ARBITRATION OPINION AND AWARD

In the Matter of the Arbitration between SOO LINE RAILROAD COMPANY and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	RE:	ARTICLE I, SECTION 11 OREGON SHORT LINE PROTECTIVE CONDITIONS

APPEARANCES

Jeffrey S. Berlin, for the Company

L. Pat Wynns, for the Union

STATEMENT OF CLAIM

The claimants listed below are "displaced" employees within the meaning of the Oregon Short Line conditions as a result of the abandonment of a portion of the Brooten Line from MP 164.22 near Genola, Minnesota to MP 278.23 near Saunders, Wisconsin.

David A. Berry	Section Foreman	Moose Lake Section
Joseph A. Thayer	Section Foreman	Superior Section
Geoffrey Mitchell	Section Foreman	Hoffman Section
Gregory Knops	Section Foreman	McGrath Section
David Senger	Section Laborer	Shoreham Section

BACKGROUND

On December 1, 1989 Division Manager's Notice No. 31 was issued providing notice pursuant to Employee protective conditions imposed in Oregon Short Line Railroad Company - Abandonment Goshen, 360 I.C.C.91 (1979), that the Soo Line Railroad Company would abandon a portion of the Brooten Line between MP 164.22 near Genola, Minnesota and MP 278.23 near Saunders, Wisconsin on March 1, 1990 or soon thereafter as was practicable.

In conjunction with such abandonment an Implementing Agreement dated December 10, 1990 was entered into between the Soo Line Railroad Company and the Brotherhood of Maintenance of Way Employees. Such Implementing Agreement stated two positions at Moose Lake and two positions at McGrath would be abolished and the permanent incumbents of those positions who were identified in the agreement were to be afforded protective benefits as imposed in the Oregon Short Line Railroad Company - abandonment Goshen, 360 I.C.C.91 (1979).

Effective at the close of work on December 7, 1990, Section 250 at McGrath, Minnesota and Section 221 at Moose Lake, Minnesota were abolished due to the abandonment of the Brooten Line affecting two section foremen, one assistant foreman and one laborer.

On July 3, 1991 General Chairman W. D. Birnbaum appealed the denial of the claimants' protection claims for various months asserting the claimant was adversely affected by the transaction and did meet the definition of a displaced or dismissed employee and was, therefore, entitled to the protection allowance under the

provisions of the Employee Protective Agreement concerning the Brooten Line Abandonment.

Subsequently on July 12, 1991 General Chairman Birnbaum furnished Personnel Coordinator Guy Hugo with a list of displacements which allegedly occurred due to the abolishment of several positions on the Brooten Line and requested that the Carrier furnish all the employees mentioned on such listing, who were affected by a job abolishment or subsequent displacement, their test period monthly average earnings and test period monthly average time in accordance with the formula used for calculating the displacement allowance as set forth in Section 5(a).

The General Chairman asserted that it was essential that the Carrier furnish such employees with a TPA, so that the employees would know if they were a "displaced employee" as was defined under the provisions of Section 1(b) of the Oregon Short Line Conditions.

The Organization stated it was the Carrier's obligation to furnish these employees, who had initiated claims for a displacement allowance, with their TPA under Section 5(a) of the Oregon Short Line Conditions.

On July 19, 1991 the Carrier advised the General Chairman that numerous Board Awards have held that the mere fact that an employee becomes displaced in conjunction with a particular transaction was not sufficient to qualify the employee as meeting the definition of a "displaced employee" under the terms of the protective conditions. The Carrier asserted it was incumbent upon the employee to identify the manner in which he was placed in a

worse position with respect to compensation and rules governing his working conditions as a result of the transaction. Carrier further advised that if the adverse affect or loss of compensation resulted from an individual's own desire regarding his exercise of seniority, then it was clearly not the result of the transaction. The Carrier also advised that it was not obligated to provide employees' test period averages so they might determine if they met the definition of a "displaced employee" as defined within the referred to protective conditions. Carrier also advised it had never provided employees with test period averages for the purpose of determining whether they earned less money or they met the definition of a "displaced employee." The Carrier also stated their position was supported by the historic application of such provision within the railroad industries.

In a letter dated August 30, 1991 the Carrier's position was similarly stated, and the Organization's appeal dated July 3, 1991 was denied. It was the Carrier's position that the Organization had failed to set forth how the claimant had been placed in a worse position with respect to compensation and rules governing his working conditions as a result of the identified transaction.

An initial conference was conducted on January 7, 1992 and the Organization was again advised that the claimant did not meet the definition of a "displaced employee" as provided for in the Oregon Short Line Protective Conditions, and therefore, was not entitled to a "displacement allowance." The claimant was not placed in a worse position with regard to his compensation or his working conditions as a result of the transaction, and no protective

period was activated. Again the Carrier asserted it was not required to calculate test period averages for other than "displaced or dismissed" employees.

At the conference the Organization advised that the claimant had approximated his test period average based on his 1990 earnings. In turn, the Carrier advised that if the claimant had earned less in a particular month during what he alleged was to be his test period, it was not a result of the transaction or the abandonment of the Brooten Line but was a result of other factors. The Carrier pointed out that the fact the claimant chose to exercise seniority toa higher rated seasonal position, work overtime as a result of derailments, emergency track conditions or snow removal during the past year caused him to earn more than his eight hour regular assignment; also that he chose to exercise seniority to a position producing less compensation than the regular position from which he was displaced.

Subsequent conferences were conducted, and no resolution to the disputes was reached. It was agreed, however, that inasmuch as the question of whether the Carrier was obligated to provide, upon request, calculation of an individual's test period average for an individual who had his job abolished or was later displaced as a result of a transaction was currently before Referee Robert Peterson, the conferences were held in abeyance until the referee's decision was delivered. It was further agreed that the parties would resume their conference as soon as possible, following receipt of the referee's decision.

On August 20, 1992 the Orgqnization again advised that it was their position that the claimant was affected as a result of the Brooten Line Abandonment. The Organization had computed the test period average monthly compensation in accordance with Article I, Section 5 of the Oregon Short Line Conditions, and based on the TPA as figured by the Brotherhood and in the normal exercise of seniority rights under the existing Agreement, the claiamnt was not able to obtain a position producing equal to or exceeding the compensation he received in the position from which he was displaced for the months indicated in the Brotherhood's calculations. The Organization insisted that an employee's average monthly compensation was determined by the total compensation received by the employee for which he was paid during the previous twelve months in which he performed service immediately preceding the date of his displacement as a result of the transaction and the amount divided by twelve determined the employee's monthly compensation.

In March of 1993 the Carrier again confirmed its position that the claimant did not meet the definition of a "displaced employee" and was therefore not entitled to a "displacement allowance."

The parties agreed that the undersigned would serve as the neutral referee under the terms of the Oregon Short Line Conditions. The parties exchanged briefs and provided the referee with their briefs on July 16, 1993. The hearing was held on July 22, 1993 where the parties presented their cases. The parties were offered the opportunity to present post-hearing briefs. The

Carrier accepted this offer, but the Brotherhood of Maintenance of Way Employees chose not to do so. The Brotherhood of Maintenance of Way Employees did request to file reply briefs, but this request was denied.

POSITION OF THE UNION

Concerning the burden of proof the BMWE contends that it is the obligation of the employees to identify the transaction and specify the pertinent facts of that transaction relied upon to determine whether the employee was affected by the transaction. The BMWE then contends that pertinent proof is upon the Carrier to prove the factors other than a transaction affected an employee.

In support of that position the BMWE points up that Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 and revised Section 5(2)(f) of the Interstate Commerce Act. The BMWE also cited award Grand Trunk Western Railroad Company v United Transportation Union and George P. Baker v BRAC by Neutral Friedman. The BMWE then cited the New York Dock and Oregon Short Line Conditions and the language of Appendix C-1 in Section 11(e) wherein it is stated:

> "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 that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employees."

The BMWE also notes that the Second Circuit upheld the burden of proof imposed by the ICC in the New York Dock Conditions

and noted it was "drawn directly" from the Appendix C-1 Conditions and the Hodgson Affidavit.

The BMWE contends the claimants sustained their obligation under Section 11(e) and have shown that either their positions were abolished as a result of the abandonment or that they were involved in the chain of bumping which occurred as the result of the abolishment of positions. BMWE further contends the claimants have shown, by computing their own test period averages, that they have been placed in a worse position with respect to their compensation since the transaction.

The Union notes that the Soo Line has never disputed that the claimants lost their positions as a result of the transaction herein. The Union further contends that the Soo Line is not contending the claimants have failed to show that their compensation after the transaction has been lower than their actual earnings during the test period but does contend that claimants have not shown adverse effect because under its interpretation of the Oregon Short Line Conditions, the claimant are not adversely affected if their rate of pay is the same or higher than their rate of pay before the transaction. The Union points up that the Soo Line takes the position that the claimants are not entitled to include overtime earnings in their test period computations. The Union further notes that Soo Line contends that two claimants are not entitled to displacement allowances even though they have suffered losses in compensation because they failed to select higher paying positions available to them which would have required them to relocate.

The BMWE contends that the monthly or hourly rate of pay is not determinative of an employee's TPA but rather such is determined by the total compensation received by the employee during the last twelve month period in which he performed service immediately preceding the date of his displacement.

The BMWE notes that the Soo Line has paid claimns of three employees affected by the abandonment of the Brooten Line. The Union contends the Carrier admits that at least two of those claimants' test period compensation included overtime, and one of those employee's test period compensation included 25 hours of overtime per month, and none of the claimants herein earned that much overtime. BMWE notes that with the exception of claimant Mitchell, who earned approximately 19 hours of overtime per month, the claimants' monthly overtime ranged from no overtime per month to 6.6 hours of overtime per month.

BMWE contends that overtime may be excluded from the test period average compensation only if the Carrier can show that the overtime earned during the test period was extraordinary and was earned because of the impending transaction. BMWE notes that the Soo Line has not made that argument, much less introduced evidence to support such an argument.

BMWE further contends that the Soo Line argument regarding claimants Thayer and Senger not being entitled to displacement allowances because they did not exercise seniority to the highest paid permanent position available, even if it means relocating, is not justified. BMWE points to the language of Section 5(b) which requires the displaced employee to exercise his seniority to the

highest rated position which does not require a change in residence. The Union further notes that even if an employee refused to take the highest rated position which does not require relocation, the employee does not forfeit his or her right to protective benefits but is treated as occupying the higher paying position.

The BMWE refers to the Soo Line's contention that the "redlined" rate of pay that claimant Knops was earning prior to the transaction cannot be used to determine the claimant's TPA. The Union notes that Soo Line cites no support for its position and contends that claimant Knops would have continued to draw that rate of pay if he had not been displaced.

BMWE relies upon Oregon Short Line Conditions, Article I, Section 5 which states:

> "So long after a displaced employee's displacement as he 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, he shall, during his protection period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced."

BMWE notes that Article I, Section 5 then states in partial part:

> "If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work that the aforesaid average compensation (adjusted to reflect subsequent general wage increased to which he would have been entitled, he shall be paid the difference . . .

The BMWE then notes that WJPA, Docket No. 62, Referee Bernstein, held as follows:

> "Employees may be due displacement allowance even if they are in positions carrying a rate of pay equal to or higher than that received at the time of coordination. Eligibility is established if a month's compensation (for a number of hours equal to 'average time paid for') is less than that of the 'average monthly compensation' for an equal number of hours and any part of the deficit is attributable to effects of the coordination."

BMWE contends that in two 1991 decisions arising under the Oregon Short Line Conditions and involving the BMWE and CSX Transportation, Inc. the Neutral rejected the Carrier's contention that employees who held positions after the transaction with the same rate of pay as prior to the transaction were not adversely affected by the transaction. The BMWE points out that the Neutral therein held that:

> "It is the compensation filtered through the TPA that shows whether or not an employee has been placed in a worse condition."

The BMWE cited several other awards by prominent referees who issued similar decisions.

On the foregoing basis the BMWE contends that the claimants are entitled to a displacement allowance in any month during the protective period in which their monthly earnings during the test period hours is less than their test period average, and that they do not forfeit those benefits for failing to select a higher paying position which would have required them to relocate.

POSITION OF THE COMPANY

At the outset Soo Line notes that the employees herein requested their test period earnings (TPAs), which the Carrier denied. The Carrier contends it is not the purpose of a TPA to

determine if an individual employee has been placed in a worse position as the result of the transaction. The Company alleges rather that the purpose of Article I, Section 5(a) - Displacement Allowance - is to provide an equitable method for determining compensation to be allowed a "displaced employee" who has, in fact, been placed in a worse position with respect to his compensation and rules governing working conditions as a result of a transaction.

The Carrier notes that Article I, Section 1(b) defines a displaced employee as:

> "Displaced employee means an employee of the railroad who as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions."

The Carrier contends that the obligation is upon the employee to establish the necessary casual nexus between the transaction and the adverse affect. The Carrier contends that inasmuch as a "displacement allowance" is based on "total compensation received" by the employee and the time for which he was paid, it could include overtime worked for derailments, snow storms or while filling higher rated positions on a temporary basis. The Carrier points up that because of the mobility and seasonability of MOW forces, any number of factors could cause an individual to earn less in a particular month, regardless of whether he happened to be displaced in conjunction with a chain of displacements caused by a force reduction related to a transaction. In support of this position the Carrier has cited a decision by Neutral Marty E. Zusman and Robert E, Peterson.

The Carrier contends that the claimants' losses were caused by factors other than the transaction and contends that Soo Line has shown that the losses were the result of other factors. On the foregoing basis the Carrier urges that a test period average, in and of itself, is not a proper determination as to whether an individual meets the definition of a "displaced" employee. The Carrier notes that any rights the claimant had prior to being displaced continued following the transaction.

The Carrier notes that claimant Knops was holding a position at McGrath and was redlined at a rate of $2,824.14 per month as a result of a Memorandum of Agreement dated January 20, 1990 establishing Section Foreman rates. The Carrier points up the established rate for the McGrath section was $2,350.00. The Carrier contends that the redline rate was in effect until such time as "that employee vacates his current position either through an exercise of seniority, force reduction, or any other action which would not allow him to remain on a position . . . since such individual has relinquished ownership of a permanent position, he will forfeit his right to the respective rate of pay."

The Carrier further notes that claimant Knops was advised that the Genola Section was part of the transaction involved herein but nevertheless he chose to ignore that information and displaced from McGrath to Genola. The Carrier points out that claimant Knops was afforded relocation benefits once his position was abolished at McGrath and contends he is not entitled to further protective benefits on the same transaction.

The Carrier contends that sporadic or irregular compensation cannot be used to determine if an employee first meets the definition of a "displaced employee." On that basis the Carrier urges that a test period average, in and of itself, is not a proper determination as to whether an individual meets the definition of a "displaced" employee. The Carrier contends that the claimants herein seek a wage increase for an employee whose position is abolished or who is displaced as a result of a transaction, regardless of his own actions.

The Carrier contends the employees had the right under the current agreement to exercise their seniority throughout the Soo Line system and that a claimant electing not to do so cannot thereafter request the displacement allowance.

The Carrier contends that the evidence has established that the claimants' loss of extra income was for reasons other than the line abandonment.

The Carrier relies upon the award of Arbitrator Robert C. Peterson rendered in April of 1992 and the award of Referee Nicholas Zumas which involved the New York Dock Conditions dated March 26, 1990.

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OPINION

The arbitrator would first note that all of the contentions of both parties have been carefully considered. Also, the arbitrator has studied all of the exhibits, including previous awards cited by the parties.

Burden of Proof: The BMWE has identified the transaction and introduced facts which establish that the claimants herein were affected by the transaction. The burden of proof then shifts to the Carrier to establish factors other than the transaction which affected the claimants. A loss in wages establishes that these claimants were affected by the transaction. The claimants herein either had their positions abolished as a result of the abandonment or they were involved in a chain of bumping which occurred as a result of the abolishment of positions.

Merits: The Carrier has contended that the monthly rate of pay should determine the test period average. Arbitrator Birnbaum held: "An employee's TPA is determined by the total compensation received by the employee . . . during the last twelve months in which he performed services immediately preceding the date of his displacement."

The arbitrator also notes that the Carrier has contended the claimants are not entitled to include overtime earnings in their test period computation. This issue is resolved by the above finding. However, if the employee refuses to work overtime in his new position equal to the amount of overtime which was included in his test period average, such may be deducted. Also, the claimants who fail to select higher paying positions without

relocating are still displaced employees but are considered to have the earnings of the higher paying position available. The claimant would only be entitled to payment for the difference between that position and what the employee's test period average was for the preceding twelve months. The arbitrator notes that other awards have held that an employee is not required to relocate, and this is also supported by Section 5(b).

The Carrier contends that claimant Knops was "redlined at $2,824.14 per month until such time as he vacated that position either through an exercise of seniority, a forced reduction, or any other action which would not allow him to remain on a position . . . once such individual has relinquished ownership of the permanent position, he will forfeit his right to the respective rate of pay."

The Carrier has cited an agreement which states that this rate of pay does not go with the individual. That agreement is not the controlling provision herein. The controlling provision is established by the test period average provision. Except for the transaction that employee would continue earning the "redline" rate of pay. Therefore, that employee was placed in a worse position as a result of the transaction. The "redline" position is not in effect with his new position. Therefore, his earnings are determined by his test period average for the last twelve months preceding the transaction.

The Board finds that the Peterson and Zumas awards are in harmony with this decision, as well as the Van Wart award between the Brotherhood of Railroad Signalmen and CSX Transportation, Inc. issued on November 21, 1992.

The Board finds that all five claims are valid with the proviso which is expressed herein. If there is a dispute between the parties as to the opinion expressed herein, the Board will retain jurisdiction for sixty days in order for the parties to present a request for an interpretation of the language of this decision.

Preston J. Moore
Neutral Referee

October 4, 1993