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AWARD NO. 2
CASE NO. 2

ARBITRATION COMMITTEE
ESTABLISHED PURSUANT TO ARTICLE 1, SECTION 11 OF THE
MENDOCINO COAST LINE EMPLOYEE PROTECTION CONDITIONS
(ICC FINANCE DOCKET NO. 30965, ET AL)

In the matter of an arbitration between:

UNITED TRANSPORTATION UNION

and

BOSTON AND MAINE CORPORATION
MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY
SPRINGFIELD TERMINAL RAILWAY COMPANY

FINDINGS AND AWARD

QUESTION AT ISSUE:

"Is Mr. K. S. Gardner entitled to a displacement allowance, and, if so, is his TPA to be properly based upon, as claimed, average monthly time of 168 hours and average monthly compensation of $3,800.00?"

BACKGROUND:

The Grievant entered the service of the Boston and Maine Corporation (B&M), one of several carriers which subsequently came to be subsidiaries of Guilford Transportation Industries (GTI), as a Carman in 1974. The position of Carman at that time, as it has been over the years, was a position subject to and in fact represented by a union. The Grievant was first promoted from a represented to a non-represented position in 1977, i.e., to the position of General Foreman/Wreckmaster. Although he resigned from this latter position to return to the craft ranks some 11 months later, the Grievant again accepted promotion to General Foreman/Wreckmaster in 1981. He was thereafter promoted to a management position of Superintendent Car, East, on September 1, 1985. He held this position until June 15, 1987, when, in the voluntary exercise of retained seniority, he elected to return to an agreement or represented position as a Car Foreman.

Three months after the Grievant had resigned from his management position as Superintendent Car, East, to be a Car Foreman, the Carrier, on September 11, 1987, transferred employees from the B&M, as well as employees from certain of its other subsidiaries, to another part of its corporate family, namely, the Springfield Terminal Railway Company (ST). The Grievant accepted an agreement position with the ST that was represented by the United Transportation Union (Organization or UTU).

The GTI transactions involved leases and trackage rights subject

to 49 U.S.C. 11343. Since the GTI carriers were members of the same corporate family, and the Interstate Commerce Commission (ICC or Commission) has previously exempted, from the prior approval requirements of 49 U.S.C. 11343, transactions within a corporate family that would not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family (49 CFR 1180.2(d)(3), the GTI carriers filed verified notices of their transactions about one week before the transaction was consummated, and the exemptions became effective pursuant to the ICC regulations.

The transactions taken were, however, subject to mandatory labor protection under 49 U.S.C. 11347. The protections imposed by the ICC have already been identified by this Arbitration Committee in Case No. 1, and will not be repeated here. They are, basically, what the ICC has termed, modified Mendocino Coast conditions, or those "extraordinary labor protective conditions" which the Commission set forth in Finance Docket No. 30965, D&H Ry.--Lease & Trackage Rights Exempt. Springfield Term., 4 I.C.C. 2d 322 (1988) (Springfield Terminal). These conditions, the ICC has stated, "combine procedural aspects of the different conditions" set forth in what are commonly known as the New York Dock conditions the Mendocino Coast and Norfolk and Western conditions.

In this latter respect, and as concerns the dispute before this Arbitration Committee, the ICC, in a Decision released with a service date of January 10, 1989, stated in part the following:

> "Under the employee protective conditions we imposed in Springfield Terminal, we gave the parties 90 days to reach an implementing agreement for the lease transactions. We indicated that the implementing agreement should provide for the protection of seniority, allow employees to 'follow their jobs' to the extent consistent with the new operational structure, and protect employees against the consequences of management's initial failure to provide accurate and fair information regarding the employees' options. If the parties' failed to reach agreement, they were to submit the matter to arbitration. The parties' failed to negotiate an implementing agreement, and the issue was submitted to arbitration. The neutral arbitrator, Richard R. Kasher, issued an award on June 12, 1988, entitled In the Matter of an Implementing Agreement Arbitration (Springfield Terminal Railway Company and Guilford Transportation Industries, Inc., and the Railway Labor Executives' Association and the United Transportation Union) (herein referred to as the Kasher award, the arbitral award, or the arbitration decision)."

As set forth in the Background of Case No. 1 before this Arbitration Committee, the ICC, on January 10, 1989, denied in part and

affirmed in part the Kasher award. It affirmed the Kasher award decisions as to claims procedures, allowance benefits, and the election of benefits by employees adversely affected by the lease transactions. It decided not to affirm the Kasher award decisions as to the rates of pay and work rules that apply to operations on the ST, and returned such matter to further arbitration.

In setting forth determinations relative to the claims procedure, the Kasher award, in part here pertinent to a consideration of the instant dispute, states:

> "The RLEA also suggested a methodology for calculating test period earnings. The Arbitrator is not persuaded that in constructing the test period, for purposes of calculating displacement and dismissal allowance benefits, we should adopt the RLEA's suggestion that only months in which employees performed compensated service for at least fifteen (15) days should be counted. We have no way of knowing whether this would improperly inflate displacement allowance entitlements for certain employees; i.e. those who worked exclusively off non-guaranteed extra lists or spare boards.
>
> On the other hand, we recognize that the use of certain months in the test period, in which employees did not work at all, or worked very little, due to the 1986 BMWE strike or the 1987 UTU job action on the ST and the aftermaths of those actions, might unduly deflate average monthly compensation figures. Accordingly, we believe that the test period should include the last twelve (12) months of compensated service that employees performed for their lessor carriers prior to the effective dates of the respective leases, in which months employees performed, at least, ten (10) days of compensated service."

Accordingly, included in the Implementing Agreement made a part of the Kasher award is the following relative to the calculation of test period earnings for affected employees:

> "Section 8. Test Period
>
> The test period shall include the last twelve (12) months of compensated service that employees performed for their lessor carriers prior to the effective dates of the respective leases, in which months employees performed, at least, ten (10) days of compensated service."

On April 14, 1989 the Carrier mailed test period averages (TPA's) to employees working on the ST. The letter to the Grievant reads as follows:

"Listed below you will find a test period average calculated in accordance with the Award rendered by Mr. Richard Kasher on June 15, 1988. This calculation was derived from your past payroll records. Provision of this calculation does not certify that you are a protected employee, that may be determined later upon a review of your work history. Any inquiries concerning this matter should be directed, in writing, to the Human Resources Department at No. Billerica, MA.

MO/YR	EARNINGS	HOURS
09/87	1,502.71	94.00
08/87	2,605.86	173.80
07/87	3,188.77	206.50
TOTALS	7,297.34	474.30
AVERAGE	2,432.50	158.00"

In an undated letter, the Grievant advised the Carrier that he was in disagreement with the Carrier calculation of his TPA. His letter to the Carrier reads:

"At this time I would like to inform you that I dispute the T.P.A. figures your office has supplied me on 4/15/89. The Kasher award specifically requires that in calculating an employee's displacement allowance, and I quote:

> '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 service immediately preceding the date of his displacement as a result of the transaction, (thereby producing average monthly time paid for in the test period).'

The figures received by me from your office are totally ridiculous and in no way reflect my average earnings of the year before the Springfield Terminal lease transactions. If your office is incapable of researching the Boston & Maine payroll records to calculate my displacement allowance, then I will be more than happy to supply you with copies of the original payroll stubs for the 12 months preceding the lease transaction on Sept 12, 1987. From these documents you will be able to calculate correctly my compensation and hours in accordance with the award rendered by Mr. Kasher on June 15, 1988."

On December 26, 1989, the Grievant wrote a further letter to the Carrier. It reads as follows:

> "I have received Mendocino Coast payments for the months of Sept., Oct., and Nov. of 1987.
>
> These payments were based on an incorrect T.P.A. which I have previously written to Mr. Dinsmore and Mr. Kozak about. At this time we are discussing a different formula and possible T.P.A. for me.
>
> Therefore the payments sent to me are incorrect and at this time, as provided by Article I, Section 11, of the Mendocino Coast conditions, I am appealing my claims and submit my claims to arbitration.
>
> In this regard I designate the United Transportation Union as my representative for the purpose of these appeals and request that you contact the U.T.U. regarding the selection of a neutral to hear this dispute."

In yet another letter, dated February 11, 1990, the Grievant wrote the Carrier as follows:

> "Please be advised that after careful consideration of your offer to adjust my T.P.A. to 190 hours at around $2,900.00 I feel this offer not acceptable.
>
> Using the Mendocino Coast application of the previous 12 months compensation and hours I feel the figures are around 168 hours and $3,800.
>
> I therefore feel if we cannot agree on figures more in that range I will go to arbitration under Article 11 of the Mendocino and abide by an arbitrator's decision."

When the parties were unable to resolve the question at issue they agreed to place such dispute to this Arbitration Committee pursuant to the disputes procedures set forth in the Mendocino Coast conditions.

In addition to presenting ex parte submissions regarding their respective positions, the parties also offered oral argument at this board's hearing on the dispute on August 3, 1990. They have also presented awards of past boards of arbitration in support of their arguments.

POSITION OF THE ORGANIZATION:

Basically, the Organization argues that the Mendocino Coast conditions require the Claimant's TPA to be calculated upon the basis of total compensation and total time for which he was paid during the last 12 months in which he performed services im-

mediately preceding the date of his displacement as a result of the transaction, i.e., the date the Grievant transferred from the B&M to the ST.

The Organization also maintains that the Carrier would have the Grievant placed in a worse position by virtue of its intent to include only that time during the last 12 months in which the Grievant had worked in a represented position.

It asserts that the Grievant's TPA must be calculated so as to include those earnings which the Claimant had received during 10 of the last 12 months while working in a management position.

The Organization submits that the total compensation received for such 12-month period amounts to $45,600, or, a TPA of $3,800 per month, with average total time for which he was paid being 171.50 per month.

POSITION OF THE CARRIER:

The Carrier does not dispute the fact that at the time of the lease transaction that the Grievant was holding a position that falls under the ambit of the ICC-imposed labor protection conditions. However, it does dispute the claim that he is entitled to those labor protection conditions during the time he held a management or official position, or, principally, to have the salary earned in that official position factored into his TPA.

The Carrier submits that the Grievant had voluntarily resigned his position as Superintendent Car, East, and that to sustain the Grievant's claim would essentially force the Carrier into subsidizing him for having voluntarily relinquished his official position. Further, the Carrier says, arguendo, that the Grievant would not have the ability to even come close to earning a TPA in his current represented position based upon an inclusion of his former management salary in a TPA, amounting to an unprecedented "windfall" for the Grievant.

The Carrier offers extensive argument in support of its position that the term "employee" has been historically recognized as not including carrier officials and that the ICC consciously used the term "employee" to exclude officials from the coverage of its protection conditions.

The Carrier concluded its written submission to this Arbitration Committee with the following statement:

> "The legal and arbitral precedent in this case is clear that the claimant is not entitled to have his Superintendent's salary factored into his TPA. The question remains, then, what is the appropriate basis to compute his TPA? A literal and correct application of

the Mendocino Coast conditions would be to calculate the last twelve months' earnings that the claimant had in a position that was subject to the ICC imposed protection conditions. Under the Kasher methodology for computing TPA's, this would have included the months of July, August and September 1987 and the last nine months of service in an agreement position in which he worked more than ten days per month. This would have required going back to the period 1980-1981 to capture the remaining nine months of earnings.

Obviously, this would have significantly depressed the claimant's TPA. For this reason the carrier attempted to facilitate a no-precedent compromise of this dispute by constructing a model TPA of $2,900 and 190 hours. Although the carrier was not obligated to construct such a model in order to comply with the Mendocino Coast conditions, nevertheless this appeared to be a fair and reasonable resolution of this dispute. However, Mr. Gardner elected to reject this offer and press on with his demand that his Superintendent's salary must be included in his TPA.

The Carrier respectfully requests that the committee deny the claimant's demand that his Superintendent's salary be factored into his TPA for the reasons outlined in this submission."

THE ARBITRATION COMMITTEE'S FINDINGS:

The purpose of labor protection conditions is to protect affected employees from the adverse impacts of an authorized transaction, merger or consolidation. The establishment of a job protection allowance for an affected employee is one of several protections imposed by the ICC in such matters. This allowance is intended to stabilize that level of income which attached to and most likely would have continued for an adversely affected employee had the transaction not taken place.

In this latter respect, Section 5 of the Mendocino Coast conditions prescribes that a displaced employee's monthly displacement allowance shall be "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 from which he was displaced."

There is no question that the Grievant was, as claimed, a covered employee and thereby subject to benefit of the protective conditions by virtue of having occupied or been employed in an agreement or represented position when the transaction took place. The Grievant was, therefore, entitled to be protected against a level of income which would have continued to prevail for him in that particular position, or other union-represented positions, had

the transaction not taken place.

However, that the Grievant is a covered employee, does not establish that he is, as claimed, entitled to be protected against any loss of compensation as a consequence of his voluntary resignation from a management, or non-represented, position some three months prior to the transaction. He was not, by any stretch of the imagination, placed as a result of the transaction in a worse position with respect to compensation which had been paid to him in his management position.

Certainly, having voluntarily resigned from a management position prior to the transaction, the Grievant cannot properly maintain that it was on account of the transaction that he would sustain a loss of that salary which had been granted to him as a member of the Carrier's management staff. As stated by Arbitrator Eischen in an Interpretation to Award No. 434 of SBA No. 605 (Trml RR Assn of St Louis and BRAC): "It is unreasonable to the point of absurdity to conclude that the official position worked, irrespective of compensation, should establish the protected rate which is the quid pro quo for continued (resumed) employability under the BRAC Agreement."

In making this determination it is recognized that the ICC, in its decisions, as well as in the determinations of the Kasher award which were affirmed by the ICC, that mention is made of employees who "transferred" to the ST and the need for there to be a review and determination as to the manner in which the lessor carrier employees (B&M in this case) had been transferred to the ST in terms of their seniority rights and a right to "follow their jobs" consistent with the new operational structure.

Clearly, these are matters which relate strictly to the nature of collective bargaining agreements and employees in represented as opposed to management positions. In this same respect, we believe it must be considered that references which are made to certain months that are to be properly included in calculating a TPA, that is, months in which employees performed, at least, ten (10) days of compensated service, express a concern about represented employees, who are generally compensated on a daily rate of pay, as opposed to those who occupy management positions and have a salary expressed in terms of a given amount per annum.

In view of the above considerations this Arbitration Committee has no basis to hold that the Claimant is entitled to a TPA which is calculated in part upon his services in a management position from which he had resigned prior to his being adversely affected while occupying a represented position of Carman.

In addition to argument made relative to a determination of the Grievant's compensation for a TPA, a significant part of the Grievant's and the Organization's case involves the number of hours to be included in the Grievant's TPA. It is urged that

such average number of hours be predicated on an 8-hour day of service for that period of time that the Grievant held a management position. The Carrier, on the other hand, asserts that a reasonable number of overtime hours should be applied to the TPA in order to justify the higher compensation which it had been willing to establish as a matter of compromise, supra, in its no-precedent offer.

In the opinion of this Arbitration Committee, the Grievant and the Organization wrongfully seek to minimize the occasional overtime hours proposed by the Carrier in settlement of the dispute. We say this in the light of it being difficult to comprehend how, in view of the purported labor and work climate on the Carrier at the time the Grievant held a management position, that he would not have had occasion to work beyond an 8-hour day. Indeed, it would seem to be most unusual or unique for management personnel, let alone the Claimant as Superintendent Car, to not work beyond an 8-hour day or 40-hour week even in normal circumstances, or, more especially, as here, over a 10-month period of time.

Under the circumstances, it must be held that the Carrier made a reasonable and equitable proposal to dispose of the dispute. We believe the Claimant would be well disposed to accept this Carrier offer because, absent such disposition, the Grievant's TPA is subject to calculation on the basis of the Kasher award, i.e., the last 12 months of compensated service in which months at least 10 days of compensated service had been performed in an agreement or represented position.

AWARD:

The Grievant is entitled to a displacement allowance. However, the Grievant is not entitled to a TPA in the amount as claimed. His TPA is to be as set forth in the above Findings.

Robert E. Peterson, Chairman
and Neutral Member

Daniel J. Kozak
Carrier Member

Eugene F. Lyden
Organization Member

Boston, MA
August 30, 1990