AWARD NO. 3

CASE NO. 3

BEFORE THE ARBITRATION COMMITTEE
PURSUANT TO SECTION 9 OF THE
GREAT NORTHERN PACIFIC AND BURLINGTON LINES
MERGER PROTECTION AGREEMENT

In the Matter of an Arbitration between BURLINGTON NORTHERN INC. and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	OPINION AND AWARD

QUESTIONS AT ISSUE:

(1) Is Mr. Lawrence R. Zumwalt entitled to merger protection pay, under the provisions of the Merger Protection Agreement-ment dated January 28, 1968, subsequent to the abolishment by Carrier effective January 14, 1974, of his position as crossing watchman at Tacoma, Washington?

(2) Is Mr. John R. Jarvis entitled to merger protection pay, under the provisions of the Merger Protection Agreement dated January 28, 1968, subsequent to the abolishment by Carrier effective January 14, 1974, of his position as crossing watchman at or near Seattle, Washington?

(3) Is Mr. Willie H. Williams, Jr., entitled to merger protection pay, under the provisions of the Merger Protection Agreement dated January 28, 1968, subsequent to the abolishment by Carrier effective June 23, 1973, of his position of crossing watchman at or near Seattle, Washington?

BACKGROUND:

In this case claims have been presented for merger guarantee payments for each of three crossing watchmen from the former Great Northern Railway whose jobs were abolished in 1973-74 and Carrier has denied each of the claims on the property. Pursuant to Section 9 of the controlling Merger Protection Agreement, the Organization has referred the dispute to this Arbitration Committee for consideration and determination. The members designated by the parties selected

Dana E. Eischen, Esq., as Chairman and Neutral Member and the Committee convened at St. Paul, Minnesota, on July 2, 1975, to hear the cases. Thereafter the record was declared closed and the time limits for issuance of the Committee's decision were extended by mutual agreement.

The three claims each seek the same basic relief, are premised on the same contractual provisions, and flow from essentially similar gravamens. They were handled separately, but basically in the same manner, by both parties on the property and the three were presented concurrently before the Committee. There are some salient distinguishing factual characteristics about the claim of each Claimant, however, and therefore they are described separately and seriatim herein.

(1) L. R. Zumwalt: This Claimant began service with the former Great Northern on March 8, 1950 as a track laborer but underwent an operation for stomach ulcers in 1952 and thereafter worked only as a crossing watchman because of resultant physical incapacity for trackmen's work. In May, 1973, Zumwalt transferred as crossing watchman from Seattle to Tacoma, Washington, and in September, 1973, Carrier's examining physician, Dr. Edward R. Anderson, certified as follows: "Lawrence Zumwalt only qualified as flagman--not to do section work." Subsequently Claimant's position as crossing watchman at Tacoma was abolished by Carrier effective January 14, 1974.

The record after January 14 becomes somewhat murky and contradictory but careful analysis of the available evidence convinces us that events transpired as follows: (a) On or about January 21, 1974, Zumwalt was ordered by Carrier's Assistant Supervisor-Roadway Maintenance, to submit to another examination by Dr. Anderson, the physician who four months earlier had found him incapable of doing section work. That medical examiner's report states rather ambiguously that the employee does meet prescribed standards and recommends that he be retained

through 1978. But, as we read it, that report is entirely unclear as to which position, flagman or sectionman, Claimant was deemed qualified for. (b) By telegram dated January 28, 1974, Claimant advised the Assistant Superintendent-Roadway Maintenance and his Supervisor-Roadway Maintenance, of his desire to displace a junior sectionman at Tacoma. (c) The Supervisor-Roadway Maintenance refused to accept Claimant's bump and by letter dated February 4, 1974, notified the Assistant Superintendent-Roadway Maintenance as follows:

> "Mr. Zumwalt was hired by me when I was General Section Foreman in Seattle, Washington, and some time in 1952 Mr. Zumwalt underwent a very serious stomach operation. Later when he recovered he was assigned as Crossing Flagman at Seattle, Wn. due to not being able to perform Sectionman's duties and has been in this capacity up to the abolishment of his position as Crossing Flagman at 17th & Pacific Ave. in Tacoma, Wn. on January 15, 1974.
>
> I am attaching a form signed by Dr. E. R. Anderson on September 25, 1973 restricting this man to Flagging work only, not to do section work.
>
> I personally know this man's history and am confident that he cannot perform the duties of a sectionman.
>
> It is my recommendation that he be placed on Physical Disability."

(d) Thereafter, Claimant filed the instant merger protection pay claim which, failing resolution on the property, has been referred to this Committee.

(2) J. R. Jarvis: Claimant Jarvis entered service as a laborer with the Great Northern in 1940 but thereafter became incapacitated due to injury and since 1949 has worked continuously as a crossing watchman. He was working as crossing watchman at or near Seattle, Washington, when Carrier abolished his position effective January 14, 1974. Claimant Jarvis was ordered to take a physical examination and he was declared physically unable to perform sectionman's work and therefore was not able to exercise his seniority as a sectionman. Jarvis thereafter submitted his claim for merger protection pay which was not resolved and comes now to our Committee.

(3) W. H. Williams, Jr.: Claimant Williams entered the service of the former Great Northern as a crossing watchman on February 18, 1969. Williams worked as a crossing watchman until April 16, 1973, when he bid on and received a sectionman's assignment. However, he failed to pass the physical examination for that job and he was removed from it and returned to the crossing watchman's position May 30, 1973. His position as crossing watchman was abolished effective June 23, 1973. Thereafter, commencing in December, 1973, Claimant filed merger guarantee pay claims which were denied by Carrier and referred by the Organization to this Committee.

POSITIONS OF THE PARTIES:

The Organization and the Carrier each argue that the clear and express language of the Merger Protection Agreement supports their respective positions. The Organization relies on the terms of Section 1(b), while the Carrier points to certain exceptions to 1(b) which are set forth in Section 3(a). Thus the case in essence reduces to the rather narrow question of whether Section 3(a) applies to the claims of Zumwalt, Jarvis and Williams.

Carrier specifically contends that each of the three claims is taken out from under Section 1(b) by the exception in Section 3(a) which states that "an employee shall not be regarded as deprived of employment or placed in a worse position....in case of his... failure to work due to disability." With respect to the Zumwalt claim, Carrier argued additionally and alternatively that another exception bars his claim, to wit., "...failure to obtain a position available to him in the exercise of his seniority rights..." In addition to the foregoing arguments on the merits, Carrier also urges that Rule 42(the Time Limit on Claims Rule of the collective bargaining agreement between Carrier and the Organization) applies to these merger guarantee claims. Thus, Carrier contends that the Zumwalt and Williams cases are time-bound under Rule 42 and must be dismissed on that basis. Consistent

with this position, Carrier stipulated that the Jarvis claim was not handled by local management in a timely fashion under Rule 42 and on this basis and without conceding any merit to the substantive claim, Carrier offered in August, 1974, to pay the Jarvis claim for January, 1974, less earnings. The Organization denies that Rule 42 applies to any of these claims, and consistent with its position on this point declined the offer of payment for Jarvis which Carrier had premised on Rule 42, and elected to proceed on the merits.

DISCUSSION:

We turn first to Carrier's assertion that Rule 42 applies in these claims and bars two of time on timeliness grounds. We dispose of this erroneous position without undue ceremony by reference to Award No. 1, Case No. 1, of another Arbitration Committee established pursuant to Section 9 of the Merger Agreement and comprised of the same Carrier and Organization members who serve on the instant Committee. In Award No. 1 dated February 26, 1975, the Committee ruled as follows:

> "If the Merger Agreement contained no time limits at all, Carrier's contention about the applicability of Rule 42 of the Schedule Agreement would have more weight. But where a separate agreement contains some time limits and not others, the absence of the others is significant. Section 9 of the Merger Protection Agreement contains various specifications about when a dispute ripens for arbitration, when partisan members of an arbitration committee are to be selected, when a neutral is to be designated and how, when the committee is to meet, and when it is to render its award.
>
> "Given such explicit features, did the parties intend that the initial filing of the claim was to be governed by Rule 42? The Merger Protection Agreement certainly could have said so if that had been intended, especially in the light of the experience under the February 7, 1965 Agreement. Yet it would have required no more than a phrase to make the schedule agreement's time limits obligatory, except with respect to arbitration. Thus it would be inappropriate to impose unstated requirements about filing claims, where the parties themselves neither did so nor clearly showed any intention to apply existing rules to this special Agreement.

"Time limits, like all contractual conditions, must be observed by the parties and by their neutrals. But the predominant view in labor relations--for understandable reason--is that disputes should be decided on their merits unless a clear procedural barrier blocks the way. None was shown here. Consequently, it is held that the grievance was not filed untimely. Even if it had been, it is a continuing claim and could have been filed at any time, merely with a limitation on retroactive compensation."

We expressly adopt the foregoing findings and hold that Rule 42 is no bar to the claims before us.

The basic question remaining is whether claimants are entitled to the protected status of Section 1 (b) or are they excepted therefrom by operation of Section 3 (a)? Carrier argues that they failed to work due to disability or failed to obtain a position available to them in the exercise of their seniority and are thus clearly within the context of Section 3 (a) and thereby not covered by Section 1 (b). The Organization counters that the disability exception of 3 (a) by its express terms and by necessary implication applies only to a disability suffered after the Agreement took effect. Moreover, the Organization argues that because of pre-existent disability the only positions "available" to these claimants in the exercise of their seniority were those of crossing watchmen which Carrier abolished.

We have carefully analyzed the positions of the parties and especially the language of Section 3 (A) which is herein at issue. Carrier urges that the language is clear and unequivocal and we may not legislate new meaning by arbitral decision. Certainly an arbitrator should not impose a meaning to clear and unambiguous language which is at odds with what the parties have mutually expressed, since to do so would be to usurp the functions of labor and management at the bargaining table. But the arbitrator is less likely than one of the parties to find in written language what one would like to find, rather than what is actually

there. In our judgment, the language of Section 3 (a) is not so clear and unambiguous as Carrier believes it to be on the central question raised herein, i. e., whether the disability exception applies retroactively to continuing disabilities which predate the effective date of the Merger-Protection Agreement, or whether that provision applies only to disabilities arising after the effective date. As we read Section 3 (a) the provision is silent rather than clearly expressive of the parties' intention on this point.

Where the meaning and intent of the parties is not patent from the agreement language used, we must turn to recognized standards for construing and interpreting contract language. Not uncommonly, definite meaning may be given to ambiguous or doubtful words by construing them in the light of their context. Indeed, the leading legal authority on contracts and their interpretation, states: "Noscitur a sociis is an old maxim which summarizes the rule both of language and of law that the meaning of words may be controlled by those with which they are associated." Williston Contracts Section 618.

Applying the foregoing principle to the instant case, we find that all of the exceptions listed in Section 3 (a) are couched in the context of future, rather than prior, occurrences. In this case, therefore, we find persuasive the Organization's assertion that the language of Section 3 (a) must make an exception from the coverage of Section 1 only if the disability were suffered after the effective date of the Merger Protection Agreement (January 2, 1966). Thus, the exception clause is not applicable to Claimants Zumwalt and Jarvis whose disabilities occurred respectively 14 and 17 years prior to the effectuation of that Agreement. Claimant Williams, on the other hand, has a disability dating from April 1973, over 7 years after the effective date, and therefore falls squarely within the disability exception listed in Section 3 (a).

We are also compelled to reject Carrier's alternative basis for denial of the Zumwalt and Jarvis claims, and we hold that Claimants did not fail to obtain positions available to them in the exercise of their seniority. With respect o this holding, we found persuasive the Awards of Special Board of Adjustment No.605. That Board interprets and applies the protective provisions of the February 7, 1965, National Agreement; Article IV, Section 5 of which bears considerable similarity to our Section 3(a). Both parties presented us with awards of SBA No. 605 recognizing that they were instructive, albeit not binding, in our deliberations herein.

As we read Awards 136 and 149 of SBA No. 605 against the background of the facts and Agreement language before us, we find that the inability of Claimants Zumwalt and Jarvis to exercise seniority otherwise available to them is because of their disabilities. We held supra that the disabilities of Zumwalt and Jarvis are not covered by Section 3(a) and therefore would not directly deprive them of the coverage of Section 1. We shall not by indirectinn deprive them of that coverage because of the disability-caused failure to exercise their otherwise available seniority rights. Unfortunately for Williams, however, his disability is covered under Section 3(a) and his derivative failure to exercise seniority rights does take him out from under the coverage of Section 1.

In the light of the foregoing, therefore, we are constrained to find that the claims of Zumwalt and Jarvis are not blocked by Section 3(a). However, the claim of Mr. Williams is not payable because pursuant to Section 3(a) he shall not be regarded as deprived of employment or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto.

AWARD

1. The answer to Question No. 1 is Yes.

2. The answer to Question No. 2 is Yes.

3. The answer to Question No. 3 is No.

/s/ Dana E. Eischen
Dana E. Eischen, Chairman

Dated:

Syracuse, New York
1976

/s/ C. L. Melberg, dissenting to the answers to Questions 1 and 2
C. L. Melberg
Carrier Member

/s/ O. M. Berge
O. M. Berge,
Organization Member

ERRATA

1) The reference to "Great Northern Railway" in the first sentence of the Background at page 1 should read "Northern Pacific Railway".

2) The reference to "Great Northern Railway" in the first sentence of the second full paragraph at page 2 should read "Northern Pacific Railway."