Arbitration in the Matter	OPINION AND AWARD
Between	
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY	
vs.	
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS.	Gil Vernon Arbitrator

CASE 1002

I. BACKGROUND AND FACTS

On December 20, 1977, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (to be referred to as the Railroad) filed bankruptcy. In April of 1978, the court-appointed trustee of the Railroad announced his intention to abandon all lines of the Railroad west of Miles City, Montana. On November 4, 1979, Public Law 96-101 (the Milwaukee Railroad Restructuring Act) was passed by Congress. The purpose of the Act was "to provide for the orderly restructuring of the Milwaukee Railroad and for the protection of the employees of such railroad." As a result of Section 9 (a) of the Act, the Railroad and the labor organizations representing its employees entered into an Employee Protection Agreement. It was signed and dated December 14, 1979. The Act provided that any claim of an employee for benefits under such an Agreement must be filed with the Railroad Retirement Board. Further in this respect, the Employee Protection Agreement provided that if the Railroad Retirement Board found that a dispute under the Agreement involved the interpretation, application or enforcement of the Agreement, the Board would appoint an arbitrator, whose decision would be final and binding.

The dispute involves the claim for separation allowance under the Agreement of Mr. David W. Retterath of Tacoma, Washington. Mr. Retterath (Claimant) was employed as a Boilermaker at Tacoma. His position was abolished and he was furloughed at the close of the work day March 30, 1979.

II. PERTINENT AGREEMENT PROVISIONS

SECTION 1 - DEFINITIONS

(c)EMPLOYEE - means any person with an "employment relationship" with the Milwaukee Railroad or the Trustee as of January 1, 1979 and who has maintained such relationship up to and including October 1, 1979, but does not apply to any person who was hired for a specific project or projects funded with monies provided pursuant to the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, and who did not have an employment relationship with the Milwaukee Railroad as of January 1, 1979, or who resigns, retires or is discharged for cause in accordance with existing agreements, where applicable, prior to a transaction, and does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the Board of Directors or any other person performing such functions. The term Employee also includes:

(1) a person absent because of illness or injury, but only upon approval of his fitness to resume his normal occupation by a company physician, or, in the event of a dispute, by a board of medical examiners comprised of a company physician, the employee's physician and a third physician selected by the first two physicians;

(2) any person on a leave of absence from the Milwaukee Railroad for the purpose of serving as a union representative.

(d) TRANSACTION - means any action taken in connection with the restructuring of the Milwaukee Railroad, or the results thereof, including but not limited to abandonments, sales or transfers of railroad lines, consolidations, and diversion of traffic undertaken by the Milwaukee Railroad in connection with such restructuring.

(e) SEPARATED EMPLOYEE - means an employee whose position is abolished or who is displaced therefrom by another employee as a result of a Transaction and who is unable to obtain through the exercise of his seniority rights employment with the restructurd Milwaukee Railroad that does not require a change in residence of more than 125 Milwaukee Railroad route miles in existence as of the date of this agreement.

SECTION 5 - SEPARATION ALLOWANCES, BACK PAY AND VACATION PAY

(a) Any Separated Employee may, no later than April 1, 1981, elect to receive a Separation Allowance from the Milwaukee Railroad in accordance with this section, except that no such allowance shall be paid to any employee who secures employment with seniority rights unaffected on any railroad which acquires a line or portion thereof from the Milwaukee Railroad.

SECTION 8 - REARRANGEMENT OR ADJUSTMENT OF FORCES

Should the Milwaukee Railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this agreement, this agreement will apply to such employee.

SECTION 9 - PROCESSING OF CLAIMS AND RESOLUTION OF DISPUTES

(b) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of the transaction relied upon. It shall then be the Milwaukee Railroad's burden to prove that factors other than a transaction affected the employee.

III. ISSUE

The issue to be decided by the Arbitrator can be framed as follows:

Is Mr. David W. Retterath entitled to a separation allowance under the provisions of the Employee Protection Agreement dated December 14, 1979?

IV. POSITION OF THE RAILROAD

The Railroad first argues that the Claimant is not entitled to a severance allowance because he is not an employee within the meaning of Section 1 (c) of the Employee Protection Agreement. As the Railroad states: "To qualify for any benefits under the MRRA Agreement, an employee must have an employment relationship with the Carrier as of January 1, 1979, and maintained such relationship up to and including October 1, 1979." The Railroad argues the Claimant did not have an employment relationship because when he was furloughed on March 30, 1979, he failed to file his name and address in accordance with Rule 27 (c). The Railroad asserts that the Claimant's failure to do so causes the forfeiture of his seniority rights and thus the end of his employment relationship. Rule 27 (c) reads:

> "(c) Employes laid off by reason of force reduction, in order to retain their seniority rights, must file their correct addresses in writing with their foreman and local committee within five (5) days after being laid off. Employes laid off by reason of force reduction who change their addresses will promptly file their names and correct addresses with their foreman and local committee."

As evidence to support this contention, the Carrier submits a statement from the Claimant's former supervisor that he does not recall the Claimant filed his name and address.

The Railroad argues secondly that even if the Claimant did comply with Rule 27 (c) he still would not qualify for benefits under the Agreement for two reasons. First, in order to be eligible for benefits, the Railroad points out an employee be

a "separated employee." Under the Agreement this means to qualify for a separation allowance an employee must have had "either his job abolished as a result of a restructuring transaction or been displaced by a senior employee whose position was abolished as a result of a restructuring transaction." "Transaction" is defined in Section 1 (d) of the Agreement. The Railroad then contends that Mr. Retterath's position was not abolished by a restructuring transaction but "instead; it was caused by the diminution of work of that particular craft." In other words, he lost his job as a result of a reduction in business not as a result of restructuring or abandonment of the railroad. Additionally, the Railroad argues ". . . when claimant Retterath relinquished his seniority on April 4, 1979, the MRRA legislation was not even under consideration. Thus, a transaction as defined in the Labor Protection Agreement of December 14, 1979, could not have taken place on March 30, 1979, when his job was abolished."

V. POSITION OF THE UNION

The Union argues first that Mr. Retterath is an employee within the meaning of the Agreement. He did, contrary to contentions of the Carrier, file his name and address in accordance with Rule 27 (c). In as much as he filed his name and address he maintained seniority and thus his employment relationship with the Carrier. As evidence that his name and address were filed, the Union presented two statements from other employees who observed the Claimant file his name and address. This is in addition to

the Claimant's statement. Further, the Union presents a copy of an address index card showing Claimant's name, address, phone and a notation that he was furloughed 3-31-79. The Union contends the document was obtained from local Carrier files. They also point out that the Claimant's name appeared on the 1980 seniority roster with a notation that he was furloughed. The Carrier contends this was a clerical error which was corrected in a revised roster issued March 4, 1980.

Secondly, the Union asserts that the Claimant's job was abolished as a result of a restructuring transaction, i.e. the abandonment of operations west of Miles City, Montana. As evidence of this they point to a letter dated January 17, 1980, directed to various unions which listed several positions to be abolished in anticipation of court of approval abandonment of lines west of Miles City. The letter listed among others, one Boilermaker position at Tacoma, Washington. The Union contends this is the Claimant's position inasmuch as his position was the only Boilermaker position west of Miles City. Incidentally, this stands unrefuted in the record. Further, they point out that the same position was listed in a notice dated April 3, 1980, giving notice of actual abandonment.

VI. OPINION

There are two issues that must be dealt with in order to determine if Mr. Retterath is entitled to a separation allowance. It first must be determined if he was an employee within the

meaning of the Agreement and secondly, if it is found that he was an employee, it must be determined whether he was affected by a transaction within the meaning of the Agreement. The questions will be dealt with separately.

A. Was Mr. Retterath an "Employee"?

The arguments in respect to this question center around the issue of whether Mr. Retterath filed his name and address in compliance with Rule 27 (c). The Carrier introduced another argument at the hearing not contained in their submission contending that furloughed employees do not have an employment relationship.

In respect to the question of whether Mr. Retterath filed his name and address, it must be concluded that he complied with Rule 27 (c). The Union has showed by a preponderance of the evidence that he did in fact file his name and address. They have presented the Claimant's statement and the statement of two other employees. They have produced a copy of the Claimant's address card kept by the Carrier showing his address. It is unrefuted in record that this card was the Carrier's actual record. This evidence must be given decisive weight when compared to the Railroad's evidence on the point. The Railroad's evidence consisted of only one statement by the Claimant's former foreman which states he didn't recall if Retterath filed his. A statement such as this leaves open the significant possibility that Retterath may have submitted his address. As a result, it has little weight.

The Carrier also argued that furloughed employees are not employees. Even if this argument had been made during the handling of this grievance, it is unpersuasive. When an employee's seniority rights continue by contract beyond the date of furlough and he or she fulfills the requirements of the contract, and so long as the employee is available for service, an employment relationship exists.

From the above discussion, it is clear that the Claimant's seniority rights and thus an employment relationship did exist during the qualifying period specified in the contract.

B. Was Mr. Retterath Affected by a "Transaction"?

The Railroad argues that the Claimant couldn't have been affected because his furlough took place approximately 11 months prior to any actual abandonment. During the hearing, they elaborated on this argument stating that in effect there was no retroactivity in the Agreement. However, it is clear that the Agreement extends potential coverage to employees who may lose their job prior to an actual transaction. Section 8 of the Agreement states:

> Should the Milwaukee Railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this agreement, this agreement will apply to such employee.

The language of the Agreement given its plain and ordinary meaning makes clear that whether an employee was affected prior to the date of the Agreement in anticipation of a transaction is a valid question under the Agreement. Further, it is not farfetched to say that it is possible that Mr. Retterath's job was abolished in anticipation of a transaction even though 11 months prior to actual abandonment when considering the Trustee announced

as early as April, 1978, his intent to abandon all lines west of Miles City. The Agreement does apply in a jurisdictional sense and the next question becomes whether he was furloughed in anticipation of a transaction.

The Union argues he was affected by a transaction. The Railroad argues on the other hand he was furloughed not in anticipation of the abandonment but as a result of a reduction in business. Normally, the burden of proof is on the petitioner but in this case the contract places the primary burden on the Carrier. Section 9 (b) states:

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of the transaction relied upon. It shall then be the Milwaukee Railroad's burden to prove that factors other than a transaction affected the employee. (Emphasis added)

The Union has satisfied its obligation under 9 (b) by identifying the transaction which they assert affected the Claimant; in this case the abolishment of his position allegedly in anticipation of a transaction. They have also indicated the facts upon which they relied. Inasmuch as they have fulfilled their obligation under 9 (b) the burden of proof shifts to the Carrier. The critical and decisive issue becomes whether the Carrier sustained its burden, in the words of the Agreement, to "prove that factors other than a transaction affected the employee." Specifically, the question must be asked, did the Carrier prove their assertion that the employee's position was abolished as a result of

a decline in business and a resultant diminution of work in the Claimant's craft. While this is a defense availabe to the Railroad and while it may have been the case, the Railroad has not proved it. There has been no evidence presented to show the Claimant was affected by "other than a transaction" beyond the mere assertion made by the Railroad. If the Railroad is to be upheld, they must come to arbitration with facts and evidence to support their contentions as the contract requires. The possibility of a connection between the abolishment and the abandonment may even be less than strong in some cases, but an arbitrator cannot decide cases on the basis of supposition. If it is the Railroad's position that the abolishment was caused by a decline in business and not the abandonment, it is their responsibility to conclusively draw the distinction between the two events.

In view that the Railroad has failed to sustain its burden to prove factors other than a transaction caused the abolishment of Mr. Retterath's position, the claim is sustained.

AWARD:

The Claim is sustained.

Gil Vernon, Arbitrator

Eau Claire, Wisconsin
September 12, 1981