Award No. 483

Case No. MW-60-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

TO THE ) and

DISPUTE) BURLINGTON NORTHERN RAILWAY COMPANY

QUESTION AT ISSUE

Is Section Laborer M. L. Serosky entitled to a severance allowance under Article V of the February 7, 1965 Agreement due to the abolishment of his laborer's position at Othello, Washington, when the Carrier sold the former Chicago, Milwaukee, St. Paul and Pacific Railroad Company main line and affiliated trackage between Warden, Washington, and Othello, Washington, to the Washington Central Railroad?

OPINION OF THE BOARD:

Claimant entered the service of the Milwaukee Railroad ("Milwaukee Road") on July 3, 1962.

The Milwaukee Road went bankrupt in 1977 and was reduced from a transcontinental railroad to a midwestern railroad. The Rock Island Railroad was also for sale at this time. Ordinarily, the New York Dock labor protection provisions would have applied to employes of these railroads. In order to make the purchase of the two railroads more attractive, a Labor Protective Agreement was entered into on March 4, 1980 between several railroads and labor organizations. The March 4 agreement generally allowed the purchase of portions of the two railroads with the purchaser committed only to taking those employes it needed and providing them with a

reduced three year non-escalating guarantee. The purchasers would continue to operate the newly acquired lines under the purchaser's labor agreements.

Article I, Section 8(a) of the March 4 Agreement provides:

"A purchasing carrier shall not take over or assume any of the contracts, schedules or agreements in effect between the Rock Island or Milwaukee and its employes concerning rates of pay, rules, working conditions or fringe benefits, and shall not be bound by the terms and provisions thereof."

The preface to the March 4 Agreement provides:

"The scope and purpose of this agreement are to provide, pursuant to the Milwaukee Railroad Restructuring Act (45 U.S.C. Sec. 901 et seq.) and the Interstate Commerce Act (49 U.S.C. Sec 10101 et seq.) a fair, equitable and complete arrangement for protection of Milwaukee and Rock Island employes taken into the employ of interim service operators and purchasing carriers signatory hereto."

Article I, Section 2(a) of the March 4 Agreement provides:

"The provisions of this agreement shall constitute the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employes who are taken into its employ because of a transaction."

Article IV, Section 3 of the March 4 Agreement provides:

"Milwaukee or Rock Island employes accepting employment with a purchasing carrier pursuant to this agreement will be given credit for service with the former employer in computing vacation qualification, entry rates and sick leave."

Article III, Section 6 of the March 4 Agreement provides:

> "Elections -- Nothing in this agreement shall be construed as depriving any employe of the purchasing carrier whose employment relationship began prior to the effective date of this agreement of any rights or benefits or eliminating any obligations which such employe may have under any existing job security or other protective conditions or arrangements; provided, however, that if a protected employe otherwise is eligible for protection under both this agreement and some other job security or other protective conditions or arrangements, he shall elect between protection under this agreement and, for so long as he continues to be protected under the arrangement which he so elects, he shall not be entitled to any protection or benefit (regardless of whether or not such benefit is duplicative) under the arrangement which he does not so elect."

The Carrier purchased 22 different segments of the Milwaukee Road the work on which was commingled with its existing seniority districts. Thirty-seven new maintenance of way positions were created and former Milwaukee Road employes were given first right of hire for them.

In November 26, 1980, an Implementing Agreement was entered into which gave the former Milwaukee Road employes, including Claimant, Carrier seniority as of the date they entered the Carrier's service. Claimant entered the Carrier's service on March 22, 1980.

Paragraph (f) of the November 26 Agreement provides:

> "Milwaukee employees will be subject to all BN labor agreements and benefits applying to their craft and class based upon their earliest seniority date they now hold under Maintenance of Way Agreement."

Paragraph (m) of the November 26 Agreement provides:

"Nothing in this agreement is intended to supersede the provisions of the March 4, 1980 Labor Protective Agreement."

In late 1986, the portion of the former Milwaukee Road on which Claimant worked was sold to the Washington Central Railroad Company. His position was abolished on December 13, 1986 and Claimant was furloughed.

The National Agreement of February 7, 1965, applicable to the Carrier's employees provides:

"In the event of merger or consolidation of two or more carriers, parties to this Agreement on which this agreement is applicable, or parts thereof, into a single system subsequent to the date of this agreement, the merged, surviving or consolidated carrier will constitute a single system for purposes of this agreement, and the provisions hereof shall apply accordingly, and the protections and benefits granted to employes under this agreement shall continue in effect."

Article I, Section 1 of the February 7, 1965 Agreement requires, in effect, that an employe's seniority date from on or before October 1, 1962 in order to be covered by the Agreement. The February 7 Agreement applied to the Carrier's employes.

The Special Board of Adjustment No. 766, Award No. 1 (Dolnick) held:

"A later agreement providing job guaranty or job protection replaces an earlier one unless otherwise specifically provided."

Rule 42.A of the current Agreement between the Carrier and the Organization provides:

"RULE 42. TIME LIMIT ON CLAIMS

"A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."

By a letter received in December 1986, Claimant stated:

"I have been affected by the sale of Former Milwaukee Main Line and affiliated trackage from Warden, Washington, to Othello, Washington, to the Washington Central Railroad. My position as Laborer was abolished effective 12-13-86.

"Per appendix F of the January 26, 1986 merger protection agreement, I am requesting coverage under the February 7, 1965 Job Stabilization Agreement Benefits. In accordance with Article IV of the February 7, 1965 Job Stabilization Agreement.

"Please advise me in writing as to which company officer has been authorized to handle the February 7, 1965 protective benefits."

The letter was addressed to "Mr. R. J. Seeley, Superintendent." Seeley had been Portland Division Superintendent for a few years. However, for a variety of reasons, he quit the Carrier's employment on very short notice on November 1, 1986 and was not replaced immediately. T. C. McMurray, Assistant Superintendent Maintenance and Engineering, acknowledged Claimant's letter on January 12, 1987 -- a new superintendent having still not been

appointed -- and declined Claimant coverage under the February 7, 1965 Agreement. On April 16, the Organization requested an extension of time until April 30. By letter dated April 27, the Organization's General Chairman advised the Carrier that it had violated Rule 42.A by Seeley's failure (or his successor Rainey's failure) to respond within 60 days to the "claim" filed by Claimant in December. The General Chairman asserted that the Carrier was in default.

The position of the Organization is that Claimant is entitled to a severance allowance according to the provisions of Article V of the February 7, 1965 Agreement.

As to the procedural question, the Organization contends that the Carrier was in default by its failure to decline the Claimant's claim within 60 days by the officer designated in the letter of claim. The Organization argues, by implication, that Seeley was the only officer empowered to decline the claim and that McMurray could not do so.

On the merits, the Organization contends that Claimant's seniority on the Milwaukee Road entitles him to the benefits of the February 7 Agreement and that the provisions of the March 4 and November 26, 1980 Agreements do not preclude Claimant's choosing the benefits provided in the February 7 Agreement. The Organization's proof is two tiered. First the Organization points out that by the terms of the November 26 Agreement, that Agreement does not supersede the March 4 Agreement. Then, the Organization notes that Article III, Section 6 of the March 4 Agreement preserves to employes, including Claimant, all the job security rights (including coverage under

the February 7 Agreement) that existed prior to the March 4 Agreement. Article III, Section 6 permitted an election as to the choice of rights and, so the Organization contends, Claimant chose the rights under the February 7 Agreement.

The position of the Carrier is that Claimant is not entitled to a severance allowance because his rights do not included those created under the February 7 Agreement.

As to the procedural question, the Carrier contends that it was not in default. First, the Carrier argues that Claimant's letter was not a claim which started the running of a 60 day clock, but rather was a letter of alleged election and inquiry. Next, the Carrier asserts that it did decline the "claim" by McMurray's letter. The Carrier also challenges the similarity of the cases on which the Organization relies pointing out that they involved declinations at a subsequent level which had declined the initial appeal. Finally, the Carrier maintains that the unusual facts of this case are a sound basis for not finding default: Seeley left suddenly and rather than have activities come to a halt, subordinate officers -- like McMurray -- issued declinations in their own names. This, the Carrier contends, was better than issuing a declination in the name of a person who was no longer an employe.

On the merits, citing Article I, Section 8(a) the Carrier contends that Claimant is not covered by the Milwaukee Road's participation in the February 7 Agreement. Next the Carrier argues that its selective purchase of bits and pieces of the Milwaukee Road while the Milwaukee Road was still

in existence does not constitute a "consolidation" within the meaning of the February 7 Agreement. Noting the decision of Award 1 of SBA No. 766 (Dolnick), the Carrier contends that the provisions of the March 4 Agreement supersede the February 7 Agreement because the March 4 Agreement did not save the February 7 Agreement but rather made itself the sole protection, according to Article I, Section 2(a).

The Carrier further contends that Claimant cannot elect benefits under the February 7 Agreement because Article III, Section 6 applies to employes of the Carrier at the time it purchased the Milwaukee Road, not to all Carrier employes. Only those prepurchase employes are "employe[s] of the purchasing carrier."

The Carrier also contends that since Claimant's seniority date with the Carrier is March 22, 1980, he cannot avail himself of protection under the February 7 Agreement because his seniority date is after the 1962 seniority date established in the February 7 Agreement. Finally, the Carrier maintains that Claimant is not entitled to the benefits claimed because Article IV, Section 3 created certain continuity of service rights, but not the ones here claimed. Had the parties intended to create other rights, they would have included them, but by enumerating the rights, the Carrier argues, they intended to exclude other rights.

After considering the entire record, the Board finds that the instant claim must be denied.

Turning first to the procedural issue, the Board finds that there is no indication that the claim was not properly handled.

On the merits, there is substantial, credible evidence in the record that in order to receive the benefit he seeks, Claimant would had to have had broader rights than he does. Claimant's protective rights have been limited as a result of bargaining by the parties to the several Agreements before us.

Claimant's rights are limited by the well settled concept enunciated by Neutral Dolnick that a later job protection agreement supersedes one that went before it unless it specifically provides otherwise. The March 4 Agreement superceded whatever went before it not only based on that principle but by its own terms. Similarly, the November 26 Agreement did not supersede the March 4 Agreement, by its own terms. Finally, the March 4 Agreement limited any carryover rights to those specifically enumerated as in Article IV, Section 3.

Further, the Organization has not presented a persuasive argument or evidence to support its claim that the purchase of portions of the Milwaukee Road constituted a "consolidation" as intended by the February 7 Agreement. Therefore, Claimant did not derive the benefits of the February 7 Agreement directly as a former Milwaukee Road employe.

In addition, Claimant did not derive coverage under the February 7 Agreement based on his status as an employe of the Carrier because of his seniority date. Therefore, Claimant could not make the election according

to Article III, Section 6 on which the Organization bases its position. Claimant had only the rights of a Carrier employe with a March 22, 1980 seniority date plus the preferencial rights awarded to former Milwaukee Road employes as to the filling of Carrier positions according to the November 26 Agreement.

AWARD

The answer to the Question is "No."

Nicholas H. Zumas, Neutral Member

Date: 5-8-90