provisions of Section 3 hereof), in the event of any of the following: (a) claims, litigation or work stoppage shall be threatened or pending in connection with the transactions contemplated by this Agreement; (b) either an arbitration award or a judgment arising out of the ICC's imposition of labor protection conditions on the transaction subject of this Agreement imposes any obligation or expense on either CSXT or BVRY which is unacceptable to either or both; (c) the Closing has not occurred on or before July 31, 1989, for any reason, including a stay of the ICC's orders or the issuance of an injunction prohibiting the consummation of the transactions

> contemplated herein; (d) the failure or inability of BVRY or CSXT for any reason, to enter into the agreements for interchange, apportionment and assignment and assumption contemplated under this Agreement; (e) the discovery by BVRY of any material defect in CSXT's title to the Subject Property; (f) the discovery by BVRY of a material defect in the condition of the Subject Property; (g) the discovery by BVRY of unacceptable terms or conditions in any contract, agreement or lease to be assumed by BVRY which individually or in the aggregate would have a materially adverse impact on the transaction contemplated herein; or (h) the discovery by BVRY of any materially unacceptable operating conditions on the Line.

CSXT in contemplation of the approval of the sale by the ICC entered into implementing agreements with the BLE on March 31, 1989, with the BRS on April 10, 1989, and with the UTU on March 10, 1989. CSXT failed to reach agreement with the BMWE or the TCU on employee protection. The agreements reached, while differing in detail, all were intended to protect CSXT employees from the effects of the sale. Both the BLE and UTU agreements, but not the BRS agreement, allowed for a leave of absence from CSXT in order to work for the purchasing employer.

As noted above, the ICC ordered the imposition of labor protective conditions; however, it stated:

> Accordingly, we find no requirements in implementing the approved transaction that BVRC adopt the CSX labor agreements or bargain over those agreements in conformity with RLA [Railway Labor Act] procedures.*/
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> */ Nothing in the Supreme Court's recent decision in P&LE v. RLEA, 57 U.S.L.W. 4807 (U.S. June 21, 1989) requires or suggests a different result. Although there is language in that decision that might be broadly construed as

applying to all instances of conflict/overlaps between the Interstate Commerce Act and the Railway Labor Act, we believe that decision by its terms can only properly be applied to decisions authorizing transactions pursuant to section 10901 of the ICA upon which no labor protective conditions have been imposed. Nowhere is it suggested in the P&LE decision that the Court or any member thereof intended by the decision in that case to undercut in any manner the concurring opinion in ICC v. BLE, 107 S.Ct. 2360 (1987) that as a result of section 11341 Commission approval of a transaction automatically exempts such transactions from the requirements of the Railway Labor Act when ever exemption is necessary to let a person carry out the approved transaction.

Similarly, nothing in Brotherhood of Railway Carmen v. ICC, Nos 88-1724 and 88-1694 (D.C. Cir. July 25, 1989)("BRC") affects the validity of the propositions stated in the preceding paragraphs. In that case, the court ruled only that the exemptive provisions of 49 U.S.C. sec. 11341(a) did not authorize the Commission to relieve the parties to a collective bargaining agreement from their obligations under that contract (slip op. at 12-19). We do not dispute the validity of this limited holding by the Court.

In the past, we have not relied upon our explicit power under sec. 11341(a) to exempt approved transactions from all laws to sustain our authority to require that agreements be modified when necessary to carry out the transactions approved by us under 49 U.S.C. sec 11343, et seq. (although, in several cases, we have concededly been less than precise in articulating our authority, with the result that it might appear that we were asserting that the exemptive provision of sec. 11341 gave us or an arbitrator acting in our stead authority to abrogate collective bargaining agreements). On the contrary, we have relied upon the authority vested since 1940 in arbitrators acting pursuant to our protective conditions (such as Section 4 of our New York Dock, supra, conditions), which embody critical provisions of the Washington Job Protection Agreement ("WJPA") and make them applicable to transactions approved by us pursuant to sec. 11343, to impose implementing

agreements that require movement of work and employees despite contrary provisions of collective bargaining agreements.

These labor protective conditions contemplate and encourage voluntary negotiation of necessary changes in agreements to permit implementation of a consolidation approved by us. In the past this has been the norm. If, however, the parties are unable to arrive at implementing agreements necessary to permit the transaction to go forward, arbitrators acting in our stead and we have the authority to impose changes in selection and assignment of forces provisions in existing collective bargaining agreements. This authority is not derived from the explicit authority to exempt transactions from all other laws contained in sec. 11341, but from the 1940 Congressional authorization to impose conditions (then Section 5(2)(f), now sec. 11347) and the long-standing, consistent recognition by the courts and the Commission that provisions in collective bargaining agreements guaranteeing work to employees of individual railroads must be changed when two railroads are merged.

The ICC, in its decision, went on to impose New York Dock conditions, which "require the participation of both carriers, all "interested employees" and the "representatives of such interested employees." The ICC then made the following comments in footnote 6:

We see no grounds for exempting either BVRC or its employees from the requirements of New York Dock, supra. We note that BVRC recognizes its obligation to afford New York Dock, supra, protections to its employees (Robert F. Toia Statement at 4). We believe that New York Dock, supra, requires at a minimum that the present BVRC employees be permitted to join in negotiations together with affected CSX employees over the terms of the integration of the latter employees into the BVRC work force. Similarly, the voluntary concession by CSX (Reply at 24-25) that offers of employment by BVRC to CSX employees will not be considered offers of "comparable employment" for purposes

> of New York Dock, supra, cannot replace the opportunity afforded by those conditions for the potentially affected employees to participate in negotiations with BVRC over the terms of their integration into the BVRC work force.

It should be noted that BVRY took the position prior to this arbitration and in this arbitration that since its employees had never selected a representative for the purpose of collective bargaining, the working conditions of its Pennsylvania employees were unilaterally determined by BVRY. BVRY further indicated that it did not intend to give its present employees located in Pennsylvania the right to choose to work on the Sebring Line. BVRY stated that it represented its present employees for the purposes of the establishment of an implementing agreement.

After the first two days of hearings, the arbitrator suggested to the parties that a further attempt be made to arrive at a negotiated implementing agreement as there might be provisions which the parties could agree to which were not included within those required by Appendix III of New York Dock. The parties did meet; however, they were unable to reach agreement.

The organizations submitted a table which indicated the following:

Employee Craft	Jobs to be abolished per CSXT Notice	Employees Required t relocate due to Sale
Engineers	4	1
Maintenance of Way	10	8
Signalmen	1	1
Clerks	2	2
Conductors/ Brakemen	11	1

The carriers have represented and the organizations do not dispute that at the present time there will not be any dismissed employees because of the line sale and that of the approximately 28 jobs which are filled by CSXT employees (during the sugar season), 13 jobs will be moved and the incumbents will have to relocate. The parties agree that after the sugar season there are four less jobs, all involving train crews.

The only information regarding the composition of the BVRY work force is contained in the carriers' brief. It indicates that:

> BVRY plans to employ a total of approximately twenty persons in its Sebring line operation. One of these will be the superintendent, the senior carrier officer on the scene; this officer will report to the general manager of BVRY, located in Pennsylvania. Reporting to the superintendent will be two management supervisors, one for train operations and the Sebring line office functions, and one for maintenance, including track work and mechanical work. There will be two other management

employees, known as "yardmaster-clerks," who will be responsible for operations on a per-"turn" (shift) basis.

The remaining fifteen employees will be hourly employees who will perform the work of the railroad under the supervision of management. Although these employees will not be divided along craft lines, BVRY intends to classify their work into several primary areas. Eight employees will work in train operations, each person working four hours on the ground and four hours in the cab during an eight-hour turn (thus, no employees will be exclusively engineers as distinct from conductors). Four of these employees will be essentially full-time; the remaining four will work in train operations when there is a demand but will shift over to the maintenance area at other times. In the maintenance area there will be four employees primarily working in track maintenance and three primarily working as mechanics (performing signal work, locomotive repair, car inspection, and other mechanical duties).

BVRY maintains that its employees, regardless of primary function, are required to perform all types of work. It indicates that "seniority" is not a concept which is followed on BVRY and that it "retains and exercises the prerogative of assigning employees to work assignments as determined by management in the interest of the railroad, without regard to any comparison among lengths of service of various employees." BVRY has indicated that it will apply its own employment standards to all new employees, including its medical qualification requirements. It never submitted any evidence regarding those standards and requirements.

Position of the Parties

It is the position of Rail Labor that BVRY must be required by the implementing agreements to assume the collective bargaining agreements of the CSXT employees whom it hires. It indicates that the ICC was wrong when it said that BVRY was not required to adopt the CSXT labor agreements. Rail Labor contends that this arbitrator is not bound by the direction of the ICC in creating an implementing agreement award.

Rail Labor further contends that CSXT is incorrect in its assertion that there must be a single implementing agreement to deal with the selection of forces, noting that prior to the ICC decision in this matter, CSXT had reached individual agreements with several organizations.

Rail Labor notes that all of the individuals working on the Sebring Line have seniority which extends beyond that line and will have to exercise their seniority outside of the geographic area in which they now work. This will mean that they will have to relocate over 30 miles from their present work location, but will not be compensated for that move or will have to work for BVRY. Rail Labor contends that under the Washington Job Protection Agreement they have the right to bargain with BVRY about how many employees will be transferred from CSXT to BVRY; they have the right to bargain about the assignment and selection of forces and that BVRY has

refused to bargain about these issues with them, so BVRY has not met its obligation under New York Dock.

The carriers take the position that BVRY is not required to assume CSXT's labor agreements or to negotiate with CSXT's labor organizations regarding BVRY's rates of pay, rules or working conditions. They indicate that a single agreement is required to determine how the selection of forces should be done. The carriers contend that their proposed implementing agreement which provides for leaves of absence for CSXT employees who obtain employment with BVRY should be adopted even though it is not required by New York Dock. They further note that CSXT jobs are not being transferred to BVRY, so no CSXT employee is required to apply for or to accept employment with BVRY in order to retain protected status under New York Dock; that CSXT does not consider employment with BVRY to be "comparable employment" for purposes of the protective conditions; that a CSXT employee who becomes a "dismissed" employee and who then wishes to go to work for BVRY would not be required to elect the leave-of-absence procedure, but could receive a lump-sum separation allowance under New York Dock and relinquish his CSXT seniority altogether; and that CSXT employees who go to work for BVRY are not being required to do so and would not be eligible to receive New York Dock relocation allowances.

Issue

What is(are) the appropriate Implementing Agreement(s)?

Discussion

In attempting to create an implementing agreement to govern the protection of employees of CSXT who may be affected by the sale of the Sebring Line, it is important to set forth how the situation involved in this line sale is different from the customary sale of a line from one Class I carrier to another. It was that type of line sale which was involved in New York Dock where the ICC set forth the protection it believed appropriate for affected employees. In those cases, each railroad had employees who were represented for the purposes of collective bargaining by labor organizations. The ICC, accordingly, ordered that the two railroads meet with representatives of the employees of each railroad to fashion an implementing agreement.

CSXT, when it contemplated the sale of the Sebring Line, knew that it would have to offer protection to affected employees. It attempted to negotiate implementing agreements with the labor organization representing each of its potentially affected crafts. It reached agreement with several organizations and did not

reach agreement with several other organizations. In each case, BVRY was not a party to the implementing agreement.

Railway Labor believed that BVRY should be a party to the implementing agreements and asked the ICC to require BVRY's participation in the creating of an implementing agreement to govern the transaction. The ICC, as set forth above, found some merit in this position and ordered that BVRY be included in the negotiation of an implementing agreement which would cover the selection of forces when the sale was consummated. It specifically did not direct that the collective bargaining agreements which are in effect on CSXT for the various crafts and classes of employees be transferred over to the BVRY.

Rail Labor has taken the position that this arbitrator should enforce Article I, Section 2 of New York Dock regardless of what the ICC has stated in its decision. However, as this arbitrator has stated in other cases where this argument has been made, an arbitrator writing an implementing agreement award is acting under authority delegated to him by the ICC and he cannot exceed the authority which has been delegated. This arbitrator does not have authority to transfer the provisions of the CSXT collective bargaining agreements to BVRY when the ICC has specifically found that those agreements should not be so transferred.

BVRY has taken the position that it represents the

interests of its present, Pennsylvania based, employees since those employees have not chosen to be represented for purposes of collective bargaining. BVRY indicates that in its view these employees have no interest in BVRY's purchase of the Sebring Line because BVRY will not allow these employees to transfer to work on the Sebring Line. Since there is no collective bargaining agreement between BVRY and its Pennsylvania employees, there is no right of seniority and it is up to BVRY to determine whether it will allow an employee to transfer. This arbitrator cannot look behind that assertion and if BVRY's Pennsylvania employees have any rights under this transaction, they will have to be adjucated under Article IV, Section 11 of New York Dock.

BVRY also has indicated that it does not intend to voluntarily recognize a representative for its employees and will not recognize a representative for its employees unless required to do so under the Railway Labor Act. However, the ICC order has placed BVRY in the anomalous position of having to bargain with the representatives of another railroad's employees. As noted earlier, bargaining has been attempted but BVRY and CSXT have been unable to reach agreement with Rail Labor on even those terms of an implementing agreement which involve the selection of forces.

CSXT has recognized that working for BVRY will not be

comparable to working for CSXT. Accordingly, it has offered as part of an implementing agreement a provision which would state that it will not consider employment by BVRY to be comparable work which would terminate eligibility for benefits under the protection afforded by New York Dock. This would be an obligation of CSXT and not BVRY.

In the past, the ICC has used the singular in its decisions to describe the negotiation and agreement upon, or arbitration to create, a number of implementing agreements which cover individually each of the organized groups which were represented on the railroads involved in the transaction to which labor protective conditions were attached. In those cases, the parties' interests were contiguous. Here that is not true. The carriers have argued for a single agreement because all that BVRY is interested in is fulfilling the direction of the ICC to deal with the selection of forces issue. Rail Labor, on the other hand, wishing to continue the present division of representative status by individual labor organizations has argued that each labor representative is entitled to bargain for or arbitrate its own implementing agreement. Central to this position is Rail Labor's view that not only the collective bargaining agreements, but also its right to represent the crafts or classes found on the seller railroad, are transferred over to the acquiring

railroad by means of the requirements of Section 2 of New York Dock, which states:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

Section 2 of the Railway Labor Act, 29 USC sec 152, sets forth in detail the rights of individual employees to chose representatives for the purpose of collective bargaining and indicates that where there is a dispute as to who is the representative of such employees the National Mediation Board is to "investigate such dispute and to certify" who has been designated to represent such employees. Neither the ICC nor this arbitrator has the power to determine the representatives of an employee group (craft or class).

In Southern Railway Company, et al., Finance Docket No. 31088, 5 I.C.C.2d 842 (1989), the ICC affirmed this arbitrator's finding that if the Mendocino Coast conditions did not require the continuation of the collective bargaining agreement of the lessor carrier, the employees transferring to the lessee would be bound by the collective bargaining agreement on that carrier. The ICC in this case again specifically affirmed its view that collective bargaining agreements do not get transferred

under New York Dock when there is a line sale. While Railway Labor contests this view, in this case they are asking for even more. Here the claim is made that the recognition clause of the agreement between the various organizations and CSXT can bind BVRY and its yet unhired employees, perhaps under a successorship theory. If the law requires such a result, that decision is for the NMB or the courts. Accordingly, an implementing agreement award cannot either grant or deny representative status to a representative for purposes of collective bargaining.

BVRY took the position at the hearing that its purchase contract with CSXT did not require it to hire more than six CSXT employees. The contract itself, quoted above, does not appear to be entirely without ambiguity. Nonetheless, this arbitrator believes that BVRY is attempting to turn its commitment to make "bona fide offers to hire" into a limitation. Were that the case, it should not, in the next succeeding sentence, have stated that it would establish a preferential offer list of CSXT employees who wish to be hired and are qualified. There is no question but that the agreement gives BVRY the right to establish bona fide occupational qualifications and CSXT employees who wish to be hired must meet these qualifications; however, BVRY, having agreed to preferential interviewing, cannot refuse to hire more than six CSXT employees for reasons having nothing to do with

occupational qualifications.

The Supreme Court noted in NLRB v. Burns Security Services, 406 U.S. 272, 280-1 (1972) at footnote 5 that:

> ... [A]n employer who declines to hire employees solely because they are members of a union commits a sec. 8(a)(3) unfair labor practice.

In Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 47-9 (1987), the Supreme Court again discussed successorship and what happens when there is a start-up period while the new employer builds up its operations and hires employees and stated:

> In these situations, the Board [NLRB], with the approval of the Courts of Appeals, has adopted the "substantial and representative complement" rule for fixing the moment when the determination as to the composition of the successor's work force is to be made. If, at this particular moment, a majority of the successor's employees had been employed by its predecessor, then the successor has an obligation to bargain with the union that represented these employees. (Footnotes omitted.)

In Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Assn, 109 Sup. Ct. 2584 (1989), the Supreme Court discussed the sale of an entire railroad. It relied on precedent under the National Labor Relations Act to reach its conclusion as to what was appropriate under the Railway Labor Act. It noted, at page 2595-6:

> Although Darlington arose under the NLRA, we are convinced that we should be guided by the admonition in that case that the decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of

> its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case. Absent statutory direction to the contrary, the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of sec. 156.
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> * * *
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> This construction of the RLA also responds to our obligation to avoid conflicts between two statutory regimes, namely the RLA and the ICA, that in some respects overlap.

The failure to hire an employee because of his union affiliation would be an unfair labor practice under the NLRA. The RLA contains an analogous provision in Section 2, Fourth, where it states:

> No Carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . .

BVRY may establish <u>any</u> reasonable occupational qualifications for its employees. Since BVRY has indicated it will not allow Coatesville employees to transfer to the Sebring Line, there will be no integration of forces problem. Apparently, all employees to be utilized on the Sebring Line will be either BVRY qualified former CSXT employees or new employees.

In fashioning an appropriate selection of forces provision to be included in the implementing agreement in

this case, the arbitrator must look to the ICA, the RLA, and, by analogy, to the NLRA. Guidance is offered by the ICC statement that the employees of CSXT will not be:

> required to elect between employment with BVRC or asserting their rights against CSX until an implementing agreement, which establishes the terms of the method of selection of CSX employees to be offered positions by BVRC and the manner of the integration of such employees into the BVRC work force is in place.

BVRY has indicated that it intends to use the same method of operation which it uses in Coatesville; however, the contemplated operation on the Sebring line will have many more employees and will be spread over a vastly greater distance. While it may be philosophically pleasing to BVRY to claim that all employees will be interchanged in their jobs, experience has shown that as a practical matter, the larger the operation the less likely that this will happen. In an arbitration involving Springfield Terminal Company, RLEA, and the UTU, this arbitrator found that while senior management and the labor relations department had contended that Springfield Terminal had complete interchange of its work force, the operating departments were not utilizing crossover employees as each wanted to maintain skilled workers at the highest skill level possible.

In this case no operations have begun so it is impossible to see how BVRY's proposed system is really working. However, based upon the statements made by

BVRY, quoted above, it appears clear that there will be a differentiation between personnel who operate the trains and those who maintain the locomotives, the cars, and the track. Accordingly, CSXT is directed to make two lists of employees, one covering engineers, conductors and brakemen and the other covering all employees working on track maintenance, signal work or clerical work.

Each of the lists which shall be utilized by BVRY in its selection of forces shall contain the names of the individuals qualified to work in the positions which they presently hold on CSXT in the order that they were first hired by CSXT. This means that the list of operating employees will integrate the seniority lists of the engineers, and the conductors and brakemen. Similarly, the maintenance of way employees, the signalmen and the clerks seniority lists will be integrated. The integrated lists will be furnished to BVRY.

Rail Labor has contended that the seniority list of the employees of each of the organizations whose members could be displaced on CSXT, that is, all individuals who potentially could, or could have exercised seniority to work on the Sebring Line should be included on the selection of forces lists. Both CSXT and BVRY have taken the position that only those employees who could be affected by the transaction should be included.

While it is true that individuals with more seniority

than the individuals presently holding jobs on the Sebring Line could bid for such jobs, the fact that they have not done so is a clear indication of lack of interest. Furthermore, the right to apply for a job with BVRY while obtaining a leave of absence is not part of the collective bargaining agreement, but is a special offer made by CSXT as part of its efforts to implement the protection afforded by New York Dock. The right to receive this special protection is a right given affected employees. Without this protection, anyone who applies for a job with BVRY and obtains employment will have to relinquish the seniority held on CSXT. If it is part of the protection afforded by New York Dock, this special seniority should only be afforded to affected employees. Accordingly, it will be only those employees who may be affected by the transaction who will be listed on the selection of forces lists.

In the implementing agreements which CSXT proposed to several of the labor organizations and in the present case, CSXT has offered to grant a leave of absence to any affected employee who is accepted for employment by BVRY. The granting of such a leave of absence is not within the ambit of the protective conditions which the ICC requires to be granted to affected employees by New York Dock. Normally, it would not be within the power of an arbitrator to grant such additional protection. However,

in this case, the original offer of such protection was accepted and it was only when BVRY was brought into the negotiations as a necessary party to the agreements by the ICC that the parties were unable to reach agreement without resort to arbitration. It appears to be against the interest of all concerned parties to fail to include the leave of absence provision. Accordingly, it will be included in the implementing agreement award.

Finally, while it may be possible for all of the affected employees to make their choice as to whether to apply for work with BVRY prior to the commencement of operations by BVRY, in accordance with the contract between CSXT and BVRY, BVRY shall maintain a preferential hiring list of employees of CSXT who were affected by the transaction and did not have an opportunity to apply for employment with BVRY prior to the commencement of operations on the Sebring Line.

Award

The above findings and opinion shall form the basis for the Implementing Agreement that is made a part hereof and appended hereto.

Robert O. Harris
Arbitrator

Washington D.C., April 16, 1990

Implementing Arrangement Arbitration Award

CSX Transportation, Inc. ("CSXT") has received authority from the Interstate Commerce Commission to sell 102.52 miles of its rail line in Florida between: (1) Sebring (milepost AVC-873.94) and Palmdale (milepost AVC-918.6); (2) Palmdale (milepost AVD-918.58, a short distance southwest of milepost AVC-918.6) and Lake Harbor (milepost AVD-957.99); and (3) Keela (milepost AVF-953.69, an intermediate point between Palmdale and Lake Harbor) and Cane (milepost AVF-972.14), to the Brandywine Valley Railroad Company ("BVRY"). The transaction is covered by Finance Docket No. 31393.

ARTICLE I

A. The labor protective conditions set forth in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) and which are attached and made a part hereof as Attachment "A", shall be applicable to this transaction. CSXT shall bear the cost of protection for its employees who are determined to be "displaced employees" or "dismissed employees" as a result of the sale as set forth herein.

B. In the event CSXT and the employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of the New York Dock conditions, and such dispute or controversy is referred by either party to arbitration as provided in Section 11 of the conditions, BVRY shall not participate in the resolution of the dispute or controversy but the handling on behalf of the railroad shall be conducted solely by CSXT.

C. In the event BVRY and its Pennsylvania employees cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of the New York Dock conditions, and such dispute or controversy is referred by either party to arbitration as provided in Section 11 of the conditions, CSXT shall not participate in the resolution of the dispute or controversy but the handling on behalf of the railroad shall be conducted solely by BVRY.

ARTICLE II

A. In order that the provisions in Article I, Section 3 of the conditions contained in New York Dock may properly administered, each employee determined to be a "displaced employee" or a "dismissed employee" as a result of this transaction who also is otherwise eligible for protective benefits

and conditions under some other job security or other protective conditions or arrangements shall, ten (10) days after having established "displaced" or "dismissed" under the conditions set forth in New York Dock, notify CSXT of his election between the benefits under such other arrangement and this Agreement. This election shall not serve to alter or affect any application of the substantive provisions of Article I, Section 3.

B. In the event an employee fails to make such election within the said ten (10) day period, he shall continue to be entitled to monetary protective benefits payable under the provisions of such protective conditions or arrangements with CSXT, and will not be subject to the monetary protective benefits of this Agreement.

C. There shall be no duplication of monetary protective benefits receivable by an employee under this Agreement and any other agreement or protective arrangement with CSXT.

ARTICLE III

A. Each "dismissed employee" shall provide CSXT with the following information for the preceding month in which he is entitled to benefits no later than the tenth day of each month on a form provided by CSXT:

1. The day(s) claimed by such employee under any unemployment insurance act.

2. The day(s) each such employee worked in other employment, name and address of the employer and the gross earnings by the "dismissed employee" in such other employment.

B. In the event an employee referred to in this Article III is entitled to unemployment benefits (other than R.U.I.A.) under applicable law but forfeits such unemployment benefits under any unemployment insurance law because of failure to file for such unemployment benefits (unless prevented from doing so by sickness or other valid causes) for purposes of the application of Subsection (c) of Section 6 of Attachment "A", he shall be considered the same as if he had filed for, and received, such unemployment benefits.

C. If the employee referred to in this Article III has nothing to report under this Article III account not being entitled to benefits under any unemployment insurance law and having no earnings from any other employment, such employee shall submit, within the time period provided for in Section A of this

Article III the appropriate form stating "Nothing to Report".

D. The failure of any employee referred to in this Article III to provide the information required in this Article shall result in the withholding of all protective benefits during the month covered by such information pending CSXT's receipt of such information from the employee.

ARTICLE IV

A. (1) Except as provided in Paragraph A(2) below, an employee who as a result of the line sale covered by the terms of this Agreement and who is the incumbent of a position which will be abolished, or who meets the definition of a "dismissed employee", may request a leave of absence from CSXT for the purpose of employment with BVRY.

(2) Employees referred to in Paragraph A(1) above who meet the definition of a "dismissed employee" may in lieu of requesting a leave of absence from CSXT for the purpose of employment with BVRY, opt to accept the separation allowance that is available to such "dismissed employees" under the terms and conditions of New York Dock.

B. An employee as defined in Paragraph A(1) above, who obtains employment with BVRY, shall make written application to CSXT for a leave of absence for the purpose of employment with BVRY. CSXT shall grant such a request for a leave of absence to commence no earlier than the effective date of the sale and subject to the conditions specified in this Agreement. A CSXT employee who goes to work for BVRY shall provide BVRY with an executed release on the form supplied to such employee by BVRY to permit BVRY to transmit to CSXT the earnings and benefits information necessary for CSXT to make the calculations provided in Section 6(c) of New York Dock to determine the amount of the dismissal allowance which may be due.

C. Employees granted a leave of absence pursuant to this Article IV, shall be afforded the protective benefits contained in Article I, Section 6 of the New York Dock Conditions, and shall be subject to the conditions specified in Article III of this Agreement; provided, however, that for the purpose of determining the reduction of the dismissal allowance pursuant to Article I, Section 6(c), the combined monthly earnings for each of the twelve months following the month in which a lump sum bonus or equivalent allowance was paid to an employee in BVRY employment shall be deemed to include one-twelfth of any said lump sum bonus or equivalent allowance which was paid by BVRY. Accordingly, a lump sum bonus or equivalent allowance shall not be considered in

determining combined monthly earnings for the month in which the bonus or equivalent allowance payment is made.

D. A leave of absence granted pursuant to this Article IV will continue until such time as the employee relinquishes employment with BVRY, or the employee ceases to perform services for BVRY for sixty (60) calendar days, or the employee's employment relationship with BVRY is terminated. Such an employee will have his leave of absence from CSXT cancelled on the date he relinquishes employment with BVRY, or the earlier of the sixtieth (60th) calendar day after he stops working for BVRY or the date his employment relationship with BVRY is terminated. Such an employee must exercise seniority rights on CSXT to the fullest extent required by the New York Dock conditions in order to maintain eligibility for protection under New York Dock.

E. Employees granted a leave of absence pursuant to this Article IV, must maintain a current address and telephone number on file with CSXT.

F. The application of this Article IV shall not involve any expense to CSXT for moving or real estate costs.

ARTICLE V

A. CSXT employees seeking employment with BVRY pursuant to this Agreement shall supply such information and use such forms as BVRY may require. The incumbents of the CSXT positions to be abolished as the result of the sale may make application for employment with BVRY no later than three weeks prior to the effective date of sale, or one week after the date they learn of the abolishment of their position whichever occurs later. CSXT employees who become "dismissed employees" due to the sale may, not more than three months after the effective date of the sale, apply for employment with BVRY.

B. BVRY shall, in its sole discretion, evaluate any applications received from CSXT employees described in paragraph A of this Article V using its own standards to determine qualifications for employment. BVRY shall be the sole judge of the qualifications of applicants and shall decide, in its sole discretion, whether to extend offers of employment to any applicants.

C. If BVRY decides to offer employment to a CSXT employee who has applied pursuant to paragraph A of this Article V, BVRY shall extend such offer to such employee by certified mail. An offer shall be deemed accepted if the applicant's written notice of acceptance is actually received by BVRY, at a place designated by

BVRY in the offer, within seven days after the date of receipt of the offer; all offers not accepted in this fashion shall be deemed to have been declined.

D. BVRY may, in its sole discretion, request an applicant to attend one or more job interviews. Any such request, directed to a CSXT employee who has applied pursuant to paragraph A of this Article V, shall be extended to such employee by certified mail, and shall specify a time, date, and place for the interview, which shall be scheduled no sooner than seven days after the mailing date. An applicant who does not respond to an interview request or does not complete the application/interview process shall be deemed to have withdrawn his application for employment by BVRY.

E. BVRY shall be supplied by CSXT with a list of all "dismissed" and "displaced" operating employees, listed separately as to whether dismissed or displaced, and then listed by date of hire and a list of all "dismissed" and "displaced" non-operating employees, listed separately as to whether dismissed or displaced, and then listed by date of hire. BVRY shall first interview dismissed and then displaced CSXT employees in the order the employees' names appear on the operating and non-operating seniority lists. Operating employees will be considered for operating positions unless the employee expresses a desire to be considered for any position. Similarly, non-operating employees shall be considered initially for non-operating positions unless they individually express a desire for consideration for any position. BVRY shall consider all CSXT dismissed and displaced employees on the lists supplied by CSXT who actually apply for employment in a timely manner before the commencement of operations and before considering any non-CSXT employed individual for employment in a non-supervisory position. This shall not limit BVRY's right to hire or not to hire any applicant so long as BVRY's decision is based upon bone fide occupational qualifications. After commencement of operations, in accordance with the transaction agreement, BVRY shall maintain a list of CSXT employees who have been displaced by the transaction subsequent to the beginning of operations and who have not previously applied for positions with BVRY. BVRY shall utilize this list to fill vacancies before attempting to fill vacancies with other individuals.

F. In the event that the "dismissal" or "displacement" of a CSXT employee does not occur until after BVRY has commenced operations, CSXT shall furnish BVRY with such additional lists of "dismissed" and "displaced" employees as may be required by the circumstances. BVRY shall utilize such additional lists as preferential interview lists and shall not interview any individual for employment who is not on such a list while there

are individuals who have not been interviewed on such supplemental lists.

ARTICLE VI

A. This Agreement, together with Attachment "A", shall constitute the required Agreement as provided for in Article I, Section 4 of the protective conditions.

B. Nothing in this Agreement shall be construed as requiring BVRY to assume any collective bargaining agreement or other agreement or obligation of CSXT; to adopt any of CSXT's rates of pay, rules, or working conditions; or to recognize any organization as representative of any BVRY employees. All BVRY employment shall be subject exclusively to BVRY's own rates of pay, rules, and working conditions.