NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1095

John C. FLETCHER, Chairman & Neutral Member
John C. CAMPBELL, Labor Member
John F. INGHAM, Carrier Member

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

and

BESSEMER & LAKE ERIE RAILROAD COMPANY
DULUTH, MISSABE & IRON RANGE RAILROAD COMPANY
ELGIN, JOLIET & EASTERN RAILWAY COMPANY
LAKE TERMINAL RAILROAD COMPANY

Date of hearing - July 15, 1997
Date of Award - July 28, 1997

Background: Under Finance Docket No. 31363,[1] the Interstate Commerce Commission approved the control by Transtar, Inc. over the Bessemer & Lake Erie Railroad Company (B&LE), the Duluth, Missabe & Iron Range Railroad Company (DM&IR), the Elgin, Joliet & Eastern Railway Company (EJ&E) and the Lake Terminal Railroad Company (LT). In doing so, the Commission imposed employee protective conditions as set forth in *New York Dock Ry. - Control - Brooklyn Eastern District Terminal*[2] (NYD).

On November 26, 1996, the Carriers served notice upon the Organization and their clerical employees of the Carriers' intent to "coordinate their accounts payable; accounts receivable; wage payroll; car hire and demurrage; revenue accounting; general accounting; property accounting; customer accounting and agency work; stores accounting; and typing, stenography and personal computer work into the Bessemer and Lake Erie Railroad Company." According to this notice, which was served pursuant to Article I, Section 4 of the NYD Conditions, the work would be performed by clerical employees of the B&LE following the coordination. The notice then identified seventy-four (74) positions and incumbents whose work would be transferred to the B&LE, which would increase its

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[1] *Blackstone Capital Partners L.P., Blackstone Transportation Partners L.P. and USC Corp. Exemption* (1988).

clerical force by sixty-two (62) positions. The notice further advised that employees adversely affected by the coordination would be allowed NYD benefits. Finally, the Carriers advised that these changes would be placed into effect March 1, 1997, or as soon thereafter as practicable.

The parties commenced negotiations toward reaching an implementing agreement concerning this coordination. Unable to reach an agreement, the Carriers requested arbitration. The National Mediation Board, by letter dated March 11, 1997, has designated Helen M. Witt as the Arbitrator in that matter. The parties continued to meet with the objective of reaching an implementing agreement. They have been unable, however, to reach agreement on an issue relating to the impact of an employee's declination of a position on the B&LE upon the employee's protective benefits under the February 7, 1965, Job Stabilization Agreement (JSA). They consequently agreed to submit this question to this Special Board of Adjustment for resolution, selecting John C. FLETCHER, Arbitrator, as Chairman and Neutral Member.

STATEMENT OF THE ISSUE

The Carriers state the issue before the Board as follows:

Does an employee cease to be a protected employee under the February 7,1965 Agreement if he fails to obtain a position available to him in the exercise of his seniority rights, or fails to accept offered employment in his craft, in connection with a coordination and transfer of work covered by the New York Dock employee protective conditions involving several railroads under common control?

The Organization states the issue before the Board as follows:

Where an employee affected by a New York Dock transaction declines an offer of transfer and exercises seniority on his/her home railroad and obtains a regular position or has meaningful work opportunities while in a furloughed status, may the Carrier deprive such employee the entitlement benefits under the February 7, 1965 Agreement, as amended?

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[2]Finance Docket No. 28905, 360 ICC 60 (1979).

The Position of the Carriers: The Carriers argue that an employee who voluntarily declines to follow his work to the B&LE as part of the NYD transaction, and is also unable to hold a position on his home road, would cease to be protected under the JSA. Carriers assert they served a proper notice in accordance with Article I, Section 4 of NYD. They now say there are seventy-four (74) positions that will be abolished[3] and sixty (60) new positions will be established on the B&LE at Monroeville, Pennsylvania. This, notes the Carriers, would leave a net reduction of fourteen (14) positions as a result of the coordination.[4]

The Carriers aver the parties have tentatively agreed that offers for the new positions will be made in seniority order on each of the involved properties. On the EJ&E, for example, the Carriers note that fifty-one (51) positions will be abolished, but only forty-two (42) will move to the B&LE. According to the Carriers, the affected employees have two options, namely following their work to the B&LE with NYD protection or exercise seniority to the six (6) remaining positions on the EJ&E. Employees who cannot hold one of the remaining jobs, say the Carriers, will be furloughed. It is these employees, who decline a move to the B&LE but cannot hold a job on their own road, who are the subject of this arbitration.

The Carriers note the entire coordination has been handled as a NYD transaction and the JSA, therefore, is not applicable. They cite Award No. 485 of Special Board of Adjustment No. 605, involving a dispute between the Brotherhood of Railroad Signalmen and CSX Transportation wherein the claimant's work had been transferred from Saginaw, Michigan, on the former Pere Marquette, to Savannah, Georgia. Instead of transferring or displacing junior employees on the former Pere Marquette, the claimant sought a separation allowance under the JSA. In denying the claim, the Board concluded that the JSA lacked

[3]Fifty-one (51) on the EJ&E, seventeen (17) on the DM&IR and six (6) on the LT.

"relevance and applicability" to the claimant's situation and that the transaction "falls within the direct purview of the New York Dock conditions." The Carriers cite additional Awards of Referees Fredenberger, Sharp, O'Brien and Zack in New York Dock arbitrations holding that employees who decline to move are not entitled to dismissal or separation allowances under NYD conditions.

The Carriers quote an agreed interpretation to Article V of the JSA as follows:

> Question No. 2: If there are more than one qualified protected employees available for a position to which an employee is required to transfer under this Article V, which employee, in the final analysis, must accept the transfer?
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> Answer to Question No. 2: The position at the new location will first be offered to the senior protected qualified employee. If he elects to decline such position and retain his present position or exercises seniority on another position in his home seniority district, the position will then be offered to other protected qualified employees in seniority order, with the understanding that the junior qualified protected employee must accept the position which is offered.

The Carriers acknowledge that employees may elect protection under the JSA in lieu of NYD protection, but they deny that an employee may elect to be furloughed and remain protected under the JSA if he refuses to follow his work to the B&LE. In further support of this position, the Carriers quote Article II, Section 1 of the JSA, which provides:

> An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements.

In this respect, the Carriers argue the refusal to follow work to the B&LE is a "failure to retain or obtain a position available. . . in the exercise of . . . seniority rights in accordance with existing rules or agreements. They contend the JSA, in consideration for retaining employees in protected service, gave them the right to make technological, operational and

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*Carriers say that nine (9) of the eliminated positions will come from the EJ&E, three (3) from the DM&IR and two (2) from the LT

organizational changes and to transfer work and/or employees throughout the system. They also point to Article III, Section 1 of the JSA, which states:

> One of the purposes of such implementing agreements shall be to provide a force adequate to meet the carrier's requirements.

The Carriers conclude that an employee who declines the offer of a position at a new location cannot be considered a "dismissed employee" under NYD or the JSA. Accordingly, they ask the Board to find that employees cease to be protected under the JSA if they refuse to follow their work to the B&LE and cannot hold a job on their home road.

The Position of the Organization: The Organization argues that a NYD transaction is governed by specific guidelines and is separate and apart from those types of circumstances contemplated by the JSA. The Organization insists there is nothing in NYD that would either modify or eliminate the terms and conditions governing employees who remain on individual carriers where facilities are not coordinated by NYD.

The Organization notes that the two protective conditions were derived from vastly different circumstances and by differing means. NYD, says the Organization, was imposed by the Interstate Commerce Commission to set forth certain minimal levels of benefits to which affected employees were entitled when their employment circumstances were altered due to two or more carriers merging facilities or work.

The Organization cites Sections 2 and 3 of Article I of NYD in support of its position. Those sections read, in part, as follows:

> 2. The rate of pay, rules, and working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statute.
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> 3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such

> employee may have under any existing job security or other protective conditions or arrangements . . . .

The JSA, on the other hand, was reached through collective bargaining prior to NYD, says the Organization, and was intended to apply in wholly different circumstances. According to the Organization, the JSA was written to protect employees against the loss of employment in the railroad industry due to the advent of technology then being developed and implemented by carriers. In exchange for a guarantee that jobs would not be eliminated except through attrition and that earnings would not be affected by technological change, the Organization notes carriers obtained the right to make technological, operational and organizational changes throughout the system within craft lines.

The Organization points out that this transaction will not result in the system-wide elimination of all clerical work, and that the Carriers have the right to utilize the remaining employees, whether they hold positions through the exercise of seniority or are furloughed. The Carriers have the right, says the Organization, to transfer these employees throughout the system to fill existing or subsequent positions, or to assign them to extra work from furloughed status.

The Organization cites a Special Arbitration Board decision in a dispute between the Transportation-Communications International Union and the Grand Trunk Western Railroad (Referee LaRocco) setting forth guidelines under which the protection afforded by the JSA may be extinguished. The Organization quotes the following portion of that Award:

> The common threads running through the above discussed line of authorities are that the drafters of the Agreement did not intend for employees to continue receiving protective benefits when: 1.) a carrier completely ceased operating a segregated segment of its transportation business; 2.) the protected employees could not exercise their seniority to any other positions on their seniority district because all the work which they had previously performed was eliminated; 3.) there was no reasonable likelihood that the protected employees would perform meaningful work for the carrier in the future; and 4.) the cessation of operations with the consequential elimination of work could not be traced to a transfer of work.

All four elements must be present to justify a company's termination of benefits under the February 7, 1965 Agreement.

Applying the LaRocco decision, the Organization argues that at least the first three criteria have not been met in this case. It avers the Carriers' business will continue to operate as it did prior to the transaction and the employees will retain seniority rights on their respective districts where clerical work will remain. Because this work remains, the Organization asserts there is a reasonable likelihood the protected employees will perform meaningful service in the future. For these reasons, the Organization concludes both statements of issue must be answered in the negative as their protection cannot be eliminated.

DISCUSSION

Although the parties have stated their questions to this Board in broader terms, the real issue in this dispute is the status of an employee who, after being given the opportunity to transfer to Monroeville to follow his work, declines the transfer and becomes furloughed because of insufficient seniority to work on his seniority district. To answer this question, the Board must examine both the NYD conditions and the JSA. The fact that this transaction is under the aegis of NYD does not vitiate the employees' protection under the JSA. To be sure, the individual employees have the option of electing which conditions under which they wish to be protected.

As noted in the Awards cited by the Carriers, the Interstate Commerce Commission recognized the efficiencies that would result through a reallocation of work forces as a result of mergers of railroads. To achieve such efficiencies, the NYD conditions were drafted to permit the carriers to integrate the work forces of the separate properties and move work and employees to central locations. The Commission obviously saw that these efficiencies could be frustrated if employees refused to relocate and the carriers were required to hire new employees at the centralized locations. To avert such a situation, the

Commission created both an incentive to relocate and a disincentive not to relocate. As an incentive, NYD contains provisions for relocation expenses as well as protection against losses as a result of the sale of a residence or an early termination of a lease. As a disincentive, the Commission has declined to extend earnings protection to employees who decline opportunities to work that require relocation. This was not an oversight. As noted by Referee Fredenberger in his decision involving the International Association of *Machinists and Aerospace Workers and the Baltimore and Ohio Railroad Company and the* Louisville and Nashville Railroad Company:

> In support of its contention the Organization analyzes the treatment of the terms "dismissed employee" and "change of residence" in various protective agreements and arrangements. The Organization argues that it is the intent of those conditions and arrangements that employees not be forced to move against their wishes if such move involves a change of residence. The Organization seeks specific language in the arbitrated implementing agreement which it contends would apply this protection to the coordination in this case.
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> The basis defect in the Organization's argument, as the Carrier notes, is that it ignores the history of this issue before the ICC. In its Decision in Finance Docket No. 28905 the Commission was requested by labor organizations to expand the definition under Article I, Section 1(c) of the New York Dock Conditions of a dismissed employee so as to protect employees from having to relocate. The ICC specifically rejected the organizations' request. The ICC has spoken authoritatively on the matter, and this Neutral must follow the ICC's pronouncement.

As a result of the NYD conditions, Carriers' employees will have work available to them at Monroeville. Whatever rights they would have to take the Monroeville positions would arise through an implementing agreement made pursuant to NYD. In this regard, it is important to note that the implementing agreement is *not* an agreement made pursuant to Article III of the JSA. For this reason, Article II, Section 2 of the JSA does not apply. Further, Article V, which includes a provision for separation pay, does not apply because it anticipates the relocation of employees under an implementing agreement pursuant to the JSA.

Instead, Section 1 of Article II applies. It reads as follows:

> An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, *or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements*, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement. [emphasis added]

An implementing agreement made pursuant to NYD would entitle the Carriers' employees to transfer to Monroeville by virtue of their seniority on their individual properties. Such an arrangement would be more than a mere preference to employment in that it would additionally permit transferred employees to dovetail their seniority on the new district. Thus, the Carrier is correct that an employee who fails to accept a transfer and cannot work in his own seniority district would cease to be a protected employee under the JSA. Accordingly, he would be entitled to neither a wage guarantee nor separation pay.

The LaRocco Award cited by the Organization is not on point in that it involved a dispute arising from the carrier's decision to terminated protective benefits that had already accrued and were being paid. The dispute herein relates to the initial accrual of such benefits.

AWARD

The question at issue proposed by the Carriers is answered in the affirmative.

The question at issue proposed by the Organization is answered in the negative if the employee is able to hold a position, but is answered in the affirmative if the employee is furloughed while declining a transfer.

John C. Fletcher, Chairman & Neutral Member

John C. CAMPBELL, Employee Member

John F. INGHAM, Carrier Member