

ARBITRATION PURSUANT TO ART. I, § 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION

* * * * *

FOX VALLEY & WESTERN LTD.,
FOX RIVER VALLEY RAILROAD CORPORATION,
GREEN BAY & WESTERN RAILROAD COMPANY,
THE AHNAPEE & WESTERN RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

* * * * *

ICC FINANCE DOCKET
NO. 32035

BEFORE PRESTON J. MOORE, ARBITRATOR

APPEARANCES

Jeffrey S. Berlin, Attorney for the Companies
Richardson, Berlin & Morvillo

William G. Mahoney, Attorney for the Union
Richard S. Edelman, Attorney for the Union
Donald F. Griffin, Attorney for the Union
Higshaw, Mahoney & Clarke, P.C.

BACKGROUND

This arbitration arises under Art. I, § 4 of the so-called New York Dock employee protective conditions. The Interstate Commerce Commission ("ICC" or "Commission") imposed those conditions when it approved an acquisition by Fox Valley & Western Ltd., a noncarrier, of the rail operating assets of Fox River Valley Railroad Corporation ("FRVR") and of Green Bay & Western Railroad

Company and its subsidiary, The Ahnapee & Western Railway Company (together, "GBW") in a decision dated December 4, 1992.

In a subsequent decision dated January 22, 1993 the ICC directed that FV&W, as well as the existing carriers GBW and FRVR, must be a participant to the implementing agreement process; that FV&W, GBW AND FRVR must give the affected GBW and FRVR employees specified notice of the asset purchase transaction under Art I, § 4 of the New York Dock conditions and must "negotiate, or submit to arbitration in the event of an inability to agree, an implementing agreement that adequately deals with the application of the New York Dock conditions to this case, including the selection and integration of the FRVR and GBW work forces."

In accordance with the ICC's direction, FV&W, FRVR and GBW attempted to negotiate implementing agreements with all the affected employees and their representatives. Implementing agreements have been entered into with the Brotherhood of Locomotive Engineers (which represents GBW's engineers) and the International Brotherhood of Firemen and Oilers (which represents GBW's laborers). A tentative agreement, subject to ratification, has been reached with the Transportation Communications International Union, which represents GBW's clerks and carmen. Agreements have also been reached with numerous unrepresented FRVR employees. Arbitration has been invoked with respect to all remaining employee groups.

The employees involved in this case are the current maintenance of way employees of FRVR and GBW, who are represented by the Brotherhood of Maintenance of Way Employees ("BMWE").

The other parties to this case are FV&W, FRVR and GBW. FV&W is not yet a carrier for purposes of either the Interstate Commerce Act or the Railway Labor Act.

FV&W is a corporation created for the purpose of acquiring and operating lines of railroad previously owned and operated by FRVR and GBW. FV&W is a subsidiary of Wisconsin Central Transportation Corporation, a holding company which also owns, among other subsidiaries, a regional railroad, Wisconsin Central Ltd. ("WCL"). WCL operates rail lines in Wisconsin, Illinois, Minnesota, Michigan and Ontario. When FV&W becomes an operating railroad, it will be operated separately from WCL, but the operations of the two railroads will be coordinated.

FRVR, a class II railroad, is a subsidiary of IteL Rail Corporation, which, in turn, is a subsidiary of IteL Corporation. FRVR came into existence as a carrier on December 9, 1988 with the acquisition of lines previously owned by the Chicago & North Western and now operates approximately 211 miles of track, extending from Green Bay to Milwaukee, Wisconsin, generally running parallel to the existing line of FV&W's affiliate, Wisconsin Central Ltd. FRVR currently employs approximately 187 hourly employees, of whom 43 are maintenance of way employees. FRVR's maintenance of way employees were unrepresented until February 5, 1933 when the National Mediation Board ("NMB"), following an election, certified BMWE as representative of the maintenance of way craft or class on FRVR. There has never been a collective bargaining agreement on FRVR. The management of FRVR has always established unilaterally rates of pay, rules and working conditions of FRVR's employees.

GBW, which is also a subsidiary of Itel Rail Corporation, is a class III railroad operating over approximately 254 miles of line, extending primarily from Green Bay to East Winona, Wisconsin. GBW has been in existence since the 1890s. Its employees are represented by several unions; the railroad's maintenance of way employees are subject to a collective bargaining agreement, which was originally effective July 17, 1973, and subsequently amended, entered into between GBW and BMW. There are in total, 61 names on the GBW maintenance of way seniority rosters, of whom 38 are active employees.

FV&W does not currently operate a railroad, has no employees and is not now a "carrier" for purposes of either the Interstate Commerce Act or the Railway Labor Act. FV&W will become a carrier, for purposes of both statutes, upon its acquisition of the rail operating properties of FRVR and GBW. FV&W intends initially to employ approximately 75 employees to perform engineering department (maintenance of way) work and intends to give priority consideration in filling those positions (subject to satisfaction of FV&W's own employment standards) to all the currently active maintenance of way employees of FRVR and GBW.

FV&W has not recognized any labor organization as representative of any members of the company's as-yet-nonexistent work force. Of course, FV&W is not subject to any collective bargaining agreements.

There is no dispute in the context of this arbitration proceeding as to the obligation of the Carriers to afford the benefits of the New York Dock conditions to the current FRVR and GBW maintenance of way employees, as directed by the ICC. The Carriers recognize that the protective conditions require the formulation of an implementing agreement appropriate to this transaction, and in accordance with the ICC's command they have attempted to negotiate such an agreement with BMW. Negotiations with BMW have not, however, resulted in an implementing agreement. Accordingly the Carriers seek to have such an agreement imposed in this arbitration proceeding.

The parties met in Washington, D.C. on April 29, 1993 and presented evidence, pre-hearing briefs and argument to the arbitrator who is responsible to render the decision by May 28, 1993.

POSITION OF BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES

At the outset the BMWWE notes that the ICC in Article I, § 4 requires arrangements "dealing as a minimum, with selection and integration of forces issues." BMWWE also notes that in response to FVW's claim that this requirement could be satisfied by bilateral agreements between GBW and its employees and FRVR and its employees, the Commission remarked: "We are at a loss to understand how this requirement can be satisfied without a single agreement involving all the carriers and both employee groups."

BMWWE further notes that in the January 25 decision the ICC also stated that it would not decide whether the implementing agreement should guarantee FVW's payment of the mandated benefits in the event that the financially vulnerable GBW and FRVR are unable to make such payments; that this matter was to be addressed in the first instance by the parties and the arbitrator.

BMWWE contends that Article I, § 2 actually requires the preservation of collective bargaining agreements and Article I, § 4 is limited to procedural application of the protection and selection of forces and assignment of employees. In support of that position BMWWE cites Southern Ry System and American Ry Supervisors Association, WJPA Docket 141 (1966).

BMWWE has submitted the following proposals for inclusion in the implementing agreement:

1. NEW YORK DOCK PROTECTIONS INCORPORATED BY REFERENCE

As a result of the transaction described above, any employee adversely affected by the transaction will be afforded the benefits prescribed by the ICA as set forth by the ICC in New York

Dock Ry -- Control -- Brooklyn East Dist., 360 ICC 60, 84-90 (1979), which are, by reference, incorporated herein and made a part hereto. A copy of those conditions is attached hereto as Attachment "A".

2. CLAIMS PROCEDURE

a. FRVR and GB&W will administer the payment of all claims made pursuant to this Implementing Arrangement. Employees claiming Dismissal Allowances or Displacement Allowances must file claims on forms provided by FRVR and GB&W and provide the information required within six months of the end of the month for which the employee claims an allowance (the "claim month"), or his or her claim will be disallowed. As part of their investigation of an Employee's claim, FRVR or GB&W may contact other employers or unemployment compensation offices, and the Employee grants consent for such employers and offices to disclose any information necessary for the proper disposition of the Employee's claim. In addition, any Employee making a claim for a dismissal allowance agrees to furnish FRVR or GB&W with satisfactory evidence of outside earnings--such as W-2 forms, payroll stubs, and/or tax returns if such request is made in writing to the Employee.

b. The filing of the initial claim for benefits, as provided in New York Dock Article I, Section 5 (Displacement), Article I, Section 6 (Dismissal), Article I, Section 7 (Separation) and Article I, Sections 9 and 12 (moving and relocation expenses) shall be made with the Carrier's highest designated officer. Upon receipt of the initial claim, the Carrier shall promptly respond as to the acceptance or denial of the claim. Claims not disallowed, in writing to the claimant and his designated representative within

60 days, shall be sustained as presented. Sustained claims shall be paid with 10 calendar days.

c. Notices to GB&W and FRVR and claims arising under this Arrangement should be sent to:

Controller
Fox River Valley Railroad Corporation
Green Bay and Western Railroad Company
200 Dousman Street
Green Bay, WI 54303

Notices to claimants and claim payments will be sent to Employees at their addresses contained in the records of the FRVR and GB&W. It shall be the obligation of each Employee to notify the FRVR or GB&W of any change in address.

d. If FRVR or GB&W shall fail to pay any amount due and payable as provided herein due to lack of cash, bankruptcy or re-organization or liquidation, FV&W shall become responsible for payment and the procedures and time limits of subsection (b) will apply.

3. CHANGE OF RESIDENCE AND MOVING EXPENSES

a. In the application of the New York Dock conditions to this transaction, a "change of residence" shall not be considered "required" if the reporting point for a position is not more than 30 miles from an employee's former reporting point, to be computed via the most direct highway mileage.

b. An Employee who accepts a position with FV&W with a reporting point more than thirty (30) miles from the Employee's former work location with FRVR or GB&W, or from the Employee's residence, whichever distance is shorter, will be entitled to his or her choice of a moving allowance as set forth below, which will

substitute for all moving benefits contemplated by New York Dock, or the benefits provided in New York Dock.

(1) If the Employee sells his residence the following schedule of benefits applies:

- (A) If sale price of the residence is less than \$50,000, an allowance of \$7,000 will be paid.
- (B) If the price of the residence is between \$50,000 and \$74,999, an allowance of \$8,000 will be paid.
- (C) If sale price of the residence is between \$75,000 and \$99,999, an allowance of \$9,000 will be paid.
- (D) For every \$10,000 amount in excess of \$100,000, an additional allowance of \$450 will be paid.

(2) For Employees who are renting and those Employees who decide to move but not sell their home, a one time allowance of \$4,000 will be paid.

(3) If an Employee who owns his or her own residence and who has accepted the moving allowance allowed for Employees who decide to move, but not sell their home subsequently sells his/her residence, he/she will be entitled to the difference between what he/she was allowed and the allowance for sale of his or her residence as outlined above.

4. CALCULATIONS OF TEST PERIOD AVERAGES

Each employee affected by this transaction will, upon request, be provided with a computation of test period earnings and hours as described in Article I, Section 5 of the New York Dock conditions. In order that the provisions of the first proviso set forth in Article I, Section 3 of the New York Dock

conditions may be properly administered each employee who qualifies for protection under New York Dock, who is also eligible for protection under some other job security or other protective conditions or arrangements will also be provided with a computation of test period earnings under those job security or other protective conditions, as described in Article I, Section 5 of the New York Dock conditions.

5. DEFINITION OF DISPLACED AND DISMISSED EMPLOYEES

a. Every GB&W and FRVR employee who obtains a position with FV&W pursuant to this Implementing Arrangement who 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, shall be treated as a displaced employee within the meaning of Article I, Sections 1(b) and 5 of the New York Dock conditions. All other GB&W and FRVR employees represented by BMW E shall be treated as dismissed employees within the meaning of Article I, Sections 1(c) and 6 of the New York Dock conditions.

b. Nothing in this Arrangement shall require an employee of FRVR or GB&W to accept a position on the Wisconsin Central Ltd. ("WCL") or to accept an FV&W position that performs work on lines, facilities or property owned or operated by WCL. An employee's refusal to accept such a position will not affect his treatment as a displaced or dismissed employee or otherwise diminish his entitlement to benefits or his rights flowing from this Arrangement.

c. An Employee who qualifies as a "displaced employee" as defined in Article 1, Section 1(b) of New York Dock will be entitled to his or her choice of a displacement allowance as provided in Article I, Section 5 of New York Dock or an alternative displacement allowance as follows: Employees who are entitled to a displacement allowance may, within thirty (30) days of being so affected, select to file for a lump sum payment. This lump sum payment would be determined by offsetting the displaced employee's monthly test period average with the monthly base rate of the employee's new position on the FV&W and multiplying that amount by the number of months in that employee's protection period.

6. NEW YORK DOCK COVERAGE: LIST OF FV&W POSITIONS

Attached hereto as Attachment "B" is a list of employees represented by the BMW E that are referred to in the Notice dated January 27, 1993, that FRVR and GB&W acknowledge are covered by this Arrangement.

Attached hereto as Attachment "C" is the list of BMW E represented positions, and the specific locations of those positions, listed separately for each of FRVR and GB&W properties that are going to be established by the FV&W.

7. SELECTION OF FORCES AND ASSIGNMENT OF EMPLOYEES

The Selection of Forces and Assignment of Work by the FV&W to perform operations over or in connection with former GB&W or the FRVR lines, facilities and property shall be made in accordance with the following provisions:

- a. Combined Seniority Roster

(1) There will be a combined seniority roster established on the FV&W for all maintenance of way employees who presently hold seniority on FRVR and GB&W by dovetailing employees in order of their seniority dates on existing GB&W and FRVR rosters, recognizing Chicago and North Western seniority dates for employees hired by FRVR from the C&NW on December 10, 1988. FRVR employees will be designated by the letter "F" and GB&W employees will be designated by the letter "G".

(2) The Carrier and the Organization will jointly combine such seniority rosters at least thirty (30) days prior to the use of such rosters in assigning positions at Green Bay and on seasonal maintenance gangs that operate on both of the former properties of the GB&W and FRVR. The Combined seniority roster will be sent to each employee on the combined roster, and the combined seniority roster will be open for protest and the correction for a period of thirty (30) days. Furthermore, the parties will define the specific limits of the Green Bay, Wisconsin work area by milepost location.

b. Application for Positions

(1) All FV&W maintenance of way positions shall be made available for bids by employees covered by this Implementing Arrangement. Assignments to such positions shall be in accordance with employees standing on the new FV&W consolidated seniority roster, provided that assignments on the property of the former GB&W shall be made first to employees who held seniority on the GB&W in accordance with their seniority under the GB&W-BMWE agreement (GV&W prior rights); and assignments on the property of the former FRVR shall be made first to employees who hold seniority

on the FRVR in seniority order (FV&W prior rights).

(2) In filling positions at Green Bay, Wisconsin terminal which is territory common to both FRVR and GB&W FV&W shall equally divide the work opportunities between GB&W and FRVR prior rights employees by assigning employees to positions in the Green Bay terminal on an alternating basis as follows: the FV&W shall give preference to the senior employee applying from the combined seniority roster and then to the prior right senior employee applying from the other former railroad (FRVR or GB&W) and then continue alternating between employees holding prior rights on the former railroads until all positions are filled. This formula will continue for any such positions that the FV&W establishes in the future. And, if reductions of forces are made or vacancies occur, such ratio of employees will always be maintained at Green Bay in all classes at Green Bay. All employees assigned to the Green Bay area will be governed by the GB&W-BMWE Agreement consistent with Section 8 below. The limits of the Green Bay terminal are to be determined by agreement between BMWE AND FV&W.

c. Hiring of FV&W Employees

Employees of GB&W and FRVR who apply for positions advertised pursuant to paragraph (b) above, and who were in the active service of either carrier within 90 days of the date of consummation of this transaction, shall be deemed physically qualified. Employees who were not in active service at least 90 days prior to the consummation date who are successful applicants may be required to undergo a return to duty physical examination, at FV&W's cost, if such physical examination is permitted under existing rules and practices.

d. If an employee is disqualified as a result of a physical, the following will apply:

(1) The employee may elect to draw his dismissal allowance as provided in Article I, Section 6 of the New York Dock, or

(2) Elect a separation allowance as provided for in accordance with Article I, Section 7 of New York Dock, or

(3) Elect to challenge his physical disqualification as follows:

(A) When an employee is withheld from duty because of his physical condition, the employee or his duly accredited representative may, upon presentation of a dissenting opinion as to the employee's physical condition by a competent physician, make written request upon his employing officer for a Medical Board.

(B) The Company and the employee shall each select a physician to represent them, each notifying the other of the name and address of the physician selected. These two physicians shall appoint a third neutral physician, who shall be an expert on the disability from which the employee is alleged to be suffering.

(C) The Medical Board thus constituted will make an examination of the employee. After completion they shall make a full report in duplicate, one copy to the Company and one copy to the employee. The decision of the Medical Board on the physical condition of the employee shall be final.

(D) The Company and the employee shall each defray the expenses of their appointee, and shall each pay one-half of the fee and expenses of the third neutral physician.

(E) If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the company doctors, the original medical findings shall be furnished to the neutral doctor for his consideration and he shall specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor shall be accepted by both parties. If it is concluded that the disqualification was improper, the employee shall be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under subsection (4)(C) above.

8. PRESERVATION OF RATES OF PAY, RULES AND WORKING CONDITIONS, AND RIGHTS, PRIVILEGES AND BENEFITS OF GB&W AND FRVR EMPLOYEES

a. The rates of pay, rules, working conditions and other rights, privileges and benefits (including health and welfare benefits) applicable to the former properties of the GB&W and FRVR prior implementation of the Transaction shall be preserved. Except as provided in Section 7 of this Implementing Arrangement, the rates of pay, rules and working conditions applicable to an FV&W employee represented by the BMW, working on the lines, facilities and properties of the former GB&W shall be the rates of pay, rules and working conditions applicable to the former GB&W prior to the transaction, and the rates of pay, rules and working conditions applicable to an FV&W employee represented by the BMW working on the lines, facilities and properties of the former FRVR shall be

rates of pay, rules and working conditions applicable on the former FRVR prior to the transaction.

b. FRVR and GB&W agree to compensate each dismissed employee for any unused vacation and personal leave days earned prior to the date that the FV&W acquired the FRVR and GB&W assets. GB&W agrees to continuation of all health and welfare insurance to its retirees consistent with current agreements. GB&W and FRVR agree to handle any labor claims and grievances to conclusion.

9. THIS AWARD AS NEW YORK DOCK ARRANGEMENT

This arrangement constitutes the Implementing Arrangement and fulfills the requirements of Article I, Section 4 of the New York Dock conditions as imposed by the ICC in connection with this transaction.

10: DISTRIBUTION OF THIS AWARD

A copy of this Implementing Arrangement with all attachments will be furnished to all Maintenance of Way employees of FRVR and GB&W.

11. EFFECTIVE DATE

This Award shall become effective at 12:01 a.m. on the date that the FV&W consummates its acquisition of control of the FRVR, GB&W and A&W.

POSITION OF THE CARRIERS
FOX VALLEY & WESTERN LTD.
FOX RIVER VALLEY RAILROAD CORPORATION
GREEN BAY AND WESTERN RAILROAD COMPANY
THE AHNAPEE & WESTERN RAILWAY COMPANY

Implementing Agreement Imposed In Arbitration
Under Art. I, § 4 Of The New York Dock Conditions
Imposed By The Interstate Commerce Commission In
Finance Docket No. 32035

1. This is the arbitrated agreement imposed under Art. I, § 4 of the New York Dock conditions as imposed in the proceeding designated as Interstate Commerce Commission Finance Docket No. 32035. The parties to this agreement are Fox Valley & Western Ltd. ("FV&W"); Fox River Valley Railroad Corporation ("FRVR"); Green Bay and Western Railroad Company and the Ahnapee & Western Railway Company (together "GBW"); and the Brotherhood of Maintenance of Way Employees, as representative of employees of FRVR and GBW.

2. FV&W will consider current active FRVR and GBW maintenance of way employees for employment in the following manner:

(a) FV&W will establish a consolidated length of service roster, compiled by dovetailing FRVR and GBW maintenance of way employees in order of their oldest seniority date on existing FRVR and GBW length of service rosters (recognizing Chicago and North Western seniority dates for FRVR employees hired from C&NW on December 10, 1988).

(b) FV&W will accept employment applications from persons on the consolidated length of service roster established in accordance with paragraph 2(a), in order of their standing on the roster. FV&W will inform applicants of its employment policies; will use its

own reasonable standards to determine qualifications for employment; and will make job offers to qualified applicants, subject to the results of a physical examination, including a drug screen, taken at FV&W's expense.

The Carriers contend that the above proposals satisfy the requirement of Article I, ¶ 4 of the New York Dock conditions with regard to maintenance of way employees of GBW and FRVR who will be affected by FV&W's acquisition of the rail operating assets of those two railroads, as approved by the Interstate Commerce Finance Docket No. 32035. The Carriers contend that the principal function of an implementing agreement under Article I, § 4 of the New York Dock conditions is to provide for "the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case," and for the "assignment of employees made necessary by the transaction." On this basis the Carriers contend their proposal should be accepted.

The Carriers contend the BMW proposal is not appropriate because its terms are outside the scope of an imposed implementing agreement under Article I, § 4 and provides benefits in excess of the level of benefits established in the New York Dock conditions.

The Carriers also point to the fact that the BMW wants to be appointed collective bargaining representative for FV&W's future maintenance of way employees, but points out that the selection of a collective bargaining representative, if any, may be made only by FV&W's employees themselves, and only under the processes of the Railway Labor Act.

Also the Carriers point up that the BMW wants to subject FV&W to the terms of the current GBW/BMW Collective Bargaining Agreement and the current employment practices of FRVR, and to restrict FV&W's use of its future employees in various ways. The Carriers contend those requests are not meaningful because FV&W's future work force is not represented by a collective bargaining representative, and the requests are outside the scope of the arbitrator's authority and are precluded by all pertinent arbitral and ICC authority.

The Carriers contend that the implementing agreement may not be the vehicle for Union recognition in such circumstances, but rather the decisions as to employee representation are reserved solely to the National Mediation Board. In support of this position the Carriers rely upon Norfolk Southern Corporation--Control--Norfolk and Western Railway and Southern Railway, 4 I.C.C. 2d 1080, 1086-87 (1988) holding that representation determinations are solely within the province of the National Mediation Board, even where the question arises in the context of a coordination of work subject to the protective conditions imposed as part of the authorization of a railroad merger or common control transaction. The Carriers point up that the Sixth Circuit affirmed the holding that the Interstate Commerce Act does not require a purchaser to recognize and bargain with the collective bargaining representatives of the seller's employees.

The Carriers point up that in this case the ICC did not impose the Wilmington Terminal modifications to the New York Dock conditions. The Carriers point up that if Wilmington Terminal does not apply here, then the ICC precedent on point is the earlier

decision (which Wilmington Terminal partially overruled) in Brandywine Valley Railroad Purchase--CSX Transportation, Inc. Lines in Florida, 5 I.C.C. 2d 764 (1989) (Brandywine) appeal dismissed. The Carriers point up that in Brandywine the Commission held, inter alia, that under the New York Dock conditions the purchaser of rail assets would be required to negotiate with the seller's unions over the terms of an implementing agreement. The Carriers further point up that the Commission held, however, that the purchaser would not be required, as a result of any obligation imposed by the Interstate Commerce Act or the protective conditions, to negotiate with those unions under the Railway Labor Act (or adopt the seller's labor agreement.)

The Carriers point up that during the short time in which the ICC's Brandywine decision was in effect prior to its partial overruling (and further narrowing of the purchaser's obligations) in Wilmington Terminal, cases arose in which implementing agreements had to be imposed under Article I, § 4 of the protective conditions, subject to the Brandywine rule. The Carriers point up the arbitrators in those cases uniformly held that they lacked the authority to require purchasers to recognize the seller's unions as collective bargaining representatives of those former employees of the seller who would go to work for the purchaser.

The Carriers cited a decision in Brandywine and another decision by this arbitrator holding "that the buyer of a rail line is not obligated to recognize the seller's unions."

The Carriers further point up that existing collective bargaining agreements may not, in any event, be permitted to impair

the carrying out of ICC-approved transactions. The Carriers further urge that if the question is not completely resolved by the fact that this transaction is an asset purchase rather than a true railroad merger, there would still be no basis for giving continuing effect to the requirements of the existing GBW/BMWE working agreement. The Carriers urge that under ample ICC and arbitral authority developed in true merger cases, GBW's existing agreement may not carry over to the new FV&W operation; rather FV&W's own employment practices should prevail.

The Carriers point up that following consummation of the approved transaction, FV&W will be conducting all the work over its whole system, including the former GBW territory; it will be FV&W, not GBW, which will be operating the railroad and carrying out the maintenance work pertinent to the operation. The Carriers urge that this integration is necessary if FV&W is to realize the benefits which it sought to obtain by means of its asset acquisition and which the ICC endorsed when it approved the transaction.

The Carriers cite cases which they contend establish that when work is transferred from one carrier and integrated into the operations of another carrier, the practices of the "controlling carrier" should apply to the transferred work.

The Carriers point up that absent agreement of the parties, a referee acting under Article 1, § 4 lacks the authority to impose benefit levels or items of benefits in excess of those provided in the New York Dock conditions themselves. Several decisions have been cited in support of that position.

The Carriers point to Section 2 of the BMW's proposal which provides that claims will be sustained, if not disallowed, within 30 days after presentation. The Carriers contend this is an unrealistically short time frame for the handling of claims, and there is no reason why an implementing agreement needs to impose such an administrative requirement.

The Carriers also point to Section 3(a) of the BMW's proposal which is a provision suggesting that a change in an employee's reporting point of more than 30 miles would be deemed to require a "change in residence." It is pointed up that a job change requires a change in residence potentially has implications with regard to an employee's New York Dock obligation to accept comparable employment, and in any event, triggers an entitlement to relocation expenses, if the employee does actually relocate. The Carriers urge this provision should be omitted because it is unnecessary for an implementing agreement to define "change in residence" as a decision whether such a change has been required with respect to an individual employee should be made on a case-by-case basis. It is urged that BMW's proposed Attachment H contains a relocation benefit schedule that exceeds the level of benefits provided in New York Dock.

The Carriers point up that the BMW proposal under Section 3(b) would not require a former GBW employee to accept a position with FV&W on the former FRVR property, and similarly would not require a former FRVR employee to accept a job on the former GBW property. The Carriers contend this contravenes the point of the ICC-imposed requirement that FV&W negotiate with all the current GBW and FRVR employees in order to afford priority hiring consideration to them; the corollary of the ICC's requirement is that

all the employees have to seek, (and, if offered, accept such employment) as a precondition to maintaining their eligibility for compensatory benefits.

The Carriers further point up that Section 3(c) of the BMW proposal would allow employees to decline positions of FV&W's affiliate, Wisconsin Central Ltd, as well as FV&W positions that perform work "on lines, facilities or property owned or operated by WCL." The Carriers contend the first part of this provision is irrelevant and unnecessary, as the Carriers do not seek to require current GBW or FRVR employees to take WCL jobs as a precondition to maintaining their entitlement to protective benefits. However, the Carriers do contend that the New York Dock conditions do not support the attempt to limit FV&W from using its own employees to perform whatever work the new carrier will choose to have them perform.

The Carriers point to Sections 4 and 5 as proposed by the BMW and allege that the New York Dock conditions do not support an entitlement to a computation of an employee's test period.

The Carriers point to Section 6 proposed by the BMW which contends that every employee who obtains a position with FV&W will be treated as a "displaced" employee while all other employees shall be treated as "dismissed" employees. The Carriers urge that such employees will not necessarily be displaced employeeed within the meaning of the New York Dock. The Carriers urge that any employees who fail to apply for FV&W jobs, or decline job offers, will be neither displaced nor dismissed employees, for purposes of the protective conditions.

The Carriers point to Sections 7 (a) and (b) proposed by the BMW which would establish a consolidated FV&W seniority roster

on a territorial basis. The Carriers urge that the territorial restrictions proposed are beyond the scope of an imposed implementing agreement which should be restricted no further than the initial hiring consideration.

The Carriers points to Section 7(c) of the BMW proposal which provides that FV&W "will be allowed" to operate seasonal maintenance gangs in certain circumstances, including a requirement that such gangs work under the GBW collective bargaining agreement. The Carriers addressed this subject matter supra.

In regard to Section 8 of the BMW proposal the Carriers contend that this provision is outside the scope of an implementing agreement.

The Carriers take the same position regarding Section 10 as proposed by the BMW.

In regard to Section 11 the Carriers contend that this provision is beyond New York Docks and is not a proper matter for an imposed implementing agreement. The Carrier agrees that as to the GBW, this matter would be governed by the existing agreement.

The Carriers point to Attachment D, Sections 1 and 2 of the BMW proposal. Section 1 provides that FV&W will hire all GBW and FRVR maintenance of way employees who apply and pass a physical. Section 2 would require FV&W to recognize prior GBW and FRVR seniority in territorial "zones" in connection with the bidding for available jobs. The Carriers contend these provisions are barred from an imposed agreement because they are attempts to regulate the size of FV&W's future work force and the way in which FV&W may use that work force. Also the Carriers point up that Section 4 would

confer "dismissed employee" status on a current employee who is not qualified for FV&W employment.

The Carriers point up that Attachment I as proposed by the BMW E would permit an employee who is eligible for a displacement allowance to take it in a lump sum at his discretion. It is urged that New York Dock does not support such an arrangement, which the carriers were willing to adopt only as part of a comprehensive negotiated settlement.

On the foregoing basis the Carriers contend that their proposal is appropriate to the ICC-approved asset acquisition transaction and should be embodied in the imposed implementing agreement.

DISCUSSION

SECTION 1. New York Dock Protection.

There is no dispute on this section.

SECTION 2. Claims Procedure.

The FV&W seriously objects to Section 2(d). The ICC left this determination to be made in the implementing agreement.

The BMW proposal is justified for the reason that FRVR and GB&W are going out of existence as far as corporate existence is concerned. All that is left of both of those carriers is the stock. This provision only provides assurance to the employees that the protection offered by the New York Dock decisions are provided for.

SECTION 3. Change of Residence and Moving Expenses.

The Carriers have urged that this position be omitted and that "change in residence" should be determined on a case-by-case basis. The evidence submitted by the parties indicates it is extremely difficult to establish precise provisions which substitute for the moving benefits contemplated by New York Dock. For this reason we find that the New York Dock conditions should apply to this transaction.

SECTION 4. Calculations of Test Period Averages.

The Carriers have taken the position that the New York Dock conditions do not support an entitlement to a computation of an employee's test period.

The evidence indicates that an employee needs a computation of the test period earnings under those job security or other protective conditions, as described in Article 1 § 5 of the New York Dock conditions.

SECTION 5. Definition of Displaced and Dismissed Employees

The Carriers have also contended that the New York Dock conditions do not support this entitlement.

The proposal of the BMW E cannot be accepted entirely. Section (a) is in conflict with the merger of the seniority rosters. Section (a) also proposes that all employees who are not treated as displaced employees will be treated as dismissed employees. We believe that Article I, Section 1(c) and 6 of the New York Dock conditions provide an adequate determination.

Section (b) is acceptable except that work which was formerly performed by FRVR employees on Wisconsin Central Ltd may continue to be performed by those employees who are working on lines which formerly belonged to FRVR.

Section (c) is acceptable except for the alternative displacement allowance. The carriers made this offer previously in negotiations but are not bound by that offer.

SECTION 6. New York Dock Coverage: List of FV&W Positions

The Carriers object to this section on the basis that it will treat every employee who is placed on FV&W as a displacement.

Section 6 of the proposed agreement is unnecessary.

SECTION 7. Selection of Forces and Assignment of Employees

The Carriers object to Sections 7 (a), (b) and (c). The Carriers contend these three proposals would have a substantial impact upon the operations of FV&W in the use of its work force.

This section required a great deal of deliberation. We believe that the proposals by the Union, with slight modification, are completely acceptable and permitted under the New York Dock decisions and the authority granted by the ICC.

SECTION 8. Preservation of Rates of Pay, Rules and Working Conditions, and Rights, Privileges and Benefits of GB&W and FRVR Employees.

The Carriers contend this proposal is outside the scope of an implementing agreement.

All of the proposals made by the BMW E cannot be accepted since serious conflicts would occur with the manner in which the FV&W proposes to operate.

There has been substantial argument that this transaction does not involve a merger. The FRVR and GB&W have been separate and are now operating under one entity. This constitutes a merger.

The FV&W contemplates a substantial change in operations which would have a serious impact upon working conditions and some other benefits under the GB&W agreement. BMW E proposal under 8(a) cannot be entirely accepted. The rates of pay, privileges and benefits (including health and welfare benefits, applicable to the former properties of the GB&W and FRVR prior to implementation of the transaction shall be preserved.

The rates of pay and rules applicable to Section 8(b) of the BMW E proposals cannot be accepted as worded. GB&W is required to compensate each dismissed employee for all benefits, as provided in the agreement between the parties. FRVR is required to compensate each dismissed employee for any benefits established by practice between the parties.

GB&W and FRVR agree to handle any labor claims and grievances to conclusion.

Although the BMW E does not specifically set forth in the proposed implementing agreement that the BMW E be recognized as the

Union representing the employees on the FRVR and GB&W, they do contend in their pre-hearing brief that such should be included in the implementing agreement. Article I, § 4 of the New York Dock conditions does not grant broad authority to an arbitrator to change collective bargaining agreements. The BMWWE contends that Article I, § 2 actually required the preservation of collective bargaining agreements. The Union further urges that the only effect Article I, § 4 of the implementing agreement can have on collective bargaining rights is with respect to assignment of employees and selection of force, to the extent that particular post-transaction assignments or selections would otherwise violate an agreement. This is true except for working conditions, seniority rights and practices which impair the transaction. BMWWE represents the maintenance of way employees on the FRVR and GB&W at the present time.

SECTION 9. This Award as New York Dock Arrangement

There is no dispute herein. Therefore, this section is accepted en toto.

SECTION 10. Distribution of this Award

There is no dispute herein. Therefore, this section is accepted en toto.

SECTION 11. Effective Date

There is no dispute herein. Therefore, this section is accepted en toto.

ATTACHMENT D. SECTION 1.

This section is objected to by the carriers on the basis that it would require FV&W to hire all GB&W and FRVR maintenance of way employees who apply and pass a physical. The carriers point

out Section 2 would require FV&W to recognize prior GB&W and FRVR seniority in territorial zones. The Carriers contend those provisions are barred from an imposed agreement because they are attempts to regulate the size of FV&W's future work force and the way in which FV&W may use that work force. Also the carriers point up that Section 4 would confer "dismissed employee" status on a current employee who is not qualified for FV&W employment.

The carriers further point up that Attachment I would permit an employee who is eligible for a displacement allowance to take it in a lump sum at his discretion. The carriers point up that the New York Dock does not support such an arrangement, which the carriers were willing to adopt only as part of a comprehensive negotiated agreement.

IMPLEMENTING AGREEMENT

The following Implementing Agreement will be established as directed by the Interstate Commerce Commission in Finance Docket No. 32035.

SECTION 1. NEW YORK DOCK PROTECTIONS INCORPORATED BY REFERENCE

As a result of the transaction described above, any employee adversely affected by the transaction will be afforded the benefits prescribed by the ICA as set forth by the ICC in New York Dock Ry--Control-Brooklyn East Dist. 360 ICC 60, 84-90 (1979), which are, by reference, incorporated herein and made a part hereto.

SECTION 2. CLAIMS PROCEDURE

a. FRVR and GB&W will administer the payment of all claims made pursuant to this Implementing Arrangement. Employees claiming Dismissal Allowances or Displacement Allowances must file claims on forms provided by FRVR or GB&W and provide the information required within six months of the end of the month for which the employee claims an allowance (the "claim month"), or his or her claim will be disallowed. As part of their investigation of an Employee's claim, FRVR or GB&W may contact other employees or unemployment compensation offices, and the Employee grants consent for such employers and offices to disclose any information necessary for the proper disposition of the Employee's claim. In addition, any Employee making a claim for a dismissal allowance agrees to furnish FRVR or GB&W with satisfactory evidence of outside earnings--such as W-2 forms, payroll stubs, and/or tax returns if such request is made in writing to the Employee.

b. The filing of the initial claim for benefits, as provided in New York Dock Article I, § 5 (Displacement), Article I, § 6 (Dismissal), Article I, § 7 (Separation), and Article I, § 9 and § 12 (Moving and Relocation Expenses) shall be made with the Carrier's highest designated officer. Upon receipt of the initial claim, the Carrier shall promptly respond as to the acceptance or denial of the claim. Claims not disallowed, in writing to the claimant or his designated representative within 60 days, shall be sustained as presented. Sustained claims shall be paid within 10 calendar days.

c. Notices to GB&W and FRVR and claims arising under this Arrangement should be sent to:

Controller
Fox River Valley Railroad Corporation
Green Bay and Western Railroad Company
200 Dousman Street
Green Bay, WI 54303

Notices to claimants and claim payments will be sent to Employees at their addresses contained in the records of the FRVR and GB&W. It shall be the obligation of each Employee to notify the FRVR or GB&W of any change in address.

d. If FRVR or GB&W shall fail to pay any amount due and payable as provided herein due to lack of cash, bankruptcy or reorganization or liquidation, FV&W shall become responsible for payment and the procedures and time limits of subsection (b) will apply.

SECTION 3. CHANGE OF RESIDENCE AND MOVING EXPENSES

The parties are directed to resolve these issues on an individual basis.

SECTION 4. CALCULATIONS OF TEST PERIOD AVERAGES

Each employee affected by this transaction will, upon request, be provided with a computation of test period earnings and hours as described in Article I, § 5 of the New York Dock conditions. In order that the provisions of the first proviso set forth in Article I, § 3 of the New York Dock conditions may be properly administered each employee who qualifies for protection under New York Dock, who is also eligible for protection under some other job security or other protective conditions or arrangements will also be provided with a computation of test period earnings under those job security or other protective conditions, as described in Article I, § 5 of the New York Dock conditions.

SECTION 5. DEFINITION OF DISPLACED AND DISMISSED EMPLOYEES

a. Every GB&W & FRVR employee who obtains a position with FV&W pursuant to this Implementing Arrangement who is unable to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, shall be treated as a displaced employee within the meaning of Article I, § 1(b) and § 5 of the New York Dock conditions.

b. Nothing in this Arrangement shall require an employee of GB&W to accept a position on the Wisconsin Central Ltd (WCL) or to accept an FV&W position that performs work on lines, facilities or property owned by WCL that was not formerly performed by FRVR employees. Nothing in this Arrangement shall require an employee of FRVR to accept a position on the Wisconsin Central Ltd or to accept an FV&W position that performs work on lines, facilities or

property owned by WCL that was not formerly performed by FRVR employees. An employee's refusal to accept such a position will not affect his treatment as a displaced or dismissed employee or otherwise diminish his entitlement to benefits or his rights flowing from this Arrangement.

c. An Employee who qualifies as a "displaced employee" as defined in Article I, § 1(b) of New York Dock will be entitled to his or her displacement allowance as provided in Article I, § 5 of New York Dock.

SECTION 6. NEW YORK DOCK COVERAGE: LIST OF FV&W POSITIONS

This Section is unnecessary.

SECTION 7. SELECTION OF FORCES AND ASSIGNMENT OF EMPLOYEES

The Selection of Forces and Assignment of Work by the FV&W to perform operations over or in connection with former GB&W or the FRVR lines, facilities and property shall be made in accordance with the following provisions:

a. Combined Seniority Roster

(1) There will be a combined seniority roster established on the FV&W for all maintenance of way employees who presently hold seniority on FRVR and GB&W by dovetailing employees in order of their seniority dates on existing GB&W and FRVR rosters, recognizing Chicago and North Western seniority dates for employees hired by FRVR from the C&NW on December 10, 1988. FRVR employees will be designated by the letter "F" and GB&W employees will be designated by the letter "G".

(2) The Carrier and the Organization will jointly combine such seniority rosters as least thirty (30) days prior to the use of such rosters in assigning positions at Greey Bay and on seasonal maintenance gangs that operate on both of the former properties of the GB&W and FRVR. The combined seniority roster will be sent to each employee on the combined roster, and the combined seniority roster will be open for protest and correction for a period of thirty (30) days. Furthermore, the parties will define the specific limits of the Green Bay, Wisconsin work area by milepost location.

b. Application for Positions

(1) All FV&W maintenance of way positions shall be made available for bids by employees covered by this Implementing Arrangement. Assignments to such positions shall be in accordance with employee standing on the new FV&W consolidated seniority roster, provided that assignments on the property of the former GB&W shall be made first to employees who held seniority on the GB&W in accordance with their seniority under the GB&W-BMWE agreement (GB&W prior rights); and assignments on the property of the former FRVR shall be made first to employees who held seniority on the FRVR in seniority order (FRVR prior rights).

(2) In filling positions at Green Bay, Wisconsin terminal which is territory common to both FRVR and GB&W, FV&W shall equally divide the work opportunities between GB&W and FRVR prior rights employees by assigning employees to positions in the Green Bay terminal on an alternating basis as follows: the FV&W shall give preference to the senior employee applying from the combined seniority roster and then to the prior right senior employee applying

from the other former railroad (FRVR or GB&W). FV&W may consider fitness and ability in making the above assignments. FV&W will continue alternating between employees holding prior rights on the former railroads until all positions are filled. This formula will continue for any such positions that the FV&W establishes in the future. And, if reductions of forces are made or vacancies occur, such ratio of employees will always be maintained at Green Bay in all classes at Green Bay. All employees assigned to the Green Bay area will be governed by the GB&W-BMWE Agreement consistent with Section 8 below. The limits of the Green Bay terminal are to be determined by agreement between BMWE and FV&W. The above preference is controlling if fitness and ability to perform the work is relatively equal.

c. Hiring of FV&W Employees

Employees of GB&W and FRVR who apply for positions advertised pursuant to paragraph (b) above, and who were in the active service of either carrier within 90 days of the consummation of this transaction, shall be deemed physically qualified. Those employees whom FV&W believe may not be physically qualified will fall in the category of employees who are not in active service at least 90 days prior to the consummation date. Employees who were not in active service at least 90 days prior to the consummation date who are successful applicants may be required to undergo a return-to-duty physical examination, at FV&W's cost, if such physical examination is permitted under existing rules and practices.

d. If an employee is disqualified as a result of a physical, the following will apply.

(1) The employee may elect to draw his dismissal allowance as provided in Article I, § 6 of New York Dock, or

(2) Elect a separation allowance as provided for in accordance with Article I, § 7 of New York Dock, or

(3) Elect to challenge his physical disqualification as follows:

(A) When an employee is withheld from duty because of his physical condition, the employee or his duly accredited representative may, upon presentation of a dissenting opinion as to the employee's physical condition by a competent physician, make written request upon his employing officer for a Medical Board.

(B) The Company and the employee shall each select a physician to represent them, each notifying the other of the name and address of the physician selected. These two physicians shall appoint a third neutral physician, who shall be an expert on the disability from which the employee is alleged to be suffering.

(C) The Medical Board thus constituted will make an examination of the employee. After completion they shall make a full report in duplicate, one copy to the Company and one copy to the employee. The decision of the Medical Board on the physical condition of the employee shall be final.

(D) The Company and the employee shall each defray the expenses of their appointee, and shall each pay one-half of the fee and expenses of the third neutral physician.

(E) If there is any question as to whether there was any justification for restricting the employee's service or removing him from service at the time of his disqualification by the

company doctors, the original medical findings shall be furnished to the neutral doctor for his consideration, and he shall specify whether or not, in his opinion, there was justification for the original disqualification. The opinion of the neutral doctor shall be accepted by both parties. If it is concluded that the disqualification was improper, the employee will be compensated for actual loss of earnings, if any, resulting from such restrictions or removal from service incident to his disqualification, but not retroactive beyond the date of the request made under Subsection (4)(C) above.

**SECTION 8. PRESERVATION OF RATES OF PAY, RULES AND
WORKING CONDITIONS, AND RIGHTS PRIVILEGES
AND BENEFITS OF GB&W AND FRVR EMPLOYEES**

a. The rates of pay, rules, working conditions and other rights, privileges and benefits (including health and welfare benefits) applicable to the former properties of the GB&W and FRVR prior implementation of the Transaction shall be preserved. Except as provided in Section 7 of this Implementing Arrangement, the rates of pay and rules applicable to an FV&W employee represented by the BMWE, working on the lines, facilities and properties of the former GB&W shall be the rates of pay, rules and working conditions applicable on the former GB&W prior to the transaction; and the rates of pay and rules applicable to an FV&W employee represented by the BMWE working on the lines, facilities and properties of the former FRVR shall be the rates of pay, rules and working conditions applicable on the former FRVR prior to the transaction.

b. Dismissed employees claims for unused vacation and personal leave days earned prior to the date that FV&W acquired the FRVR and GB&W assets should be handled by claims against the FRVR and GB&W.

SECTION 9. THIS AWARD AS NEW YORK DOCK ARRANGEMENT

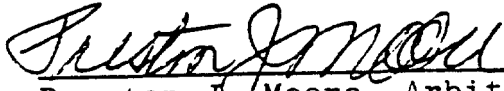
This arrangement constitutes the Implementing Agreement and fulfills the requirements of Article I, § 4 of the New York Dock conditions as imposed by the ICC in connection with this transaction.

SECTION 10. DISTRIBUTION OF THIS AWARD

A copy of this Implementing Arrangement with all attachments will be furnished to all Maintenance of Way employees of FRVR and GB&W.

SECTION 11. EFFECTIVE DATE

This Award shall become effective at 12:01 a.m. on the date that the FV&W consummates its acquisition of control of the FRVR, GB&W and A&W.


Preston J. Moore, Arbitrator

May 14, 1993