ARBITRATION BOARD
NEW YORK DOCK II LABOR PROTECTIVE CONDITIONS
(IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31922)

In the matter of an arbitration between BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and SOO LINE RAILROAD COMPANY	FINDINGS & AWARD

QUESTION AT ISSUE:

Is the Carrier required under the provisions of the New York Dock Conditions to furnish employees affected by a line sale their test period averages to the employee or his representative upon request for such test period averages?

BACKGROUND:

The Interstate Commerce Commission (the "ICC" or "Commission") in approval of the purchase of a line of track by Wisconsin Central, Ltd. (the "WCL") from the Soo Line Railroad Company (the "Soo Line" or "Carrier") in Finance Docket No. 31922, service date of November 5, 1991, imposed the labor protective conditions in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. (1979) as clarified in Wilmington Term. RR. Inc. - Pur. & Lease -- CSX Transp., Inc., 6 I.C.C. 2d 799 (1990) and 7 I.C.C. 2d 60 (1990), aff'd sub nom. Railway Executives Ass'n v. ICC, 930 F. 2d 511 (6th Cir. 1991) (the "NY Dock Conditions"). The line of track which the WCL purchased from the Soo Line is commonly known as "The Ladysmith Line," situated between Ladysmith, Wisconsin and Superior, Wisconsin, a distance of 102 miles.

Pursuant to Article I, Section 4, of the NY Dock Conditions, the Soo Line served notice on November 11, 1991 upon its employees represented by, among others, the Brotherhood of Maintenance of

Way Employes (the "BMWE" or "Organization") of its intention to effect the above described transaction in accordance with the ICC decision. In part here pertinent, this Carrier notice, served as Division Manager Notice No. 59, reads:

> "RE: LADYSMITH LINE SALE
>
> "Pursuant to the employee protective conditions provided in New York Dock . . . as imposed by the ICC in Finance Docket No. 31922, the Soo Line Railroad Company hereby serves notice of its intention to sell the Ladysmith to Superior Line, MP 355.487 north of Ladysmith, Wisconsin to the point of intersection with the south right-of-way line of Stinson Avenue at Superior, Wisconsin to the Wisconsin Central, Ltd. on November 25, 1991 or as soon thereafter as practicable.
>
> We anticipate the changes to be affected will result in the abolishment of Section 157 South Superior and Section 155 Stone Lake; the Roadmaster Position at Superior and the Signal Maintainer Position at Superior.
>
> Because Soo Line has no train operation on this line no adverse impact is anticipated on train and engine employees.
>
> Estimate of number of employee affected:
>
> | Class of Employes | Number Affected |
> |---|---|
> | Section Foremen | 2 |
> | Section Laborers | 2 |
> | Roadmasters | 1 |
> | Signal Maintainers | 1" |

On or about November 15, 1991 the Organization requested that there be a meeting for the purpose of reaching an implementing agreement in application of the terms and considerations for the protection of the employees it represents who would be affected by the sale of the line of track or the ICC approved transaction.

The Carrier responded to the Organization by letter dated November 19, 1991. It confirmed that a draft agreement had been faxed to the BMWE on November 15, 1991. This letter further stated:

> "Inasmuch as the I.C.C. has imposed New York Dock protective conditions as clarified by Wilmington Terminal, the level of protection has been set. There is no rearrangement of force as a result of this transaction and the employes whose positions have been identified to be abolished as a result, have system seniority on the entire former Soo Line property. As I have indicated in the past in similar situations, for

these reasons, I do not agree that an implementing agreement is necessary as the necessary conditions have been provided for.

However, as has been done in previous situations, without prejudice to the Carrier's position, I did agree to provide a proposed agreement as you requested. We have had some discussion regarding separation allowances and I have indicated that separation allowances are provided under the terms of New York Dock conditions. I am aware that New York Dock protective conditions require a ninety (90) day written notice containing a full and adequate statement of the proposed changes to be affected by the intended transaction and that the I.C.C. acknowledged the Soo Line has no operation on this line and therefore, waived the normal time period for completing the transaction. I also understand that New York Dock protective conditions provide a dispute resolution mechanism.

My staff will be available to meet with you at 9:00 a.m., November 22, 1991 to make a good faith effort to reach an agreement in this regard, without prejudice to my previously stated position."

The Organization responded to the Carrier letter on November 21, 1991. It took exception to certain of the Carrier statements and asserted that sale of the line of track could not be consummated or positions abolished until such time as the parties negotiated an implementing agreement or any dispute in connection therewith had been resolved in arbitration.

The Carrier responded to the Organization's contentions, and in addition to refuting certain positions espoused by the Organization, offered the following as directly pertains to the dispute here at issue:

"During this discussion, your desire to enhance protective conditions contained within the terms of New York Dock became very clear. You supported your demand for 'test period averages' before determining whether an individual meets the definition of a 'displaced' or 'dismissed' employee with the contention that that is the only way an individual knows if he has been placed in a 'worse' position. My staff pointed out that it is not the purpose of the 'average monthly compensation' or 'displacement allowance' to determine if an individual has been placed in a worse position as a result of the transaction. Certainly, an individual who has been placed in a 'worse' position as a result of the transaction has the ability to support his claim with facts and once that has been accomplished, his 'average monthly compensation' will be calculated. Your insistence that

employees be provided such information prior to determining if they meet the definition of a 'displaced' or 'dismissed' employee is an obvious effort to gain 'pre-certification' for all employees involved, regardless of any 'adverse' impact as a result of the transaction.

* * * * * * *

[C]learly, there are no changes in working conditions involved and this is a force reduction which will occur under the existing collective bargaining agreement. Your position as outlined is without support of the ICC and/or board award. Inasmuch as you were so insistent that we provide employees whose positions will be abolished as a result of this transaction with 'test period averages' prior to determining if they had been placed in a worse position or met the definition of a 'displaced' or 'dismissed' employee, R. L. Mullaney indicated that arbitration would be necessary and made that request.

Further, in a discussion with R. L. Mullaney of my staff on December 2, 1991, you were reminded that employees are, in fact, provided a statement of gross earnings, to date, with each paycheck. If it is truly your desire to see that employees are provided salary information necessary to understand obligations and benefits to which they are entitled under New York Dock and not to seek 'certification' of benefits for anyone in the 'transaction', this statement should suffice."

The Organization, by letter dated December 5, 1991, responded to the Carrier in part here pertinent as follows:

"[I] have considered your most recent offer of an implementing agreement and I must inform you that I find it unacceptable. As you are aware, the issues of both the calculation and the content of Test Period Averages for those employes affected by this transaction must be resolved in the implementing arrangements which we are attempting to negotiate. So far these negotiations have been fruitless, but since the 30 days allotted for negotiations under Article I, Section 4 have not expired, I would suggest that we meet again on December 19, 1991, in order to make another attempt to reach a negotiated solution before restoring to arbitration of this dispute. Attached hereto is our revised proposal for such agreement. Please note that Section 5 of our previous proposal, presented to your staff on November 22, 1991, was not intended to enhance the imposed conditions. We had inserted the moving allowance option based on the Carrier's proposal sent to this office by fax on November 18, 1991."

The parties thereafter came to mutual agreement on the terms of an Implementing Agreement, except as concerns the matter that is the subject of the above Question at Issue. In this connection the Carrier says that it is not obligated to have the Implementing Agreement contain a provision that requires it provide test period averages to employees assigned to the line of track and employees affected by the exercise of displacement rights prior to determining whether they have been placed in a worse position or meet the definition of "displaced" or "dismissed" employee.

On the other hand, the Organization maintains that the Carrier is obliged to be in agreement to provide information related to TPAs to affected employees and says that the Implementing Agreement should contain a provision that reads as follows:

> "Each employee assigned to the line as described in Section 1 above and employees affected by the exercise of displacement rights by such employee will, upon request, be provided with a computation of test period earnings and hours as described in Article I, Section 5."

A "displaced" and "dismissed" employee is defined in Article I, Section 1(b) and 1(c) of the NY Dock Conditions as follows:

> "(b) 'Displaced employee'means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> (c) 'Dismissed employee' means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction."

A "displacement allowance" is defined in Article I, Section 5, of the NY Dock Conditions as follows:

> "5. Displacement allowances. - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would be entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

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

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

Provision for the negotiation and arbitration of an Implementing Agreement is set forth in Article I, Section 4, of the NY Dock Conditions, and reads in part here pertinent as follows:

"4. Notice and agreement or decision. -- (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employes of the railroad and by sending registered mail notice to the representatives of such interested employees. Such

> notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner:
>
> Within five (5) days from the date of receipt of notice at the request of either [party] . . . hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix . . . Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:
>
> (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree . . .
>
> (b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered."

The parties selected the undersigned arbitrator to be the chairman and neutral member of the arbitration board.

POSITION OF THE ORGANIZATION:

Basically, it is the contention of the Organization that the NY Dock Conditions require that the Carrier provide a test period average (TPA), as described in Article I, Section 5(a), supra, to each "affected" employee. The Organization therefore submits that the Implementing Agreement here in question should properly contain a provision that reads as follows:

> "Each employee assigned to the line as described in Section 1 above and employees affected by the exercise of displacement rights by such employee will, upon request, be provided with a computation of test period earnings and hours as described in Article I, Section 5 [of the NY Dock Conditions]."

The Organization says that a provision such as that quoted above

is to be properly a part of the Implementing Agreement because the Carrier is obliged to provide employees with their TPA once they have been affected so as to permit those employees, in turn, to determine if they have been placed in a worse position as a result of a transaction and thereby entitled to benefit of a displacement allowance.

It asserts that affected employees need to be aware of their TPA since it is only with the benefit of such information that an affected employee can comply with the provisions of Section 5 of Article I of the NY Dock Conditions, supra, in regard to the exercise of seniority to a position producing compensation equal to or exceeding the compensation received in the position from which the employee is displaced.

In this particular case the Organization submits that there are four employees represented by the Organization who will be initially affected by the transaction, i.e., two Section Foremen and two Section Laborers, or, namely, the positions identified by the Carrier in its November 11, 1991 notice, supra, and that others will no doubt be affected by a chain of displacements.

Accordingly, the Organization requests that the Question at Issue be answered in the affirmative and that the Board direct that the Implementing Agreement include the aforementioned clause related to the Carrier being required to provide affected employees, upon request, with their TPA.

POSITION OF THE CARRIER:

The Carrier maintains that it is not the purpose of a TPA to determine if an individual employee will be placed in a worse position as a result of a transaction. It says the purpose of an Article I, Section 5(a), "Displacement Allowance," is to provide an equitable method for determining compensation to be allowed a "displaced employee" who has in fact been placed in a worse position with respect to their compensation and rules governing working conditions as a result of a transaction.

It says that there is nothing contained within the definition of a "displaced employee" in the NY Dock Conditions which supports an employee's entitlement to their TPA prior to the time that they are placed in a worse position as a result of a transaction. The Carrier therefore takes the position that it is obliged to provide a TPA only to a "displaced" employee who is entitled to a "displacement allowance."

In the case at hand, the Carrier offers, it remains to be determined who in fact, if anyone, will be a "displaced employee" and thereby entitled to a "displacement allowance."

Moreover, the Carrier says that if a dispute arises concerning the definition of a "displaced" employee or whether an individual is entitled to a "displacement allowance" that such dispute must be resolved under the terms of Article I, Section 11, of the NY Dock Conditions.

The Carrier says that in seeking to have the disputed provision included in the Implementing Agreement that the Organization is attempting to enhance protective conditions contained within the NY Dock Conditions. It says that the Organization is in reality seeking to gain a right of "pre-certification" for all employees involved, regardless of any "adverse" impact as a result of the transaction and to relieve the employee of the obligation to establish the causal nexus between the transaction and any adverse affect. Such a happenstance, the Carrier argues, would permit the Organization to shift to the Carrier the burden of proving any lesser earnings received by an employee was the result of something other than the transaction.

While the Carrier does not dispute the fact that four positions represented by the Organization will be abolished with the sale of the rail line, it says that no rearrangement of force will occur under the terms of the collective bargaining agreement and that no selection of forces is therefore necessary. Thus, the Carrier says there will be no change in working conditions and the employees affected by the transaction will only be subject to what it says would be a normal force reduction and an exercise of system seniority rights. In this regard, the Carrier says that it is difficult to predict the overall impact on any employee in the exercise of such system seniority.

The Carrier says that the Organization would like the Board to believe that anyone affected or displaced in conjunction with this force reduction is entitled to a "displacement allowance" as provided in Article I, Section 5(a), in any month in which their earnings may be less than their "average monthly compensation" prior to being displaced, regardless of the reason for such a difference or without establishing the necessary causal nexus between the transaction and the adverse affect.

For the above reasons the Carrier says that the Implementing Agreement which does not contain the language in dispute should be adopted as sufficiently meeting the requirements of Article I, Section 4, of the NY Dock Conditions.

FINDINGS AND OPINION OF THE BOARD:

The Board has given studied consideration to the various arguments of record, the pertinent provisions of the NY Dock Conditions; and, in particular, the awards cited by the parties in support of their respective positions.

There is no question that the Bernstein Awards referenced by the Organization cast light upon certain artful language contained in the Washington Job Protection Agreement of 1936 (WJPA). However, as the Carrier points up, there are a number of significant differences between the purposes for which the WJPA was entered into by the various carriers and the unions as compared with the NY Dock Conditions. As Referee Murray M. Rohman said in an award which issued on August 6, 1974 (PC v. IBEW & RED) as concerns the differences between the WJPA and Amtrak Appendix C-1 Provisions, or protective provisions patterned somewhat after the NY Dock Conditions: "[The] philosophy and economic conditions prevalent in the '30's were different than those prevailing in the '70's when Appendix C-1 was promulgated."

Moreover, the Bernstein Awards which are cited involve determinations that are, for the most part, bottomed on interpretation of agreements which had been entered into by the parties in the particular dispute. Thus, the awards lend themselves to a rather limited interpretation of even the WJPA.

In Case No. 138, for instance, Referee Bernstein makes extensive reference to an Implementing Agreement. It is this Agreement, not the WJPA, which is quoted as prescribing that a TPA be furnished upon the written request of an employee. The Agreement states:

> "If as a result of the merger an employee is displaced or deprived of employment, upon written request of the employee or his representative to the Superintendent, the carrier shall promptly furnish to such employee, with copy to his General Chairman, a statement showing total compensation received by such employee and his total time paid for during the last twelve months in which he performed service immediately preceding the date on which he is displaced or deprived of employment."

It is also significant that notwithstanding the foregoing terms of Agreement, a separate Letter of Agreement essentially states that the carrier is to provide a TPA to involved employees when "it becomes known what employees are affected" and, further, that when an employee is "adversely affected" and claims compensation loss that the employee will file a claim with the carrier.

In the circumstances, that Referee Bernstein concluded that the carrier had "improperly neglected" to provide a TPA upon request must be viewed in the context of the Implementing Agreement, and not the WJPA, having required such information be given upon the request of the employee or the union.

That a "position" occupied by an employee is abolished at the time of a transaction, as in the case here at issue, does not mean that that particular employee has been adversely affected

and thereby entitled to a displacement allowance. The test is what happens to the employee in the exercise of seniority and displacement rights after the abolishment of the position. And, even in this regard it must be considered that the Carrier has no control over the voluntary exercise of seniority.

Employees may place themselves into situations which, on the surface, suggest they are in a worse position as a result of a transaction. However, it may be that such circumstance is the result of, for example, a desire on the part of the affected employee to work at a given location, on a certain shift, or be off from work on particular rest days. This, as opposed to the employee having exercised seniority and working on another position which would equal or better the compensation and working conditions of a former position which was abolished or subject to displacement.

In this same respect, it is noteworthy that Referee Bernstein offered that it was not abolishment of a regular position that establishes entitlement to a displacement allowance. He said, in Case No. 138, that to be "adversely affected" would seem to require some actual detriment, and that "protection" does not come into play until compensation is worsened, requiring a comparison of compensation before and after the employee is "first adversely affected."

Therefore, that an employee may be forced to exercise seniority as the result of the abolishment of a position on the line of rail that is abandoned must be viewed in the light of whether, after having done so, the employee is placed in a worse position, or, principally, a position unlike that which the employee would have stood for absent the transaction. It must be recognized, as held in numerous past awards, that a remote or tangential effect of a transaction does not qualify an employee for a displacement allowance.

As stated by Referee Nicholas H. Zumas in a dispute between the CSX and the BMWE involving the NY Dock Conditions (Award dated March 26, 1990):

> "It is well settled that the burden of proof in cases seeking NYD protection benefits rests with the Organization to show that Claimants were adversely affected by the transaction. The Organization must prove that actual harm was suffered by Claimants as a result of the I.C.C. approved transaction.
>
> [F]luctuation of levels of compensation and movement of territory are normal characteristics of maintenance of way employment. The fact that some Claimants had their work levels altered or their headquarters points moved does not prove adverse effect nor does it show the causal nexus between the transaction and the adverse ef-

> fect that is required before imposing NYD protection benefits."

Further, as stated by Referee Marty E. Zusman in an award which issued under date of December 7, 1990 in a dispute involving the BRS and CSX and application of the Oregon Short Line Conditions, or protective provisions not unlike those found in the NY Dock Conditions:

> "Finding no evidence of language or practice requiring Carrier to calculate a TPA where no evidence exists that the employee has suffered a loss and is within the meaning of the Oregon Short Line Protective Provisions as a 'displaced employee,' we must answer the question [that the Carrier be required to provide a TPA for each of the named claimants] in the negative."

This Board likewise fails to find by language or practice that the NY Dock Conditions require a carrier to provide a TPA to an employee merely because he would be affected by a job abolishment or sustain a loss of compensation. In our view, the NY Dock Conditions clearly intend that employees not be given a TPA or be certified as entitled to the protective benefits of the NY Dock Conditions until they have been adversely affected as a result of the transaction as concerns their compensation and rules governing their working conditions.

In this latter regard, the Board finds it significant that Section 5, Displacement Allowances, of the NY Dock Conditions, supra, prescribes that an employee is entitled to a displacement allowance so long "after" the employee's displacement as that employee is unable, in the normal exercise of seniority rights to obtain a position producing compensation equal to or exceeding the compensation in the position from which the employee was displaced. No mention is made in this or any other section of the NY Dock Conditions of an employee being entitled to a displacement allowance following the date an employee is affected by a job abolishment. Further, this same section of the NY Dock Conditions states that a TPA is to be calculated on the basis of the last 12 months in which the employee performed services "immediately preceding the date of his displacement as a result of the transaction." Again, there is no mention of the date that the employee is initially affected by a job abolishment.

Certainly, to give employees a TPA simply on the basis of the position they occupied being abolished, much less because they were in the employ of the Carrier at the time of a transaction, would be tantamount to placing the burden of proof upon the Carrier to show that there was no causal nexus between any loss of future compensation and the transaction, instead of, as the NY Dock Conditions contemplate, the employees being required to show the manner in which they had been adversely affected in the first instance so as to be entitled to a protective allowance.

The Board also believes that consideration must be given to the fact that there is a significant difference as to the manner in which a protective period is described in the WJPA as opposed to the NY Dock Conditions. In the WJPA a protective period is said to be "a period not exceeding five years following the effective date of the coordination." The protective period in the NY Dock Conditions is said to mean that period of time that "extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom."

In other words, the WJPA gave reason for an employee to be immediately placed under a protective umbrella since the protective clock commenced running at the time of the coordination. This is not a circumstance of concern with respect to application of the the NY Dock Conditions. The window of protection for an employee under the NY Dock Conditions does not commence on the date of a transaction, but rather runs from the date on which an individual employee is first adversely affected. Thus it would seem to the Board that a purposeful change was made in the adoption of the NY Dock Conditions language so as to preclude a premature determination of affect that might well cause employees to be subjected to a less meaningful period of protection than would obtain if the protective period was not to commence until the employees had in fact been adversely affected.

There is no question that the absence of a proper knowledge of a TPA places a difficult burden upon an employee to know where to exercise seniority in carrying out the mandate that an employee exercise seniority to the same or a higher rate of pay so as to be entitled to the protective coverage of the NY Dock Conditions. However, this concern may not be viewed as requiring that the TPA be computed before there is sufficient reason to recognize that employee as having been adversely affected in the first instance as a result of a transaction.

Moreover, even as concerns levels of compensation and the rate of pay of various positions, it is evident that paycheck stubs provided to employees twice monthly contain a statement of "year to date" earnings and rates of pay are indicated on bulletins for positions. Thus, it would appear that such information is readily available to employees to track any concern that they may have as to their individual situations and a determination as to whether a sufficient basis exists to show that the consequence of a change in their level of compensation is in fact due to some cause related to the transaction, or, here, the track line sale.

Since the Board finds the contractual provisions which the Organization seeks to be made a part of the Implementing Agreement go beyond the scope of the NY Dock Conditions, it must be concluded that this Arbitration Board does not have the authority to impose such a condition as a part of an arbitrated Implementing Agreement.

AWARD:

The Question at Issue is answered in the negative. The Carrier is not required under the NY Dock Conditions to furnish employees "affected" by a line sale with a test period average upon request for such data. Accordingly, the Implementing Agreement which has been identified above as not having included language to such an effect will be the final agreement between the parties.

Robert E. Peterson, Chairman
and Neutral Member

Robin Mullaney
Carrier Member

Ernest L. Torske Dissenting
Ernest L. Torske
Organization Member

Dissent To Follow

Minneapolis, MN
April 28, 1992

ARBITRATION BOARD
NEW YORK DOCK II LABOR PROTECTIVE CONDITIONS
(IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31922)

In the matter of an arbitration between)
)
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
)
and)
)
SOO LINE RAILROAD COMPANY)

DISSENT OF ORGANIZATION MEMBER
ERNEST L. TORSKE TO FINDINGS AND AWARD

The decision of the majority in this dispute, were it to be followed by other arbitrators, would accomplish a result long sought by some railroad managers: the effective elimination of the New York Dock ("NYD") and Oregon Short Line ("OSL") Conditions as protection arrangements for railroad employees. The majority has deliberately disdained thirty-year standing precedents and by slavish adoption of the carrier's sophistic rationalizations has attempted to distinguish those precedents and the Washington Job Protection Agreement ("WJPA") from NYD. It engaged in this aberrant behavior so that it might conclude that an employee, concededly "affected as a result of a transaction", must prove, not only that he has been "placed in a worse position with respect to his compensation" without being afforded the means provided by NYD to enable him to do so, but also that a causal nexus exists

between his "worse position" and the transaction which affected him every time he files a monthly claim for a displacement allowance. It takes no imagination to realize that this destructive "first" in the 66-year history of railroad employee protection will be used by the unscrupulous to deny each such claim as it is made, thereby compelling the employee to arbitrate each month's claim in a separate Section 11 arbitration. That result, as well as the specious rationalization crafted to support it, violates not only the spirit and letter of NYD, but also the plain language of the law enacted by the Congress as 49 U.S.C. §11347.

The majority has approached the WJPA as if it were a different document from a different time designed for a purpose different from NYD; and, that WJPA precedent had no authoritative application to NYD because of "philosophical and economic differences between the '30s and the '70s." The majority ignored the fact that NYD is not a product of the Interstate Commerce Commission ("ICC") but a product of the Congress which the ICC is compelled by law to impose. Its provisions do not derive from ICC discretion but from Congressional mandate and, when the Congress enacted the WJPA into law in 49 U.S.C. §11347, it did so along with the consistent interpretations of that protective formula as found in its Section 13 awards for the forty years preceding 1976.

In order to ensure its compliance with the directions contained in 49 U.S.C. §11347, the ICC went beyond the crafting of specific protective provisions and added a final, all embracing Article V which the majority in this dispute gives no indication of ever having read. Article V constitutes both an order of the ICC

and a requirement of the law. Section 1 of Article V reads (*emphasis supplied*):

> 1. It is the intent of this [NYD] appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, *changes in wording and organization* from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

By way of explanation the ICC here emphasizes that all benefits and protections provided by the New Orleans Conditions and the Appendix C-1 Amtrak protections are included in NYD and that "changes in wording and organization from arrangements earlier developed under" New Orleans and C-1, upon which the majority relies so heavily, are to have no meaning whatsoever.

The derivation of NYD is authoritatively set forth by the court which first reviewed and affirmed the ICC's imposition of NYD. (*New York Dock Ry. et al. v. U.S., et al.* (2nd Cir. 1979), 609 F.2d 83.) I would draw the majority's attention to pages 88 through 90 of the court's opinion which sets forth the protections of New Orleans and C-1 that the Congress required to be included in NYD.

As the Second Circuit held, NYD must contain by law all of the protections and benefits provided by the New Orleans and C-1 protective arrangements. The New Orleans Conditions, the court

recognized, adopts the WJPA and a protective formula known as the Oklahoma Conditions. Anyone doubting the adoption of WJPA as the basic protection provided by the New Orleans Conditions (with two modifications not relevant here) need only read the ICC's explanation of those conditions in the decision and order which created them (*New Orleans Union Passenger Terminal Case*, 257 I.C.C. 177, 282 (1952):

> The intent and effect of the foregoing findings are that all employes adversely affected by the transaction involved should *receive the protection afforded by the Washington Agreement*, reduced as to dismissed employes to the extent that they receive compensation in other employment or under unemployment insurance laws; and that employes adversely affected prior to May 17, 1952 (4 years from the effective date of the order of approval) are to receive as a minimum the protection afforded by the Oklahoma Conditions as prescribed in the previous report for the period they are adversely affected prior to May 17, 1952, but if the total amount of such compensation is less than they would *receive under the Washington Agreement*, as limited, applied from the date of adverse affect, then they are entitled to the remaining benefits they would have enjoyed under the latter. (Emphasis supplied.)

The presence of two elements are necessary for a employee to recover displacement allowance benefits under NYD or any of its predecessors:

1. The employee must be "affected as a result of a transaction."

2. The employee, after the normal exercise of his or her seniority rights to secure a position of equal or better "compensation", is in a worse position with respect to compensation in a current given month as compared with the average compensation and hours worked per month over the previous 12 months.

Congress, by expressly adopting the benefits and protections of the New Orleans Conditions and Appendix C-1 in its enactment of 49

U.S.C. §11347 in 1976, and the ICC, through its promulgation of NYD in conformity with Congress' command, provided the means by which an employee could establish his eligibility under those two elements.

The means for establishing the first element was furnished by Secretary of Labor Hodgson under 45 U.S.C. §565 when he designed the so-called Appendix C-1 Conditions to protect railroad employees affected by the creation of Amtrak. Recognizing that it is difficult, if not impossible, for an employee to prove that he was affected by a particular transaction, the Secretary of Labor in designing the Appendix C-1, placed the burden of proof in arbitration proceedings squarely upon the carrier. (*See NYD v. U.S., supra* at 609 F.2d 89.) In an affidavit filed with the U.S. District Court for the District of Columbia in *Congress of Railway Unions, et al. v. Hodgson*, 326 F.Supp. 68 (D.D.C. 1971), the Secretary explained his reasons for that seemingly unusual action:

> Under the "New Orleans Conditions" employees had great difficulty in sustaining the burden of proof that they were affected by a particular transaction. The Railpax [Amtrak] Conditions simply require an employee to identify the transaction and the facts upon which he relies in his claim that he was affected by a transaction. The burden is then on the railroad to prove that factors other than "a" transaction affected the employee. (Emphasis added) [by Secretary Hodgson] The clear intent of this provision and the basis upon which I accepted it as a part of my certification of the protective arrangements, is to impose upon the railroads the burden of proving that something other than the discontinuance of rail passenger service affected the "claiming" employee. The railroad does not meet its burden by showing that some discontinuance other than the one upon which the employee relief (sic) [relies] affected him. It must show affirmatively that something other than any transaction affected the

> employee. Further, it is intended that a claiming employee shall prevail if it is established that a discontinuance had an effect upon the employee, even if other factors may also have affected the employee. Thus, the burden of proof has been transferred from the employee to the railroad, putting the employee in a better position than that existing under the "New Orleans Conditions."

That shift in the burden of proof to the employing carrier was mandated by the Congress for use in cases in which Section 11347 is applicable and was adopted by the ICC in Section 11(e) of NYD. It is the means provided by Congress to enable an employee to establish that he or she was "affected as a result of the transaction," *i.e.*, to establish the employee's "certification" as an affected employee.

Once an employee is certified as "affected by a transaction" (and that certification has been repeatedly conceded in this case) the next step is for the employee to show that he has been placed in "a worse position with respect to compensation and rules governing working conditions." The fact that an employee is certified as "affected" by a transaction does not translate into the payment of benefits under any formula of employee protection, including NYD. The employee also must show that he has been "adversely" affected in a manner which the protections are designed to cover by displacement, dismissal, separation or moving allowances. (See WJPA Award No. 138.)

With regard to eligibility for a displacement allowance, the displaced employee must show that he is now in a "worse position." This can occur in several ways: 1. He is placed in a lower rated position; 2. he is placed in an equivalent rated position but with

less work, less overtime and therefore lower monthly compensation; or, 3. a combination of the first two.

The means by which an affected employee can show "adverse" effect is also provided by NYD, by WJPA and all protection formulas in between. The employee compares his compensation in a current month with the average monthly compensation he received and average hours worked over the 12 months preceding his "adverse" affect. (WJPA Award Nos. 62, 131.) But in order to make that comparison the employer must supply the employee with his or her test period average compensation and average hours ("TPA") as such "computation . . . is thoroughly reliable only if prepared from the carrier's own records." (WJPA Award No. 138.) Indeed, as recognized in Award No. 138, "in order to determine whether he is adversely affected the employee continued in service must know his test period earnings" because "test period earnings are an essential element in establishing eligibility for a displacement allowance under Section 6 of the Washington Agreement [now Section 5 of NYD]."

The above referenced WJPA Awards had been the settled, unquestioned interpretation of the requirements of WJPA and the New Orleans Conditions for some ten to fifteen years when Section 11347 was enacted. (See WJPA Awards Nos. 62, 68, 131, 138.)

Here the majority would deprive employees of the "essential element" necessary to establish "eligibility for a displacement allowance" until the employees had established that eligibility through some other means not provided by NYD. In adopting this "Catch-22" approach to determine eligibility, the majority accepts

uncritically the carrier's contention that to provide the employee with the means to establish "adverse" affect would be to "pre-certify" the employee as "affected". The carrier itself, of course, "pre-certified" the employees as affected when it acknowledged it was abolishing their positions "as a result of the transaction."

By 1976 it was the well-settled meaning of all employee protective arrangements that once employees were certified as affected and had established a "worse position with respect to compensation", they were guaranteed their test period average compensation for their entire protective periods, and were not--as the majority would now have it--required to prove each month that the loss of compensation for that month was caused directly by the transaction. WJPA Award No. 68 (emphasis in original):

> The five year protection period for a displaced employee would make little sense and provide little protection if *each* subsequent loss of earnings in the period had to be *directly* related to the coordination. It is the first adverse effect of a coordination which makes the employee eligible for the benefits of Section 6 (See Section 2 (c)). Thereafter the protection of the Agreement is his for the specified five years in the ordinary case.

The majority not only disdained all precedent established prior to the enactment of Section 11347 which reflects the protection which the Congress mandated for employees but, it relied upon, and indeed followed, a single 1990 award by Marty E. Zusman in which that arbitrator, for the first time in the history of the NYD or its predecessors, viewed "Test Period Average Compensation" and "Test Period Average Hours" as being required to be furnished

an employee only after he or she had established having been placed in a "worse position" (at which point, of course, a TPA has become unnecessary); and, restricted an employee's protected period to one month at a time. This the arbitrator accomplished by ignoring all precedent, the citation of no relevant authority and without analysis of the similar provisions of OSL. The Zusman Award's only authoritative support is found in the arbitrator's expression of his personal views. Examined against the background of the history of NYD, the New Orleans Conditions, WJPA and Section 11347, those personal views are exposed as being irresponsibly contrary to precedent and violative of the plain language of both Section 11347 and the NYD conditions, particularly Article V. The majority of this panel which adopted those views in support of its conclusions is no less culpable.

The decision of the majority in this dispute is a travesty upon appropriate statutory and protective arrangement norms of interpretation and a cynically cruel deprivation of the protections and benefits Congress mandated for railroad employees adversely affected by ICC orders. I, therefore, vigorously dissent from the decision of the majority.

Ernest L. Torske
Organization Member

ROBERT E. PETERSON

15 MEADOW PLACE
BRIARCLIFF MANOR, NY 10510-1131
TELEPHONE (914) 941-0131

May 26, 1992

Ms. Robin L. Mullaney
Director - Labor Relations
Soo Line Railroad Company
Soo Line Building - Box 530
Minneapolis, MN 55440-0530

Mr. Ernest L. Torske
Vice President
Brotherhood of Maintenance of Way Employees
1591 Fulton Street - Room 205
Aurora, CO 80010

Re: Organization's Member Dissent to Findings & Award, NY Dock - Implementing Agreement, Line of Track Sale to WCL.

Dear Ms. Mullaney and Mr. Torske:

This is in response to the contention advanced by Mr. Torske in his Dissent to the above-mentioned Findings and Award whereby it is averred, among other things, that the decision accomplishes "the effective elimination of protection arrangements for railroad employees."

Contrary to this broad assertion, the Board's Findings and Award are premised upon the determinations of numerous past awards that employees must show that a direct causal nexus exists between the transaction and the adverse affect being claimed so as to be entitled to protective benefits.

Further, nowhere in the Board's Findings and Award is it stated or inferred, much less intended, as Mr. Torske asserts, that an employee must demonstrate "a causal nexus exists between his 'worse position' and the transaction which affected him every time he files a monthly claim for a displacement allowance . . . thereby compelling the employee to arbitrate each month's claim in a separate section 11 arbitration." The dispute at issue before the Board neither involved, nor do the Findings and Award touch upon matters related to the filing of monthly displacement allowance claims.

In responding to the dispute at issue, this Board concluded that the exercise of seniority account a position being abolished when a transaction is implemented is not sufficient reason, in and of itself, to identify an employee as being adversely affected and entitled to a test period average (TPA) on demand.

A TPA is a meaningful measurement of the immediate past earnings of a displaced or dismissed employee, as those terms are used in the NY Dock Conditions. It permits a determination to be made as to the extent that a monthly displacement or dismissal allowance is in fact due a protected employee during the protective period as a consequence of that employee having been adversely affected as a direct result of the transaction. A TPA is not, therefore, something to which employees are entitled account an indirect affect of the transaction, or on the basis of speculative beliefs that the transaction may be cause for reduced compensation or job losses at a future date.

For the Board to have concluded, as the Organization urges, that an employee is entitled to a TPA for the singular reason of being required to exercise seniority when a position is abolished coincident to the implementation of a transaction, regardless of that employee having been determined by appropriate criteria to be adversely affected or placed in a worse position as a result of the transaction, would be tantamount to certifying all employees who exercise seniority as protected employees. Further, to hold that employees not only have the right to a TPA on demand, but a right to determine when their protective period will commence, would require the Board to extend protection benefits beyond those set forth in the NY Dock Conditions. Clearly, these are matters outside the authority of a board of arbitration.

In the circumstances, this arbitrator finds it difficult to comprehend the general character or nature of the dissent.

Sincerely,

Robert E. Peterson

**** add to Award No. 240 ***

The BMWE petitioned the STB for review of the decision; on April 3, 1995, the STB affirmed the Award and denied the BMWE petition in stating: "While we are not convinced that carriers would bear a substantial burden in providing TPAs in advance, it is evident in any event that TPAs are of little or no use in helping an employee exercise seniority to bid on new jobs. TPAs are historical averages, reflecting past hours worked, including elective time, as well as rate of pay... It is true that the amount of overtime is an important factor in evaluating a job, but there is no evidence that the ours to be working in the new job can be predicted. It therefore does not appear that employees affected by a transaction would be better able to exercise their seniority rights if TPAs were furnished on demand in advance of attaining new positions." (STB decision attached)

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31922 (Sub-No. 1)

WISCONSIN CENTRAL LTD.--PURCHASE EXEMPTION--SOO LINE RAILROAD COMPANY LINE BETWEEN SUPERIOR AND LADYSMITH, WI

(ARBITRATION REVIEW)

Decided: April 3, 1995

In a decision served September 20, 1994, we reopened this proceeding and requested comments regarding an Arbitration Board award that the Brotherhood of Maintenance of Way Employees (BMWE) petitioned us to review. We have received responses from BMWE, Soo Line Railroad Company (Soo), Norfolk Southern Railway (NS), Grand Trunk Western Railroad, Inc. (GTW), the National Railway Labor Conference (NRLC), and the Railway Labor Executives' Association. In this decision, we affirm the Arbitration Board award and deny the relief being sought by BMWE in its petition for review.

BACKGROUND AND ISSUES

In a decision served November 5, 1991, we granted an exemption allowing Wisconsin Central Ltd. to purchase Soo's 102-mile Ladysmith Line. We imposed labor protective conditions under New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).

Soo notified its employees that it intended to consummate the transaction. The jobs of four members of BMWE were to be abolished, which affected other employees' jobs through bumping rights because the four were senior employees. BMWE and Soo met to negotiate an "implementing" agreement, and they agreed on all but one question: whether Soo must provide "test period average" (TPA) earnings information to "affected" employees upon their request. The disputed question went to arbitration.[1]

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The arbitration award. In the award now at issue, dated April 28, 1992, the Arbitration Board answered the question presented in the negative: under New York Dock, Soo did not have to provide TPAs to its employees until they were adversely affected by the transaction.

BMWE specifically wanted the implementing agreement to contain the following provision:

> Each employee assigned to the line . . . and employees affected by the exercise of displacement rights by such employee will, upon request, be provided with a computation of test period earnings and hours as described in Article I, Section 5 [of the NY Dock Conditions]. (Arbitration Board award at page 7.)

The Arbitration Board in its discussion at pages 10-11 reasoned essentially that, while job abolishment is an effect, it is not an adverse effect that triggers entitlement to test period data. Entitlement can be triggered only after the employee exercises seniority in attaining a new job, one that places the employee in a worse position:

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[1] Each of these three procedural steps (Soo's notice to its employees, the parties' negotiation, and their arbitration) conformed to the process prescribed in Article I, section 4 of the New York Dock conditions.

> That a position occupied by an employee is abolished at the time of a transaction, as in the case here at issue, does not mean that that particular employee has been adversely affected and thereby entitled to a displacement allowance. The test is what happens to the employee in the exercise of seniority and displacement rights after the abolishment of the position. And even in this regard it must be considered that the Carrier has no control over the voluntary exercise of seniority.

The Board resolved, at page 12:

> In our view, the NY Dock Conditions clearly intend that employees not be given a TPA or be certified as entitled to the protective benefits of the NY Dock conditions until they have been adversely affected . . . . (underline in original).

The Board concluded at page 14:

> AWARD:
>
> The Question at Issue is answered in the negative. The Carrier is not required under the NY Dock Conditions to furnish employees "affected" by a line sale with a test period average upon request for such data. Accordingly, the Implementing Agreement which has been identified above as not having included language to such an effect will be the final agreement between the parties.

New York Dock conditions. In our decision served September 20, 1994, we requested comments on "whether New York Dock conditions should be interpreted as requiring that TPAs be provided to affected employees upon request." We observed that "the carrier seems to admit a duty to make TPAs available to 'adversely' affected employees" but also noted that "it is not clear exactly how employees would be better able to exercise their seniority . . . if TPAs were furnished on demand."

Article I, sections 1 and 5 of New York Dock conditions define a "displaced employee" as an employee placed in a "worse position" as a result of a transaction and provide that the "displaced employee" is entitled to receive "a monthly displacement allowance equal to the average monthly compensation received by that employee in the position from which that employee was displaced."[2] The monthly displacement allowance is

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[2] 1. Definitions. - * * * * * * *

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction[,] is placed in a worse position with respect to his compensation and rules governing his working conditions.

5. Displacement allowances. - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained

(continued...)

to be calculated as the difference between the monthly compensation received on the new job and the average compensation received for each of the last 12 months; the average is based on the total compensation and total time worked during the 12-month "test period" preceding displacement.

In our decision served September 20, 1994 at 5, we identified two issues to which the participating parties have responded: (1) "whether and to what extent such a requirement would assist employees in exercising their seniority rights" and (2) "whether and to what extent it would impose additional burdens on the carriers."

(1) Whether and to what extent TPAs would assist employees in exercising their seniority rights. BMWE argues that, by prohibiting employees from receiving TPAs until they are placed in worse positions, the Arbitration Board award puts employees in a "catch 22 situation," because without TPAs employees cannot know whether they are adversely affected and therefore placed in "worse positions." BMWE adds that the only issue properly before the Board was whether its proposed provision requiring Soo to furnish TPAs to affected employees should be included in the

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[2](...continued)
and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

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

* * * * * * *

entitled to TPAs until they demonstrate that they are affected adversely, which BMWE suggests would apply even to claims subject to arbitration under section 11 of New York Dock.[3] BMWE's position is that when employees are displaced they must exercise their seniority rights to obtain positions with compensation equal to or exceeding that of the positions from which they were displaced. BMWE maintains that the purpose of TPAs is to enable displaced employees to determine whether they are in worse positions with respect to their compensation and number of hours worked to earn that compensation.

BMWE also believes not only that TPAs are intended for this purpose but also that they are necessary. The union contends that pay stubs reflect only compensation and not information about total time worked including, for example, overtime. BMWE asserts essentially that, without time worked to produce the employees' total compensation for the 12-month test period, which TPA's reflect, employees cannot know whether jobs that they would bid for would be better or worse.

The carriers say that TPAs are not meant for determining whether employees are placed in a worse position. Soo maintains that TPAs are intended only to serve as a basis for calculating displacement or dismissal allowances after the employee has been adversely affected. NS argues that, because a "displaced employee" is defined by Article I, section 1 (b) as one who is already placed in a worse position, "[i]t is not possible to speak of an employee as even having a TPA until it is first known whether the employee has been placed in a worse position, for it is that event which triggers the twelve-month backwards measuring ('test') period." NRLC maintains for the same reasons that a relevant TPA cannot be calculated until the employee has been determined to be adversely affected, and GTW maintains that "TPA's cannot be calculated until there is an adverse effect, because that is, by definition, the starting point for calculating a TPA, as defined by New York Dock."

The carriers contend that the only information needed to bid for new positions based on seniority is rate of pay, which the employees already know for their past jobs and can ascertain from job listings for new jobs. Then, once an employee secures a new position based on seniority but is placed in a worse position as a result, compared to the former position, a TPA will determine how much displacement allowance the employee is entitled to receive each month during the protective period. But the TPA will not determine whether the employee is placed in a worse position in the first place. (See NS reply comments.)

The parties have further addressed whether there is an "industry practice" of providing TPAs on demand to employees upon their being affected by a carrier transaction. The Arbitration Board referred to an arbitration award (by Referee Zusman) in another dispute involving parties unrelated to this case.

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[3] Whereas section 4 provides for arbitration of the implementing agreement, section 11 (a) provides:

> In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to interpretation, application or enforcement of any provision of this appendix [the New York Dock conditions], except sections 4 and 12 [which concern losses from home removal] of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

Referee Zusman concluded that there was "no evidence of language or practice requiring Carrier to calculate a TPA where no evidence exists that the employee has suffered a loss . . . ." The Board in this case similarly noted, at page 12 of its award:

> This Board likewise fails to find by language or practice that the NY Dock Conditions require a carrier to provide a TPA to an employee merely because he would be affected by a job abolishment or sustain a loss of compensation.

NRLC submitted verified statements and exhibits of other arbitration awards showing that providing TPAs is not an appropriate subject for an implementing agreements award under section 4 arbitration. NRLC said that 6 of the 10 major railroads that it surveyed have "a consistent practice of providing TPAs only to employees who are shown to be 'displaced' or 'dismissed,'" and that "therefore, their implementing agreements do not include requirements for TPAs except in rare cases where a carrier 'certifies' in advance that affected employees will be 'displaced' or 'dismissed' and entitled to protective payments." (NRLC reply comments at pages 4-5).

BMWE asserts, however, that NRLC's portrayal of industry practice misstates the issues and mischaracterizes BMWE's point. BMWE explains that all of the arbitrations relied on by NRLC were concerned with causation -- "certification" that the employees were affected by the transaction in question, which is simply not the issue in the instant case. BMWE notes that none of the other parties cites any authority to support their arguments on this issue.

(2) Whether and to what extent requiring TPAs would impose additional burdens on the carriers. Soo asserts that processing TPAs is costly and that requiring them to be provided to employees on request, in advance of determining whether employees are affected adversely, would raise employees' expectations and result in numerous unjustified claims. The railroad describes its process of furnishing TPAs "as an involved and cumbersome manual process, far from being achievable by simply depressing a computer button." Soo presents the testimony of its Director of Labor Relations indicating that the process of administering protection claims entails numerous organizational steps. As a result, each TPA calculation requires three hours of clerical time at a cost of $43. Soo further submits an example of an actual line abandonment in 1990, concerning the Brooten, MN line, to illustrate how the seniority and displacement process can spawn a far-reaching process necessitating numerous TPA calculations. Soo indicates that four positions were abolished in that abandonment. Each position elimination resulted in subsequent bumps, totaling 19 employee changes. GTW states that "New York Dock is considerably more complicated than writing checks for separation allowances" and that "Soo is not just being hard to get along with when it says it cannot provide a TPA until there is an adverse effect."

NRLC acknowledges an increased burden of providing TPAs in advance, but with somewhat less urgency than does Soo. NRLC states that while the administrative burden on carriers of calculating early TPAs for all employees affected by a transaction "may not be immense, it is wholly unjustified" and it "may tend to confuse employees into believing that any deviation between test-period and current earnings, whether or not caused by the transaction . . . supports a claim for benefits." (NRLC comments at page 5).

BMWE questions the credibility of Soo's assertions about the administrative burden of providing TPAs, characterizing the procedure as "far-fetched" and "performed with a pencil, paper and pocket computer . . . a rat's maze of Soo's 'Process of Administering Protection Claims' that would do credit to the imagination of a Rube Goldberg or an Ivan Pavlov." BMWE disputes NRLC's argument that carriers would have to defend numerous non-meritorious claims not caused by the transaction. The union says that a request for a TPA can simply be denied on the ground that the employee's claimed effect was not caused by the transaction.

DISCUSSION AND CONCLUSION

Standard of review. In reviewing an arbitration award, we will not vacate the award unless there is "egregious" error, the award fails to "draw its essence from the labor protective conditions," or the arbitrator exceeds the limits of his authority. Chicago & N.W. Trans. Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain). We also will limit our review of arbitrators' decisions to recurring or otherwise significant issues of general importance regarding the interpretation of the agency's labor protective conditions. Finally, we treat the arbitrator's judgment about matters of evidence and causation with greater deference than we do the arbitrator's interpretations of our regulations or policies. Railway Labor Executives Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993) (RLEA).

The Arbitration Board in this case limited itself to interpreting New York Dock conditions. There is no suggestion that the award failed to draw its essence from New York Dock. Nor is there a substantial argument that the Arbitration Board exceeded its authority. BMWE intimates that the Board went beyond its authority because its award does more than rule under Article I, section 4 of New York Dock that BMWE's proposed provision will not be included in the implementing agreement, thereby precluding employees from receiving TPAs even after filing claims to determine displacement allowances. However, it appears undisputed in this case that an individual's contested claim for a displacement allowance would be subject to arbitration under Article I, section 11 of New York Dock and would necessitate a TPA.* We therefore construe the award as limited to section 4 and within the Board's authority. Additionally, we find that the award involves an element potentially present in almost all transactions in which the agency's conditions are imposed, the preparation and delivery of TPAs. Accordingly, our review of the award is proper under that aspect of our standard of review.

The issues that we posed in our decision served September 20, 1994, discussed below, concern whether New York Dock should be interpreted as requiring that TPAs be provided to affected employees upon request. Therefore, in our review of the arbitration award in this decision, we will focus on the first Lace Curtain criterion, whether the Arbitration Board committed "egregious error," and, under RLEA, we will be free to exercise

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* BMWE states in its comments at 11 that "the Commission does not refer to the primary purpose of TPAs which is to enable an employee to determine whether he or she is in a 'worse position with respect to compensation' in the current month and therefore entitled to a displacement allowance for that month." (Emphasis in original). There appears to be no dispute, however, that once an employee is in his new job, he will be entitled to a determination of his TPA.

relatively greater latitude to evaluate the award than we would if the issues concerned matters of evidence or causation.

Conclusion. We agree with the Board's finding that there is no language in New York Dock requiring TPAs on demand to affected employees before they have taken new positions. Moreover, the parties' comments support the Board's conclusion that there is no industry practice of providing TPAs on demand to employees upon being affected. Accordingly, we should affirm the award as consistent with our interpretation of our conditions, an interpretation supported by industry practice, unless it is demonstrated that this interpretation is causing unwarranted hardship to employees or threatening the equitable operation of our conditions.

While we are not convinced that carriers would bear a substantial burden in providing TPAs in advance, it is evident in any event that TPAs are of little or no use in helping an employee exercise seniority to bid on new jobs. TPAs are historical averages, reflecting past hours worked, including elective time, as well as rate of pay. In this regard, the Arbitration Board stated at page 13:

> [P]aycheck stubs provided to employees twice monthly contain a statement of "year to date" earnings and rates of pay are indicated on bulletins for positions. Thus, it would appear that such information is readily available to employees to track any concern that they may have as to their individual situations . . . .

It is true that the amount of overtime is an important factor in evaluating a job, but there is no evidence that the hours to be worked in the new job can be predicted. It therefore does not appear that employees affected by a transaction would be better able to exercise their seniority rights if TPAs were furnished on demand in advance of attaining new positions.

We conclude that producing TPAs in advance would provide no particular benefit to affected employees, and that the present system is neither unfair nor contrary to the spirit of our conditions. Therefore, we reach the same result as the Arbitration Board, that there is nothing in the New York Dock conditions that requires an implementing agreement to contain a provision mandating delivery of TPAs on demand to affected employees. Accordingly, we find no need to modify the Arbitration Board award.

It is ordered:

1. The Arbitration Board award is affirmed and the relief being sought in BMWE's petition for review is denied.

2. This decision is effective on the date of service.

By the Commission, Chairman Morgan, Commissioners Simmons, McDonald, and Owen.

Vernon A. Williams
Secretary

(SEAL)