PUBLIC LAW BOARD NO. 4885

Parties to Dispute
Brotherhood of Maintenance of Way Employes
and
Maine Central Railroad
Portland Terminal Company

Statement of Claim:

1. Claim of Track Foreman Maurice Blanchard MEC, DIV. 3, for severance benefit of $26,100, plus interest of 9% since April 26, 1989, a/c being denied said benefit that was awarded by Article V of the Agreement imposed by Arbitration Board No. 466, after being furloughed because his job was abolished on June 30, 1987.*

2. Claim of Track Foreman Ernest C. Boulde, MEC Div. 1, a/c his job abolished and furloughed on June 16, 1987 and denied subsequent payments, of awarded Article V, option 1, of the imposed agreement of Arbitration Board 466, plus interest at 9% since April 26, 1989.*

3. Claim of Crane Operator Timothy A. Blackstone, for the $26,000 severance benefit provided for by Article V of the Agreement imposed by Arbitration Board 466, plus 9% interest since April 26, 1989, because his position was abolished July 18, 1986. He was furloughed on July 18, 1986. Said severance benefit was denied him.*

4. Claim of Trackman Clarance Dill Portland Terminal, for the $26,000 lump sum severance benefit provided for by Article V of the Agreement awarded by Arbitration Board 466, plus interest of 9% since April 26, 1989 because his position was abolished on August 16, 1987 and he was furloughed on that date.*

5. Claim of Track Foreman William Barnes, MEC-Div. 1, under Article V of the Agreement awarded by Arbitration Board No. 466, for the $26,000 severance benefit therein provided, plus interest thereon of 9% commencing April 26, 1989.*

6. Claim of Trackman Norman Bilodeau, MEC Division 1, for the $26,000 lump sum severance benefit awarded by Article V of the Agreement imposed by Arbitration Board No. 466, plus interest of 9% since April 26, 1989, when his job was abolished on May 23, 1986 and being furloughed on July 28, 1986.*

7. Claim of Track Foreman James Emerson, who was on paid vacation on March 30, 1986 and was never recalled therefrom because he did not own a position on March 3, 1986, when a Presidential Order was issued to return to work on May 15, 1986, for the severance benefits awarded under Article V of the Agreement that was imposed by Arbitration Board No. 466, plus 9% interest since April 29, 1989.*

8. Claim of Machine Operator Raymond N. Coutre, MEC-Div. 2, for subsistence payments as provided for by Article V of the Agreement that was imposed by Arbitration Board No. 466 plus 9% interest since April 26, 1989, a/c his job being abolished. He was furloughed June 19, 1987.*

*Statement of Claims framed by Neutral Board Member.

Background

The Brotherhood of Maintenance of Way ("BMWE") employees, on April 2, 1984, served locally a "national" Section 6 Notice on the Maine Central Railroad/Portland Terminal Company ("MEC" "PT") requesting, among other things, that "the Mediation Agreement of February 7, 1965 **** be amended" to provide that "employees having an employment relationship with a carrier for sixty (60) days, or more, shall be considered "protected employees."

The BMWE, on March 3, 1986 struck the MEC. President Ronald Reagan, on May 16, 1986, issued Executive Order 10906 initiating the Railway Labor Act's ("RLA") Emergency Board provision and thus terminated the strike by the creation of Presidential Emergency Board (PEB) No. 209.

Emergency Board No. 209 ("E.B. 209") rendered its report on June 20, 1986. Said Board, as it pertains herein and among other things, recommended that employees in active service as of March 3, 1986, when the strike began, be protected and adopted the Carrier's proposal that such employees be eligible to receive severance pay in the amount of $26,000 either in a lump sum or in monthly increments, if deprived of employment.

The parties failed to achieve an agreement based on EB 209's recommendations during the summer of 1986. Also, during the summer of 1986 because of a decline in business resulting from the strike, the

MEC requested and received approval from Judge Gene Carter of the US District Court for the District of Maine to abolish 725 railroad positions through his order of July 21, 1986. Claims involving a decline in business were filed as a result thereof.

Congress passed H. J. Res. 683 (Public Law 99-385) on August 11, 1986, extending the status quo period and established a three member Congressional Advisory Board (CAB) to investigate the MEC-BMWE situation and make a report to Congress. The CAB made its report on September 8, 1986, and recommended, among other things, that the EB 209's recommendations be made binding and failing to achieve agreement within 10 days all unresolved matters to be arbitrated.

Public Law 99-431 was enacted on September 30, 1986 imposing the PEB 209's Recommendations "as though arrived at by Agreement by the parties under the Railway Labor Act (RLA)." The Arbitrator herein was appointed to Arbitration Board (AB) No. 466 thereunder, held hearings on October 20 and 21; and wrote the provisions for the implementation of the separation allowance and other unresolved issues in agreement form in an Award rendered on October 30, 1986.

The Carrier, pursuant to Section 9 of the RLA, commenced litigation of the Award to have it set aside, on November 13, 1986. The US District Court for the Maine District enforced the Award on June 3, 1986. The US Court of Appeals for the First Circuit on April 26, 1989 affirmed the US District Court of the District of Maine action in denying the Carrier's appeal. The Award of ARB-466 then became final and conclusive on the parties on May 18, 1989.

The MEC and other Guilford Transportation Industries (GTI) corporate entities began, on or about February 11, 1987, a program of leasing its and their lines to another corporate affiliate the Springfield Terminal Company (ST). The stated objective was to thereby provide a cost effective and quality service in an effort to recapture traffic lost because of the 1986 strike and the long term shift of traffic from rail to truck in the New England region. That leasing program continued through December 1987. The positions on the lessor Carriers were abolished during this period and ST made employment offers to certain of such affected employees.

All MEC-B&M Unions, through the RLEA, challenged GTI actions in court and by arbitration. The US District Court of Maine upheld the transaction. The awards of Arbitrator Richard R. Kasher were rendered on June 12, 1986 and that of Arbitrator Robert O. Harris on March 13, 1989.

ARB-486 was reconvened on December 7, 1989 and rendered an Interpretation on January 28, 1990. The parties thereto agreed to subsequently handle the claims in dispute before a Section 3 Public Law Board (PLB). Hence, PLB 4885 subsequently came into being.

Subsequent to the First Circuit Court of Appeals decision the parties conferred on June 1990. The Carrier asserts that as a result thereof "certain claims were sustained in the amount of $413,235.24 including $156,000.00 in protection claims." Other claims were denied. The BMWE asserts that to date, Guilford, on behalf of the MEC, has issued lump sum separation allowances to six employees (Employees

Exhibit 24). However, all other requests under Article V... have been rejected by Guilford.

The relevant language of Article V - Employee Protection - implementing the E.B. 209 Protection Arrangements, as set forth in the Appendix to the Award of Board 466 is as follows:

> "(a) Each currently active employee represented by the Brotherhood of Maintenance of Way Employees effective March 3, 1986, employed on the Maine Central Railroad Company on that date shall be granted $26,000 separation allowance. The names of said employees are set forth in Attachment A hereto.
>
> (b) Each currently active employee represented by the Brotherhood of Maintenance of Way Employes effective March 3, 1986, employed on the Portland Terminal Company opn that date sahll be granted $26,000 separation allowance.
>
> (c) Each such employee shall be granted the separation allowance as provided in Paragraphs (a) and (b) above when the employee is deprived of work in the noraml exercise of seniority on March 3, 1986 to the same extent that such seniority could have been exercised on March 3, 1986.
>
> (d) Each employee may elect to receive such total of separation allowance as described in paragraphs (a) and (b) asbove in the following method:
>
> "If an employee is deprived of employment, resigns and relinquishes all employment rights, the employee will be eligible to receive a lump sum separation allowance of $26,000.
>
> ***
>
> If an employee is deprived of employment, he may elect to retain his seniority and receive a maximum of $26,000 in supplemental employment benefits." (emphasis added)

Carrier asserts that four (4) disputes over the interpretation and application of this language have undergone on-property handling and are now ripe for arbitration. The BMWE presented eight (8) cases to PLB 4885.

The BMWE framed its questions, in part, as being:

1. Is an employee whose position was abolished on the MEC and who is unable to exercise his seniority either on his seniority district or on a System Gang on the MEC entitled to severance pay as invisioned by Article V, Option 1, of the imposed Agreement of AB-466, October 30, 1986?

2. Does future choice of employment with any other railroad carrier, or any employment, change that qualification for severance pay?

3. Does a decision to retire more than one year after his being deprived of employment with the MEC change the qualification for severance on June 30, 1987?

Carrier framed the following for its four (4) disputes:

> (1) Whether or not employees who refused offers of employment, with full income protection under the Mendocino Coast protective conditions, from another carrier within the same railroad system as MEC and employees who accepted but then forfeited such employment and protection through resignation, retirement, dismissal for cause, sickness or disability, were "deprived of employment"?
>
> (2) Whether or not employees furloughed due to a decline in business, with a suspension of protection benefits under the E.B. 209 protection arrangement, were "deprived of employment"?
>
> (3) Whether or not claimants Emerson and White, who positions were abolished pursuant to an Oregon Short Line transaction and who elected voluntary furlough in lieu of exercising available seniority rights, were "deprived of employment"?
>
> (4) Whether or not claimants Coffin and Mank, whose bridge tender positions were abolished pursuant to an Oregon Short Line transaction, and who either refused or accepted and relinquished identical Bridge Tender positions with the State of Maine, were "deprived of employment"?

Position of the Parties

Union

The BMWE, argued, in effect and among other things, that it was presenting claims instead of concepts. The claims involve several categories such as these: (a) Employees who were on vacation on March 3, 1989 and Carrier would not let them come back to work after the strike; (b) Employees who were furloughed and who were offered Springfield Terminal Railway (ST) employment some of whom accepted that offer and others who refused; (c) Employees who were furloughed and wanted the separation allowance ($26,500) and the Carrier said, in effect, that they must accept ST employment or forfeit their protection allowance; (d) Employees who went to the ST and after working there quit; (e) that out of the some 100 claimants the Carrier has paid but 6.

The Carrier argues facts that may be relevant to the 1990 period but they surely are not to the 1986-1987, or even 1988 periods.

The ST's first lease transaction on the MEC commenced in February 1987 and continued until October 1987. The offers of ST employment to employees were made on the basis that:

(1) if you don't accept the ST offer your seniority will be forfeited or

(2) you have to accept the ST offer if you want your protection,

(3) if you don't exercise your seniority onto the ST then you will not get protection.

It is important to note that it was the ST and not the MEC or PT who made the offer of employment and that the employees would become "Railroaders" under a single labor agreement.

The Union also pointed out that most importantly there was no implementing Agreement. There was no overflow of rights. There was no obligation for an offer of employment. However, if offered by the ST, according to the MEC, the employee had to take it. But the ICC disagreed therewith. It, subsequently, pointed out:

> "Consequently any arbitration shall provide that an employee of the several GTI railroads as of the first such transaction under US 49 USC 1180 203, shall not be deemed to have forfeited any rights or benefits as a consequence if decisions made prior to the development of such an implementing plan."

Arbitrator Richard Kasher noted the same thing in his June Implementing Agreement Award. Arbitrator Robert Harris also, in his March 13, 1990 Implementing Agreement decision, did likewise.

The BMWE contended that the above confirms that no employee had to make any employment decision until there is a bona fide implementing Agreement and that they have 60 days therefrom the date thereof and the notice of their new Mendocino protection in order to properly and rightfully exercise their option. Further, the Mendocino "Conditions" are not applicable to the claims herein rather the AB-486 protective provisions are when their MEC-PT jobs fell off.

The "decline in business" argument is neither a proper or appropriate defense in this case. If the Carrier had wanted to acquire a "decline in business" and "comparable employment" rationale in their agreement they had every opportunity to ask for it. However, the Carrier did nothing thereon until recently when it raised this argument as a belated defense.

Mr. Kozak testified before the CAB that the Carrier's March 3 protection offer was "unconditional." There was no standard

established, as in the Clerk's agreement, for an exception or offset because of declining business. The $26,000 offer was made as being a capped liability and that's why the decline of business formulae does not show up anywhere. A "decline in business" defense was never argued before, particularly before ARB 466 or the Courts. Now that argument comes too late. If it was never intended that the decline be a proper defense in business rationale then such defense cannot be established without an agreement. Additionally, Carrier has never offered a figure of any kind in support thereof. It should also be noted that the Carrier had never argued business decline as the reason for denying benefits until relatively recently.

The February 7, 1965 BMWE National Agreement contained a guaranteed rate of pay for a lifetime providing that the covered employee responded affirmatively on certain things. Yet, even thereunder only the exercise of seniority is required and not, as here, a transfer to another railroad.

After ARB 466's Award was rendered, on October 30, 1986, the Carrier saw that 11 people who were not working were protected thereunder and that $276,000 would have to be paid out immediately. That's why the Carrier sought a court stay. Today, the Carrier argues the defense of a decline in business in order to avoid payment.

Protection benefits entitlement under the October 1986 Arbitration Award were properly available to qualified employees at the time of job abolishment and not in April or May almost 3 years later.

Before the Award of ARB 466 the Carrier had ample opportunity to present the business decline theory. Also, the time ARB 466 met in October 1986 Carrier again had the opportunity to raise that argument and not now, some 2 1/2 yeers later. Business decline or comparable employment was just never mentioned in all the time since 1984 up to recently. The arguments are just not relevant or proper.

The Carrier selectively chose MEC-PT employees for ST employment. Thus, it gave up its right to argue that ST was comparable work. ST employment is not comparable because there the employees are a "Railroader" working under a different and single agreement. The employees are not part of the same class and craft and they do not have any real rights.

The employees are entitled to at least 9% on the monies due them since at least April 26, 1989. Awards in support thereof were offered.

Track Foreman Maurice Blanchard's position was abolished on June 30, 1987. He was declared protected by ARB 466. Blanchard was furloughed June 30, 1987. He exercised his full MEC seniority. Blanchard's qualification was not disputed until June 9, 1989. What occurred on the ST is totally irrelevant.

Track Foreman Ernest Boulde's position was abolished June 16, 1987. Boulde was declared protected by ARB 466. He exercised his full MEC seniority without success. No offer of employment was ever made to this Claimant from June 16, 1987 until March 30, 1989. Boulde's qualification for subsistence benefits were never questioned until June 9, 1989.

Crane Operator Timothy A. Blackstone's position was abolished July 18, 1986. Blackstone was declared protected by ARB 466. He was furloughed July 18, 1986. That date pre-dated the ST lease. Carrier, on June 9, 1989, some 2 years later, said that he was furloughed because of a decline in business.

Trackman Clarance Dill's position on the PT was abolished August 16, 1982. He was furloughed that date. Claimant was offered and accepted work on the ST. That later fact holds no relevance as to his entitlement under Article V of the Agreement imposed by ARB 466. Carrier stated, on June 9, 1989, he was furloughed because of a decline in business.

Track Foreman William Barnes' position was abolished on June 30, 1987. He was furloughed August 16, 1987. Barnes' qualification for entitlement was not questioned until June 9, 1989. Barnes went to work for the ST until October 1987 when he refused to travel all over the MEC simply because he was a "railroader." Barnes was discharged about October 1988. Claimant accepted ST employment without benefit of his MEC seniority or Agreement until October 1987. Carrier on September 20, 1989, for the first time, outlined their reason for denying severance payment.

Trackman Norman Bilodeau MEC Div. 1 position was abolished July 28, 1986 and he was furloughed. That furlough predated the ST lease. Bilodeau's qualification for severance payment under Article V of the Agreement imposed by ARB 466 was never disputed until June 9, 1989. Claimant was never employed by ST. Although he was offered an ST job in July 1989.

Track Foreman James Emerson, who was on vacation on March 3, 1986. Carrier disputed that he was qualified under Article V of the Agreement imposed by ARB-466. When the Calais Branch closed in 1986 he lost his job but did not displace anywhere. Emerson was furloughed May 6, 1986. Claimant was not permitted, as required by the Presidential Order, to return to work on May 15, 1986 as he did not own an awarded position. Emerson has never been recalled to work. He took vacation 2/13/86 through 3/7/87. Carrier, on September 24, 1989, almost 3 years after the Award of ARB-466 outlined the reason for denying his claim (Attachment F). He was never recalled. Raymond N. Couture Machine Operator, MEC-DIV. 2, had his position abolished June 19, 1987. He was furloughed that date. Claimant's qualification was never disputed from October 30, 1986, the date of the Arbitration Award of ARB-466 until June 9, 1989.

Carrier

The Carrier, among many other things, asserted that it had taken the cases of the Claimants and categorized them by the types of issues that were involved such as: Decline in business; Refusal of ST employment; and voluntary relinquishment of ST Employment.

The term "deprived of employment" may be misleading. There never has been a demand made by the BMWE for an unconditional protective condition. The original dispute arose out of the Section 6 demand to modify the February 7, 1965 National Agreement protecting against furloughs because of technological, operational and organizational changes. BMWE also sought to protect the more recently hired employees.

That Section 6 Notice was the prelude to the $26,000 offer. PEB 209 thought that revision of a national protection (2/7/65) agreement locally was inappropriate. Hence, the recommendation of Carrier's $26,000 offer for severance pay in lump sum or installments if deprived of employment. However, that severance offer was not unconditional because it was never so sought.

The Award of ARB-466 did not become final and binding for implementation in 1986 because of Section 9 of the RLA which provided for the intervening legal handling until May 1989.

The intervening event of leasing the entire MEC-PT operations to Springfield Terminal Railway (ST) was the result of an ICC approved transaction. That transaction provided for Mendocino protective conditions. For instance if Maurice Blanchard, who accepted ST employment, had been furloughed from the ST he would then have been entitled to a severance benefit. His accepting ST employment, which in effect was the same job, was comparable employment. The intent of protection was against the deprivation of the loss of employment and not, as Blanchard did, make a decision to stop working.

The RLEA representatives for the BMWE argued before the Arbitrator Robert Harris implementing arbitration that the MEC-PT employees had the right to follow their work (job) to the ST and to retain their Agreement. Hence, Blanchard exercised his MEC seniority rights. However, his quitting work was not deprivation of employment.

On the other hand if the Unions were incorrect in urging these set of facts upon Arbitrator Harris and what happened was that all MEC

jobs ceased to exist then Blanchard had no job to exercise his seniority on. Consequently, there was simply a complete secession of MEC operations in 1987 and Blanchard was properly furloughed.

The MEC-PT argues that the premise for the BMWE's original Section 6 Notice was the belief that there was a need for improvement of the protection against technological, operational and organizational changes provided for in the February 7, 1965 Agreement. PEB 209 recognized that need (p-16) and granted protection. There never has been a demand by the BMWE for an unconditional guarantee without regard to what happens.

What the Union here seeks is automatic certification. That was never contemplated. That is an extraordinary type of protection. The Carrier is not aware of any such agreement. If such protection is in there it must be there by specific language and the express agreement of the parties. Automatic certification is just not there. For instance, in the Blackstone case there is no dispute as to his eligibility. However, there is a difference between being eligible and being affected and entitled to collect the $26,000 payment. Blackstone was not affected by technological, operational or organizational changes. Blackstone, as were others, was affected by a decline in business.

The Carrier pointed out that only the employees who were actively employed on the date of the lease transaction, except for 2 people, were offered ST employment. Those who were on furlough were not offered ST employment.

Carrier noted that subsequent to our Board's March 20, 1990 hearing it re-investigated the E. Boulde, D. R. Couture and C. Dill cases. In the Boulde case (Case #2) no written offer of employment could be found. Therefore, to avoid further protracted dispute Carrier advised that it was willing to dispose of Boulde's case on a no precedent basis by sustaining his claim. The Couture case (Case #8) was different. He received and refused an offer of ST employment. Since then Couture recanted his refusal and 2 years later he applied for employment. However, Couture was caught during the ST strike firing marbles with a hunting slingshot which caused injury to 1 ST employee and damage to an ST locomotive. The 2 ST employees who were also caught were discharged and that discharge was upheld by a ST UTU PL Board. Couture's application was not and could not be approved. Carrier has no obligation to hire him.

As to C. Dill (Case #4), Carrier asserts that he properly belongs in category E of the Carrier's September 20, 1989 letter, rather than Category B for the following reasons: He was paid "Mendocino" displacement allowances from August thru November 1987. Dill participated in the UTU's work stoppage, November 12, 1987 until June 1988 and worked until December 17, 1985. He was furloughed a/c seasonal reasons. Dill was recalled in April 1989 and failed to return. He was brought up on charges for violating Rule N (unauthorized absence) and was discharged May 19, 1989. Dill failed to show up at his own disciplinary hearing.

Couture's action in the UTU's work stoppage with the resultant Carrier claim that Couture had forfeited all protection benefits and

had resigned his position is in litigation and that will be decided there. Carrier asserts that his Mendicino benefits were paid up to the November 12, 1987 work stoppage.

The Blackstone Case (#3) and the N. Bilodeau Case (#6) lost their jobs because of a decline in business. The U.S. District Court recognized this fact and authorized the massive furlough of MEC-PT employees.

Claimant J. Emerson, who was receiving vacation pay on March 3, 1986, had his job abolished in February 1986. He refused to exercise his MEC seniority because he voluntarily went on furlough. Emerson has never been "deprived of employment." It was incumbent on the BMWE to show that Emerson was entitled to be returned to work after the strike ended.

There is no proper basis for granting interest. No such claim has ever been filed or even discussed on the property as required by Section 3, First, of the RLA (45 USC S 153, First (i)). Nor was such question among those submitted with the PLB Agreement establishing this Board. Notwithstanding, the BMWE concedes that interest is limited only to the period following the Court of Appeals decision which is May 18, 1989. Carrier avers that it has not acted in a frivolous manner in this dispute.

Findings

This Board has jurisdiction by reason of the parties Agreement establishing PLB 4885 therefor.

Carrier's letter of June 9, 1989 (Employee Exhibit 11), which was in response to General Chairman Davison's letter of May 11, 1989

(Emp. Ex. 9) sent following the Decision of the United States Court of Appeals, First Circuit in Docket Nos. 87-1524 and 88-1876, decided April 26, 1989, appears to set the tone for this dispute. It reads:

EMP EX. 11

June 9, 1989

J. J. Davison, General Chairman
Bro. of Maintenance of Way Employes
450 Chauncy Street
Mansfield, MA 01048

Dear Mr. Davison:

This is to confirm our conference next Tuesday, June 13 at 10:00 a.m. to confer pursuant to paragraph 2 Second, 2 Sixth and 3 First of the Railway Labor Act over claims arising under the award of Arbitrator Van Wart under Public Law 99-431 and the recommendations of Presidential Emergency Board 209 ("the PEB"). In preparation for that conference, I thought it would be useful to set out the position of Maine Central/Portland Terminal ("MEC").

With respect to lump sum wage payments due under Article I of the agreement imposed by the arbitration award, it will take about six weeks for the MEC to determine which of its former BMWE employees are entitled to payment and calculate the amounts owed to them under the formulas set forth in Article I. Once that determination has been made, MEC will promptly issue checks to eligible employees in the appropriate amounts.

With respect to employee protection, MEC has received 48 claims for protection payments under Article V of the agreement imposed by the award, as set forth on Attachment A. Of these, MEC grants the claims of Joseph W. Brown, Patrick Connolly, Frank D. McLean, Walter Scott, and Robert Stimpson. These employees appear to have lost employment with the railroad due to technological, operational or organization changes. Of these claimants, all except Mr. Scott sought lump-sum severance payments; Mr. Scott sought a monthly subsistence allowance. However, at our May 22 conference, you took the position that, in view of the passage of time since employees first made their claims, they should be permitted to reconsider their election between lump-sum severance payment or monthly subsistence. Please advise how these claimants wish to be paid. Checks will be issued promptly upon receipt of that information.

The remaining claims are denied, as follows:

1. The claims of Henry Frizzell and George M. Poland are denied, because they are not on the list of protected employees that the arbitrator compiled.

2. The claims of James Emerson and Floyd White are denied, because they were not "deprived of employment." These employee's jobs were abolished due to the abandonment of the Calais branch in 1987. They could have exercised seniority to other jobs but instead elected voluntary furlough.

3. The claimants listed on Attachment B are not entitled to protection because they were offered and accepted jobs with the Springfield Terminal Railway Company and thus they were not "deprived of employment." In addition, the PEB's intention in recommending employee protection was to give the BMWE employee protection comparable to that provided in the Mediation Agreement dated February 7, 1965; indeed, you may remember that this is what the BMWE requested in its paragraph 6 notice that gave rise to the dispute before the PEB. Under the February 7, 1965 Agreement, employees are not protected against layoffs due to ICC-approved transactions.

4. The claims of employees listed on Attachment C are denied because they were laid off due to declines in business caused by the 1986 strike, most of them pursuant to Court order in RLEA v. Boston & Maine, No. 86-0122-P (D. Maine). Under the standards of the February 7, 1965 Agreement, which were imposed by the PEB in this case, and virtually all other labor protection arrangements employees are not protected from furloughs due to declines in business. The claims of any claimants who are now working for Springfield Terminal and whose claims were denied above, and who were also furloughed due to strike-related declines in business, are denied on this additional basis.

In the interest of reaching an amicable settlement that would avoid protracted arbitration proceedings, MEC is willing to discuss a possible compromise settlement of the claims of those employees listed on Attachment C, as to whom MEC will otherwise assert a decline in business defense.

Many of these claimants are also plaintiffs in the Ashe et al case pending in U.S. District Court in Portland. That case is without merit. However, should plaintiffs prevail in that case, any payments made pursuant to the Van Wart Award are to be offset against the recovery, if any, of such employees arising out of that litigation.

I look forward to our conference and hope that we can resolve this matter.

Very truly yours,

D. J. Kozak
Vice President - Human Resources

cc: R. E. Dinsmore"

ATTACHMENT A
IMPOSED BY THE AWARD

Filing Claims Under Article 1 (B) of the Agreement imposed by the Award:

Name	Election
Bayrd, Charles	Subsistence
Beal, Lloyd G.	Subsistence
Belville, Richard C.	Separation
Bilodeau, Norman P.	Separation
Blackstone, Dale	Separation
Blackstone, Timothy	Separation
Brown, Joseph W.	Separation
Bucknan, Ronald	Separation
Cameron, Robert M.	Subsistence
Card, Malcolm L.	Separation
Chambers, Ivan E.	Subsistence
Clement, Howard	Subsistence
Connolly, Patrick	Separation
Crawford, Paul	Subsistence
Darveau, Kenneth	Separation following receipt of subsistence
Douglas, Clyde E.	Subsistence
Douglas, Ray L.	Subsistence
Drouin, Larry	Subsistence
Dryer, Scott	Subsistence
Emerson, James	Separation
Frappier, George E.	Separation
Frizzell, Henry	Separation
Gaudette, Angus	Subsistence
Grass, William	Subsistence
Henry, Robert J.	Separation following receipt of subsistence
Joyce, Anthony	Separation
Joyce, Wayne E.	Subsistence
Knowlton, Dennis	Subsistence
Kopacz, William E.	Subsistence
Lowell, Ronald N.	Subsistence
McCaw, Everett	Separation

McLean, Frank D.	Separation
Nightengale, George	Subsistence
Osnoe, Clayton O.	No option
Paul, Joseph M.	Separation
Poland, George M.	Subsistence
Robbins, Dale T.	Separation
Ross, Grant	Subsistence
Sanborn, Glenn D.	Subsistence
Scott, Walter	Subsistence
Small, Harold	Separation
Springer, Darrell	Subsistence
St. Thomas, J. R.	Subsistence
Staples, Carroll H.	Subsistence
Stimpson, Albert W.	Subsistence
Tourtillotte, Levi	Subsistence
White, Floyd	Separation
Witham, James A.	Subsistence

ATTACHMENT A

LIST OF EMPLOYEES SUBMITTING VALID CLAIMS UNDER PEB 209 LABOR PROTECTION ARRANGEMENT

NAME
Joseph W. Brown
Patrick Connolly
Frank D. McLean
Walter Scott
Robert Stimpson

ATTACHMENT B
EMPLOYEES WHO FILED CLAIMS AND WHO ARE NOW WORKING FOR ST

Name	Election
Bayrd, Charles	Subsistence
Beal, Lloyd G.	Subsistence
Bucknan, Ronald	Separation
Cameron, Robert M.	Subsistence
Card, Malcolm L.	Separation
Chambers, Ivan E.	Subsistence
Clement, Howard	Subsistence
Crawford, Paul	Subsistence
Darveau, Kenneth	Separation following receipt of subsistence
Douglas, Clyde E.	Subsistence
Douglas, Ray L.	Subsistence
Dryer, Scott	Subsistence
Frappier, George E.	Separation
Gaudette, Angus	Subsistence
Grass, William	Subsistence

Henry, Robert J.	Separation following receipt of subsistence
Joyce, Anthony	Separation
Joyce, Wayne E.	Subsistence
Knowlton, Dennis	Subsistence
Kopacz, William E.	Subsistence
Lowell, Ronald N.	Subsistence
McCaw, Everett	Separation
Nightengale, George	Subsistence
Osnoe, Clayton O.	No option
Robbins, Dale T.	Separation
Ross, Grant	Subsistence
Sanborn, Glenn D.	Subsistence
Springer, Darrell	Subsistence
Staples, Carroll H.	Subsistence
Tourtillotte, Levi	Subsistence

ATTACHMENT
CLAIMANTS FURLOUGHED DUE TO DECLINE

Name	Election
Belville, Richard C.	Separation
Bilodeau, Norman P.	Separation
Blackstone, Dale	Separation
Blackstone, Timothy	Separation
Paul, Joseph M.	Separation
Small, Harold	Separation
Witham, James A.	Subsistence"

The specific employee protection that is involved in the instant dispute is that as was provided by the Award of Arb 466 in October 30, 1986. Article V - Employee Protection, thereof for ready reference, in part, provides:

> "(a) Each currently active employee represented by the Brotherhood of Maintenance of Way Employees effective March 3, 1986, employed on the Maine Central Railroad Company on that date shall be granted $26,000.00 separation allowance.
>
> (b) Each currently active employee represented by the Brotherhood of Maintenance of Way Employees effective March 3, 1986, employed on the Portland Terminal Company on that date shall be granted $26,000.00 separation allowance.
>
> (c) Each such employee shall be granted the separation allowance as provided in Paragraphs (a) and (b) above when the employee is deprived of work in the normal exercise of

seniority on March 3, 1986 to the same extent that such seniority could have been exercised on March 3, 1986.

(d) Each employee may elect to receive such total of separation allowance as described in paragraphs (a) and (b) above in the following method:

Option No. 1 - Lump Sum Separation Allowance

If an employee is deprived of employment, resigns, and relinquishes all employment rights, the employee will be eligible to receive a lump sum separation allowance of $26,000...

Option No. 2 - Daily Subsistence Benefits" (emphasis added)

Thus, as pointed out in said Award (P-15) "..the list of employees appearing in Carrier Exhibit 1-A and Employees Exhibit 8, are, as modified by our findings herein, the corrected list of employees for entitlement to the protection granted. Such entitlement is achieved, when as per paragraph (c), said employee is deprived of MEC employment in the normal exercise of seniority on March 3, 1986, to the same extent that such seniority could have been exercised on March 3, 1986."

Also, as noted in the Interpretation of the Award rendered October 30, 1986, as issued on January 26, 1990:

"EB 209 and the Congress had conferred job protection entitlement on all presently active employees. The arbitrator was only determining among those employees that the both parties had said that they were in disagreement on, i.e., who was or was not protected. The October 31, 1986 Award neither granted or took away from any other right that the then all 'presently active employees' were otherwise entitled to.

Hence, employee names who did not appear on said lists, presented to Arbitration Board No. 466, might, for some reason, subsequently arise for a subsequent determination of their qualification and entitlement.

Applying the foregoing to the 8 names of the Claimants appearing in this Case's "Statement of Claim" it can be found that all the Claimants, except James Emerson, were among the names of the employees listed in Carrier's Exhibit 1-A placed in evidence before Arbitration Board (ARB) 466. Said Board, in its October 30, 1986 Award, in part, held:

> "Therefore, the list of employees appearing in Carrier's Exhibit 1-A and Employee's Exhibit 8, as modified by our findings herein, is the corrected list of employees for entitlement to the protection granted."" (emphasis added)

Claimant Emerson was among the 24 identified employees appearing in Employee Exhibit 8 placed in evidence before ARB 466. The Award thereof, in part, found:

> "4 on vacation--found to be protected (Coffin, Emerson, Henry and White)." (emphasis added)

The Carrier in its August 23, 1989 letter to the National Mediation Board (NMB) in part wrote:

> "MEC/PT and the BMWE 'reached agreement on appropriate language to implement the terms of Recommendation No. 1' during the 10 days allotted under the Public Law, as Arbitrator Van Wart recounted in the Board's Award,' except that the parties 'were unable to agree as to the entitlement of certain employees to coverage of the separation allowances under Recommendation No. 1,' i.e., which employees were 'currently active' as of March 3, 1986. (Board Award p. 10-12) (Attachment B). The Board was then appointed to resolve that initial implementing dispute, along with others as to wages and work rules not relevant here.
>
> The Board's Award, issued October 30, 1986, enumerated the categories of employees who would be deemed "currently active" as of March 3, 1986 and identified each eligible employee within each category. (Attachment B pp. 13-17). MEC/PT then filed a petition in the United States District

> Court for the District of Maine to impeach the Award on the ground, inter alia, that the Award erroneously determined that certain employees, who were in fact furloughed before March 3, 1986, were "on vacation" and therefore "currently active" as of that date. The district court rejected that contention because the parties had intensively discussed the eligibility of individual employees before the arbitration had argued about individuals during the hearing, and in the court's view MEC/PT had ample opportunity to present arguments about individual employees before the arbitrator "discussed the categories and people filling them," and "considered and categorized the disputed persons listed by the union." Maine Central R.R. v. BMWE, 691 F. Supp. 509, 514 (D. Me. 1988). The district court's judgment was affirmed by the United States Court of Appeals of the First Circuit, which issued its mandate on May 18, 1989. 873 F.2d 425 (1st Cir. 1989). Under RLA paragraph 9 the Award became final and binding on that date." (emphasis added)

Covered, or protected, employees are governed by an application of Article V - Employee Protection, particularly paragraph (c). Such covered employees have been protected since September 30, 1986 when Public Law 99-431 was enacted (Senate Joint Resolution 415) National Agreement.

March 3, 1986, as referenced in Article V, is the date that the BMWE's strike commenced. That strike lasted until May 16, 1986 when President Reagan signed Executive Order 10906 commencing the Emergency Board (EB 209 created) procedures of the Railway Labor Act, as amended.

January 30 through October 30, 1987, approximately, was the period of time during which the MEC's operations and lines were leased to the Springfield Terminal (ST) Railroad Company. ST is another Guilford Transportation Industries (GTI) subsidiary. GTI received authority therefor from the ICC in Finance Dockets 30967 in which the employee protective conditions set forth in Mendocino Coast Ry. Inc. Lease and Operate, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980) and

Norfolk and Western Ry. Co. Trackage Rights BN, 354 I.C.C. 653 (1980) as modified in Mendocino Coast, supra, were imposed.

The Board's examination of the salient circumstances involving each of the eight (8) Claimants reflect the necessary issues for our determination and guidance. For instance, James Emerson's claim of coverage for a separation allowance was previously determined by ARB 466. That decision was subsequently upheld by the courts. Emerson was declared covered. Belated evidence should not be cause for any change in the previous decisions. Therefore, these Claimants were and are considered of being, constructively, "currently active employees" on March 3, 1986.

Case 1 Track Foreman Maurice Blanchard, MEC-Div. 3. His job was abolished June 30, 1987. There were no other positions available to exercise his seniority on. Blanchard was furloughed from the MEC June 30, 1987. Blanchard applied for and was denied his Article V separation allowance. He was offered and accepted Springfield Terminal (ST) employment as a "Railroader." Blanchard worked until September 2, 1988, at which time he quit the ST and retired.

The BMWE asserts, in essence and among other things, that in Mr. Blanchard's case his entitlement to Article V's Separation Allowance arose on June 30, 1986 when there was no other MEC job to displace on and not when the First Circuit Court of appeals decision in April 1989 made the award of ARB-466 final and binding. The ST employment as a "Railroader" was not "comparable" employment if that term is to be entertained.

The Carrier contends, in essence and among other things, that between the time of ARB-466 Award October 30, 1986 and its becoming final and binding in April-May 1989, two things had intervened. First, the MEC leased its entire operations and tracks to the ST Company. All the Claimants, including Blanchard, were offered an employment opportunity by ST. It was comparable employment. The transaction permitting the lease was covered by ICC Awarded Mendocino labor protection provisions. Two, acceptance of the ST comparable employment opportunity vested Article V protection until laid off from the ST. Hence, the voluntary retirement by Blanchard was not a deprivation of employment.

This Board finds that the facts of this case place it within the confines of Carrier Issue number 1 as set forth at pg 5 and 6 of its submission to this Board. The Carrier's arguments offered pertain to those employees listed in Attachment B, D and E of Carrier's September 30, 1989 letter (Carrier Exhibit K).

The BMWE believes the questions to be answered are those as pointed out herein in the Background portion of this Award.

Guilford Transportation Industries (GTI) the corporate owner of the B&M, MEC, PT, D&H and ST railroads, because of a perceived economic benefit, conceived what the Interstate Commerce Commission referred to as the "GTI scheme" of having the smallest carrier, ST, become the ultimate and single carrier. The ST was comprised of some 50 employees. However, because of its more economic, flexible and advantageous labor agreement, i.e., lower uniform wages, but less restrictive rules with all ST employees in a single craft are called

"Railroader" and covered, of course, by a single labor agreement it was a viable and economic choice.

The ICC in its Decision of February 17, 1988 in Finance Docket No. 30965, (pp 12) observed:

> "The investigation that the Commission has instituted and recently concluded into the transactions that are the subject of this proceeding clearly establishes that a series of leases from four rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI), to a fifth carrier subsidiary, the Springfield Terminal Railway Company (ST), have, taken together, substantially injured GTI's employees. We are, therefore, imposing extraordinary labor protection conditions on these transactions.
>
> Our actions are taken to protect the interests of GTI's employees. We find that while GTI's actions fall within the letter of our regulations at 49 C.F.R. 1180 2(d)(3), the manner in which GTI has proceeded in implementing these intracorporate leases has undermined its credibility and has contributed to a loss of confidence in its ability to provide adequate and efficient rail service in new England. Prompt good faith compliance with the terms of this order would constitute a significant first step toward the restoration of that confidance.
>
> Through a series of leases and trackage rights arrangements, discussed in more detail below, GTI has in effect restructured its operations so that one of its five rail carrier subsidiaries will henceforth be conducting all of its rail operations. While pursing this course, GTI has failed to keep its employees fairly apprised of their rights and responsibilities under Commission-Imposed labor protective conditions. Some of the information given by GTI was misleading and some was wrong. In other instances, GTI has appeared slow to provide the protection to which its employees are entitled.
>
> To remedy this situation, we will impose on the transactions involved labor protective conditions that are different from those imposed in the usual lease and trackage rights transactions. We will also require that the parties engage in dispute resolution through negotiation of an implementing agreement between all of the GTI carriers and the employees of all the carriers, and, if necessary, binding arbitration. By imposing these conditions we will ensure that employees who were adversely affected by the transactions or were victims of the confusion about protective benefits receive the compensation that would have been accorded had labor

protection provisions been properly administered by GTI under the circumstances."

The ICC, also observed, under Background (p-6) that:

"Under all the notices, D&M, MEC, B&M, and PT lease their rail lines to ST and assign to ST their trackage rights over the lines of other rail carriers. It is now clear that GTI is using the transactions to have ST provide service over the entire GTI system in lieu of the other carriers. While the GTI scheme is not a merger, the transactions, when viewed collectively, nevertheless constitute a substantial undertaking that will have an impact on all of the rail employees of the GTI carriers. It is our responsibility as here pertinent and under 49 U.S.C. 11347 to provide for a fair arrangement for the employees affected by the transactions."

The workforces of B&M, M&C and, D&W are aligned along the traditional crafts of the railroad industry. Employee members of the different crafts are represented by various unions and have pay rates and work rules established through collective bargaining with those unions. ST's workforce, on the other hand, consists of one craft, the so-called "railroader." ST's railroaders perform all of the various tasks that on other railroads are separated along craft lines. ST's railroaders are paid, on the average, less than are the employees of the other GTI carriers. In addition, ST's work rules are more favorable to the carrier than are those of the other carriers. Indeed, a major reason GTI is shifting its operations to ST is to realize the economics afforded by the railroader concept and the ST work rules.

While assembling its workforce, ST has made offers of employment to present and former employees of the other GTI carriers. The record shows that GTI officials have made confusing statements to labor officials and to GTI employees regarding the effect of these offers. GTI has informed some employees that employment offered by ST must be accepted or the employees would forfeit all or some of their protective benefits. They have also been told that, if they accept an ST offer of employment without exercising their seniority rights with their GTI employer, they also forfeit all or some of their benefits.

Under Commission-imposed labor conditions, a dismissed employee is entitled to a dismissal or separation allowance unless he fails without good cause to accept an offer of comparable employment. In the typical lease or trackage rights situation, the offer of employment would come from the railroad for which the employee worked prior to the

transaction. In this instance, an employee of the lessor (or assignor of trackage rights), would in the usual case have to accept an offer of comparable employment made by the lessor to work for the lessor, with whom the employee already has an employment relationship. Thus, the lessor's employees would normally have the right to expect an offer from the lessee railroad. Moreover, they would be under no obligation to accept such employment, even if it were offered, since they had neither an employment relationship nor a bargaining relationship with the lessee.

In the typical case of a consolidation or acquisition, two or more railroads may combine their operations, with either a surviving entity conducting all of the combined operations or each carrier operating some portion of the consolidated operations. Where operations will be combined, the previously separate workforces need to be coordinated. Offers of comparable employment normally are made by the surviving operating entity to former employees of both railroads before any offers are made to outside parties. These offers must be accepted (if employees have exercised their seniority and have been dismissed), or the employees lose their protective benefits.

Here, GTI contends that ST is a carrier separate from the other GTI carriers and that ST does not intend to be a party to any implementing agreement or negotiations involving the employees of the other GTI carriers. GTI contends that those employees have no right to or expectation of employment with ST, but, nevertheless, if they are offered employment with ST, they must accept it or lose their benefits from their GTI employer. We find this approach contrary to established practice and we do not approve it.

GTI would treat ST as the typical lessee carrier--as if it were a foreign system with no obligation to offer employment to the work force of the remainder of the GTI family, and no obligation to negotiate over the merging of seniority rosters. But, on the other hand, GTI seeks to avoid exposure to the payment of dismissal allowances by claiming that an employee who declines comparable employment with ST has forfeited rights under the Mendocino Coast protection plan.

There is, in the typical case under New York Dock, and obligation to take offers of comparable employment, but those offers are not ripened until an implementing agreement has been established and rights under the agreement can be assessed. Consequently, employees have the protection of a negotiated or arbitrated arrangement establishing seniority and the basis on which the new work would be performed. RLEA correctly notes (Post-hearing Brief, at 24) that these

features of implementing agreements have long been recognized by this agency as crucial to employees.

Although each of the several ST leases may be designed operationally and financially as independent transactions, we cannot ignore the significant impact of the series taken as a whole. Although we do not have a true consolidation here, the transactions represent restructuring of the GTI system with all of its operations to be performed by ST. In the typical consolidation transactions, it is necessary to coordinate work forces of two or more railroads. Here, to the extent that ST has offered employment to many former employees of the other GTI carriers, the outcome is similar in effect to a consolidation.

Thus, we are persuaded that employees affected by the ST transactions should be provided more than the standard protections that accompany lease transactions. While the Mendocino Coast protections have proven quite satisfactory for the normal case, it has always been understood that they are minima--that additional protections could be provided in the exceptional case. Because of the system-wide impact of the present arrangement and the substantial impact on numerous rail employees, the need for an implementing agreement prior to any further reorganization is established.

In order fairly to protect rail employees in these unusual circumstances, we will require an implementing agreement (and binding arbitration, if necessary to achieve that agreement) that includes ST, the surviving operating entity, as a participant, along with B&M, D&M, MEC, and PT and the employees of ST, B&M, D&M, MEC, and PT."

"It is further necessary to be clear on the scope of employee rights under the implementing agreement we are requiring. Between the time that ST and GTI first implemented one of their transactions and the date of this decision, numerous employees in the GTI family have been required to make employment choices on what appears to have been unsatisfactory information. RLEA has argued that the 'opportunity to know what their employment options are before they are required to exercise (them)' is the 'essential difference' for employees between New York Dock conditions (the conditions that labor has sought consistently throughout this proceeding) and Mendocino Coast. (Post-Hearing Brief, at 28.) We agree with this assessment, and we have decided that the transactions undertaken by GTI cannot be fairly accomplished without respecting this essential difference. Consequently, any implementing plan, agreed to or arrived at through arbitration, shall provide that the employees of the several

> GTI railroads as of the date of the first such transaction under 49 U.S.C. 1180.2(d)(3) shall not be deemed to have forfeited any rights or benefits as a consequence of decisions made prior to the development of such an implementing plan." (Finance Docket No. 30965 Decision, page 10) (emphasis added)

Arbitrator Richard Kasher was appointed to write the referred to Implementing Agreement. He did so on June 12, 1988. The ICC affirmed only a portion thereof, i.e., "claims procedure, allowance benefits and the election of benefits of employees adversely affected by the lease transactions." The matter of rates of pay and work rules was not affirmed and was vacated. In a subsequent Decision in Finance Docket No. 30965 on January 8, 1990 the latter aspect was supposed to have been referred back to Arbitrator Kasher.

The ICC issued another Decision October 23, 1989 in F.D. 30965 which, in part, reads:

> "Arbitrator Richard R. Kasher issued his award adopting an implementing agreement on June 12, 1988 (Kasher Award). In a decision served January 10, 1989, we denied petitions to revoke the class exemptions in these proceedings and granted administrative review of the Kasher Award.
>
> Shortly thereafter, ST implemented the proposed seniority system, and entered into negotiations with the UTU to revise the existing ST/UTU collective bargaining agreement. On February 14, 1989, ST and UTU signed a new collective bargaining agreement that covered such issues as seniority, workforce selection, rates of pay and work rules and addressed other issues as well (e.g., pay raises). The agreement was subsequently ratified by the UTU.
>
> One of the current circumstances that affects the resolution of this case is the fact that no further proceedings have taken place before Arbitrator Kasher since our January order. There are several possible reasons for this. Our January order was not officially served on the arbitrator and none of the parties requested that he initiate fact-finding, mediation or arbitration in an effort to frame a further resolution of the disagreements between the parties."

***

Some parties, however, were active during this period. ST and UTU together constructed the February ST/UTU agreement. This agreement may have removed the need for fact-finding on the nature, scope, and practice of the pre-February 1989 ST/UTU collective bargaining agreement. Indeed, in view of their negotiations, ST and UTU appear to have made progress toward resolution of their differences. The ST/UTU agreement addresses work rules and rates of pay, issues which were left unresolved in our January decision, as well as provisions concerning seniority and force selection. We find, however, that Guilford's March 21 letter to employees concerning employment opportunities was premature.

We have recognized the distinction between the limited purpose of implementing agreements and the broader scope of collective bargaining agreements (CBA's). An implementing agreement traditionally focuses on and provides for the selection of forces from employees of all carriers involved. Such an agreement may be mutually formulated through negotiation, or if necessary, established through arbitration. Use of one or both of these procedures is required by the labor protective conditions imposed on the transaction approved under the Interstate Commerce Act (ICA). By contrast, a collective bargaining agreement represents a mutual agreement negotiated between a carrier-employer and its employees encompassing terms and conditions of employment from a broad range of subject matter recognized as bargainable under the Railway Labor Act (RLA). The ST/UTU agreement is not an implementing agreement.

As noted, an implementing agreement has not yet been achieved through negotiation or arbitration procedures. Under the rules established by the Commission for this proceeding, employees will not be required to make employment choices until an implementing agreement is in place. We will require Guilford to send a copy of this decision to those employees to whom it sent the March 21 letter and, thus, we will provide the relief sought by RLEA in its April 10, 1989, petition.

Having concluded that the new ST/UTU agreement does not constitute the implementing agreement, we remand with instructions to the parties to proceed to arrive at an implementing agreement, among and between all parties and their employees."

A new Arbitrator, Robert Harris, was subsequently selected (appointed by the NMB at the request of the ICC) to finish the

required implementing agreement. His award was rendered on March 13, 1990 and furnished to the ICC. The ICC, to date has, apparently, done nothing thereon. The ICC in its October 23, 1989 Decision had advised the arbitrator, in part, (p. 6-7) that:

> "Our labor protective conditions, to be sure, provide generally that working conditions and collective bargaining agreements are to be preserved. However, the terms of these conditions must be read in conjunction with our decision authorizing the transaction and the public interest factors upon which it is based. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to its implementation. See Finance Docket No. 30,000 (Sub-No. 18), Denver & R. G. W. RR Co.--Trackage Rights--Missouri Pac. RR between Pueblo, CO and Kansas City, MO (not printed), served October 25, 1983.
>
> The labor protective conditions that we impose uniformly require the development of an agreement to implement the transaction, which is to be arrived at by a mutual agreement between labor and management, or in the absence of a negotiated agreement, by binding arbitration. The arbitrator's duty, simply stated, is to fashion an implementing arrangement that will reconcile worker protections with the terms and the objectives of the transaction that we approved. If those terms and objectives cannot be achieved without modification of existing work rules and collective bargaining arrangements, he clearly has the authority to modify such arrangements to the extent necessary to carry out his mandate. On the other hand, it may not be possible for the arbitrator to reconcile completely labor's legitimate interests with all features of the carrier's initial plan. Railroads seeking approval of transactions to which mandatory labor protection applies, are on notice that they must negotiate an implementing agreement or submit to arbitration, and their transactions are subject to some degree of modification. What is essential is that the implementing arrangement be consistent with the essential terms of the transaction and the objectives ought to be obtained.
>
> An important objective to be achieved by the GTI restructuring is the economics afforded by application of the more flexible ST work rules to the entire GTI system. By imposing the lessor's collective bargaining agreements, the arbitrator effectively foreclosed the transactions we authorized. Consequently, we will not affirm the

arbitrator's (Kasher) decision to impose the rate of pay and work rules of the lessor carriers." (insert added)

Arbitrator Harris rendered his award on March 13, 1990 and in part, held that the MEC collective bargaining agreements (CBAs) were modified by his Award, to wit- a single seniority district, a less than 50% of total work incidental work rule and the required use of a conductor only in through freight service, yard and local freight service with the Carrier option to use a brakeman in yard and local freight service. However, that required implementing agreement in the Harris award has not yet been adopted by either the Carrier or the ICC.

The Board concludes from the foregoing that Claimant Maurice Blanchard was and is protected under EB 209, the congressionally mandated and ARB 466's separation benefit (Article V). Blanchard also became protected under the Mendocino Coast labor protection arrangements. Blanchard was thus entitled to exercise the option of selecting one of the two employee protection benefits. If, as the Board understands, Blanchard chose and was improperly denied the congressionally mandated and ARB 466's Article V option then his accepting the ST employment offer was but nature's reply to an empty belly, i.e., self preservation. Such election, of course, was not binding on him because, as the ICC points out, as did Arbitrators Kasher and Harris, such offer was improper ab initio since no proper implementing agreement was in place, then and now, or at least as of this award. ST was not comparable employment.

In order to protect the Mendocino benefits Blanchard's MEC position was abolished June 30, 1989. There was no MEC position to

displace on. Ergo, at that point Maurice Blanchard qualified and vested for the implementation of the Article V $26,000 separation allowance. His eligibility was set by the job abolishment and employment deprivation which met the criteria of ARB 466's Article V. Hence, tha separation allowance was then due Blanchard. Unemployment and the need to survive are the only logical reasons to cause Blanchard to accept ST employment if a proper implementing agreement was in place.

The issue raised herein, according to the Carrier, is its number 1, i.e., The Refusal or Voluntary Relinquishment of ST Employment.

The Carrier's arguments pertain to those MEC employees listed in Attachment B, D and E of the Carrier's September 20, 1989 letter. They are the employees who accepted ST positions and are now working for ST (Attachment B), or employees who refused ST employment (Attachment D), and/or employees who accepted ST positions and subsequently retired, resigned, became disabled or sick or who were dismissed for cause (Attachment E) which included Claimant Blanchard.

In view of the ICC's Decisions in Finance Docket No. 30965, et al, and Arbitrator Kasher and Harris' Implementing Agreements, not yet adopted, we must conclude that any offer of employment if made in this case, was premature, improperly made and is considered void. Notwithstanding, Blanchard's original decision was to take his Article V separation allowance. We so award same to him. The subject of interest in all claims will be discussed and covered later hereinafter.

As to Question No. 1 raised by the BMWE the answer is yes. BMWE's Question No. 2 is qualifiedly answered. Eligibility or qualifications for severance pay, when applicable and exercised, carries with that act a severance of seniority. Seniority is, of course, the link for initial employment with ST. Hence, if an employee qualified for a separation allowance and the same is taken then a separation of employment relationship will occur. Hence, what transpires thereafter is not a matter for proper consideration by this Board as the employees would no longer hold an employee-employer relationship.

In the facts of the Blanchard case Question No. 3 has no real relevance as it is answered above. Properly employed by ST, which as of this date is not possible would otherwise mean an election and exercise of options for protective benefits (i.e., Article V or Mendocino) when properly hired. When so hired, the benefits available under Award 466 are held in abeyance until "deprived of ST employment" at which time their ARB 466 benefits may be exercised.

Case No. 2 Claimant Track Foreman Ernest Boulde - MEC Div. 1. The Claimant was employed prior to and on March 3, 1986. He remained so until June 16, 1987 when his position was abolished and he was furloughed. He was never formally offered ST employment. Boulde was listed in attachment D of Carrier's September 20, 1989 letter, i.e., "those who refused ST employment."

It is not necessary to review the facts and arguments of the parties in this particular case as the Carrier has offered (May 25, 1990), following the Board's hearing in Tampa on October 20, 1990, to

dispose of this particular case on a non precedent basis by payment of the requested separation allowance. However, there remains a small dispute as to whether he should be entitled to a lump sum payment or a subsistence allowance. Boulde requested a subsistence allowance. If that fact is not settled by the parties then Ernest Boulde shall be granted, as requested, a separation allowance as per Article IV - paragraph (d) option 2.

Case No. 3 - Timothy Blackstone and Case No. 6 - Norman Bilodeau

Case #3 MEC Claimant Crane Operator Timothy Blackstone. His position was abolished on July 18, 1986 and T. Blackstone was furloughed. He was not employed by the ST. Claimant Blackstone's name appears on attachment "C" of Carrier's September 20, 1989 letter. "Decline in business," raised June 9, 1989. His name also appeared in the lists of names presented to ARB-466.

Case No. 6, Claimant Trackman, Normal Bilodeau, MEC-Div. I. He was furloughed July 28, 1986. Bilodeau's position was abolished May 23, 1986. He was never employed by the ST.

Both are listed in attachment C.

In both cases the Carrier's reason for denial of both claims on June 9 and September 20, 1989 was that they were laid off due to a decline in business caused by the 1986 strike. Carrier said:

> "The claims of employees listed on Attachment C are denied because they were laid off due to decline in business caused by the 1986 strike, most of them pursuant to Court order in RLEA v. Boston & Maine, No. 86-0122-P (D. Maine). Under the standards of the February 7, 1965 Agreement, which were imposed by the PEB in this case, and virtually all other labor protection arrangements employees are not protected from furloughs due to declines in business. The claims of any claimants who are now working for Springfield Terminal and whose claims were denied above, and who were also

furloughed due to strike-related declines in business, are denied on this additional basis."

"Attachment C lists employees who were furloughed due to a decline in business. Most of these claimants were furloughed pursuant to Court order in RLEA v. Boston & Maine, No. 86-0122-P (D. Maine). In previous conferences and correspondence you maintained that the Carrier has no right to deny protection benefits due to a decline in business. However, neither the PEB recommendation nor the Van Wart award contain the type of automatic certification benefits for protection benefits that you appear to be advocating. These claims, therefore are denied."

The terms of Article V (c) are crystal clear. Except as provided in Article V, Section 9. They are, as expressed, unconditional. Each MEC employee qualified as defined in paragraphs (a) and (B) are to be granted the agreed upon separation allowance when, as set forth in (C), such employee "is deprived of work in the normal exercise of seniority." That is the only condition precedent to any such employee receiving a separation allowance. Nothing more or nothing less.

The GTI leasing of MEC lines and any furloughs arising therefrom are not intervening causes for implied exceptions to the granting of the specific separation allowances. That is true of furloughs for business declines. What started out to be a contemplated means of at least updating the coverage of the February 7, 1965 National Stabilization Agreement to extend and include its protective coverage to those MofW employees hired subsequent to February 7, 1965, turned into negotiations on what was and is a self serving local property agreement.

The Carrier representatives knew what that Agreement's intent was and they so testified. The Carrier's agreement offer and the subsequent EB-209 and ARB-466's awarded Agreement was not the usual or

normal employee protective conditions agreement. Carrier spokesmen verified that its intent was not that of a normal employee protective agreement. Vice President Byron Rice before EB-209 (P. 350) testified:

> "A. No, we did not agree to that. We did agree that we would, as he refers to here, delete 15 months. That is a reference to the fact that our proposal contemplated that any active employee who thereafter had his position abolished could collect $20,000 separation pay in a lump sum or, alternative, take that money in an income stream, not to exceed 15 months. And what the organization wanted, as I said before, was to increase that separation pay for 20 to 26 thousand, and eliminate the cap on the income stream, and we agreed to that.
>
> We did not agree to add any more people to the list."

Later, in testifying before the CAbB August 26, 1986, Vice President Rice (P. 70) stated:

> "No. What that contemplated was a payment of not $20,000; we increased that to $26,000. And what would have happened, in the event that anybody who was a member, an active member of the work force at that time, and I think there were somewhere slightly in excess of 100 people--that in the event that a job that they were occupying were abolished, they then would have the option of accepting a lump sum separation pay in the amount of $26,000; or alternative, they could take the $26,000 and have it come to them in an income stream."

More to the point was the testimony of Carrier Witness Daniel Kozak, now Vice President, before the CAB. In answer to CAB Member Gil Vernon (pp 270-272) on the very point of intended exceptions said that such offer was unconditional:

> "Mr. Vernon: But aside from that, I was curious to note that your March 3rd protection offer was unconditional. I may have touched on this in our first day of hearing, in other words, there wasn't the standard, as there is even the clerks' agreement exception or offset for declining business.

In that respect, wouldn't the clerks' protective agreement, or something similar to it, have been more advantageous to the Carrier than their unconditional offer of March 3rd?

Mr. Kozak: No.

Mr. Vernon: Why not?

Mr. Kozak: No, Mr. Vernon, we don't believe so because if you look at the clerk's agreement, that protects people up to age 65. The offer we made to the Maintenance of Way Union, we viewed that as a capped liability, which is a fixed dollar amount which was $26,000.

So, our maximum exposure per person would be $26,000 as opposed to the clerks, even with the decline in business formula, it was theoretically possible to have a 25-year old clerk, who got furloughed and never got recalled, for us to pay him for 40 years. No, that doesn't happen very often in the real world, because of attrition, and things like that, but the clerks' agreement was more an open-ended arrangement. This was more or less a capped arrangement.

That's why the decline of business formula doesn't show up in it." (emphasis added)

Mr. Bradley Peters, the MEC highest designated officer under the RLA, at the ARB-466 hearing on October 26, 1986 said:

> "This is how we see it working. A man is sitting on a protection opportunity provided by Emergency Board 209 which we disagree with, but still exists, so an individual, man X, has the potential of being paid $26,000 if he so elects. It is our position that if he is furloughed as a section man, for example, and can, at that point, or on a production--work on a system production crew that if he, in fact, fails to exercise his rights to that system production crew he loses his protection."

The Chairman of this PLB was the Chairman of ARB 466. He accepted the premise in Peters argument and placed the only exception to the unconditional requirement in Article V Section 9. That exception required that all protected employees exercise their seniority, if any, to System Production Gangs in order to protect their separation allowance. That "normal exercise of seniority" is

the singular exception. As noted in the Carrier proposed language made in its unconditional offer to the BMWE on October 3, 1986:

> "1. A. A $26,000 lump sum separation allowance, less applicable taxes, will be payable to Maine Central Railroad Company and Portland Terminal Company employees represented by the Brotherhood on March 3, 1986, in the event of job loss or abolishment. A list of such employees eligible for a separation allowance is attached hereto. Employees accepting a separation allowance will sever all seniority and employment relationships with the Carriers.
>
> B. In lieu of the $26,000 separation allowance, employees may elect a daily subsistence allowance of $50 per day, less applicable taxes, not to exceed $250 per week up to a total aggregate amount of $26,000."

ARB-466 adopted that Carrier offer for the agreement that it issued in its October 30, 1986 Award. However, there were no System Production Gangs established so that there were and are no conditions to be met other than in paragraph (c) resulting in deprivation of employment. Therefore, a decline of business offered as a reason for denial of these particular claims must fall. The two claims in Cases Nos. 3 and 6 are herewith sustained.

Case No. 4 Claimant Trackman Clarance Dill was formerly employed by Portland Terminal. His job, as with other PT jobs, was abolished August 16, 1987. Dill was furloughed that date. He accepted ST employment and was furloughed therefrom December 7, 1988. Dill applied for his MEC Separation Allowance. Said request was denied.

Dill is listed in Attachment B. Carrier asserts now that he should have been listed in Attachment E because after he was furloughed from the ST they recalled him and he never returned. He was discharged therefrom for violation of Rule N in May 1989.

When furloughed from the MEC Claimant Dill met the required litmus test for an Article V application, i.e., furloughed and he was deprived of employment. Mr. Dill was not required to accept employment with ST. However, even though Dill did it was later held that such ST employment offer, in effect, was null and void. Dill was furloughed from the ST on December 17, 1988. At that time Dill was again made eligible for his EB-209 and ARB-466 Article V separation allowance. The claim of Clarance Dill is sustained.

Case No. 5 Claimant Track Foreman William Barnes, MEC-Div. 1. The Claimant's name was among those approved by ARB-466 for coverage or protection of the severance benefit. Claimant's position, as were the remaining MEC positions was abolished August 16, 1987.

Barnes was employed by the ST and worked thereon until October 1987. He, apparently, was discharged therefrom for failing to return on recall about October 1988.

Barnes was furloughed August 16, 1987. He, apparently, did not file for his separation allowance. Barnes employment with ST as a railroader was, in effect, evaluated by the ICC as well as by Arbitrators Kasher and Harris. The conclusion was the employment offer was void because there was no proper implementing agreement in place. This Board has no knowledge that there is a proper implementing agreement in place yet, as of August 1990. The ST offer of employment was thus improper and invalid. The acceptance of an improper offer of employment does not bind the acceptee. In the particular circumstances this claim is sustained.

Case No. 6 involving Track Foreman Norman Bilodeau was previously discussed, sustained and is thus disposed of.

Case 7 Claimant Track Foreman James Emerson's position on the Calais Branch was abolished as the result of an abandonment transaction undertaken pursuant to Oregon Short Line employee protection. Emerson, at that time, chose to not exercise his seniority rights and took a voluntary furlough. He requested and was granted a vacation period which time covered the eligibility March 3, 1986 date. ARB 466 held that Emerson was on vacation and therefor currently employed and qualified as a protected employee under Article V.

Emerson was never recalled to service. First, "because he held no position upon which to return" and second. there were no employment opportunities for him on the MEC.

Notwithstanding, having placed Emerson under the scope of Article V, he must still meet the conditions required by paragraph (c), i.e., be deprived of work in the normal exercise of seniority. Unless Emerson's voluntary furlough is the agreed upon, or mutually interpreted, equivalent of a "normal" exercise of seniority then Claimant Emerson has not yet met that requirement of paragraph (c). If, however, as entitled, Emerson goes to work for the ST and is furloughed therefrom his claim would then ripen. Emerson could, at that time, qualify for ARB-466 an implementation of his separation allowance. The claim of James Emerson must be denied as being premature.

Case 8, Claimant Machine Operator Raymond N. Couture. His MEC position was abolished on June 19, 1987 and Couture was furloughed June 19, 1987.

Couture's name was among the lists of those employees whose names were placed before ARB 466 as not being in dispute. Couture was deemed covered by the provisions of Article V.

Couture requested subsistence payments. Carrier says that they offered him ST employment at least on July 13, 1987 and charged Couture with refusing same. However, BMWE says, in effect, hogwash, no such offer of ST employment was ever made. The alleged offer referred to was made a month after he was furloughed from the MEC.

Notwithstanding, a proper implementing Agreement was not reached by ST-MEC prior to such alleged offer of employment. Such failure negates any offer of employment. Aside therefrom there are other negating factors such as the employment offer given by ST was made selectively. The offers were made amidst a confusing rational why the offerees would have to accept the ST offer. The ICC, and the two arbitrators that it appointed to arbitrate the implementing agreement, have held, in effect, that the employment offer was void until properly made. Couture's furlough pre-dates any implementing agreement.

Exhibit 4, the court case against Couture, was dismissed March 13, 1990 at the request of District Attorney Daniel Crook on December 13, 1989. Now, ST must employ him "warts and all."

More importantly Claimant Couture had qualified under ARB-466's Article V, paragraph (c) of MEC employment. He was furloughed and

deprived of employment in the normal exercise of seniority. Couture met Article V's test. If he were to accept employment with the ST Couture would only be protecting again his "Mendocino" protection benefit. Couture has the right to elect which of the two benefits he desires. He chose those given by ARB 466.

This claim will be sustained.

Issue of Interest

This Board is satisfied that it has the authority when circumstances are such as to become onerous or burdensome to award reasonable interest on the delay in payment of separation allowances due employees. Technicalities aside justice delayed is justice denied. Justice denied is a cause for a breakdown in the faith of the labor-management relationship.

The Carrier had the absolute right under Section 9 of the Railway Labor Act, as amended, to appeal the October 30, 1986 Award of ARB-466 to the US District Court. However, by appealing the District Court's decision, on June 7, 1987, against the Carrier to the First Circuit Court of Appeals, who issued its affirming conclusion on April 26, 1989, does lend support to a belief that such appeal was taken to avoid, for awhile at least, coming to grips with the administration of Article V of the October 30, 1986 Award. It is noted that the cause for one of the Carrier's counts raised in the appeal, i.e., failure of Award to confirm to the provisions of the Railway Labor Act, occurred as the result of the Vice President of the Carrier, the President of the BMWE and the Arbitrator mutually agreeing that the parties' positions in the dispute would be presented in submission form and

that the parties did not desire to use the services of a Court Reporter. Notwithstanding, the District Court, without that information, found against the Carrier's contention.

The ICC Decision in Finance Docket 30965, et al, on February 17, 1988, parts of which for ready reference are reproduced, show how the letter of the law was complied with but not its spirit.

> "Through a series of leases and trackage rights arrangements discussed in more detail below, GTI has in effect restructured its operations so that one of its five rail carrier subsidiaries will henceforth be conducting all of its rail operations. While pursuing this course, GTI has failed to keep its employees fairly apprised of their rights and responsibilities under Commission-imposed labor protective conditions. Some of the information given by GTI was misleading and some was wrong. In other instances, GTI has appeared slow to provide the protection to which its employees are entitled." (emphasis added)

The ICC described the tactical means chosen by GTI to achieve the GTI's "Railroader" concept, lower operational costs without, hopefully, any negotiations with all the Unions affected.

> "These transactions fall under 49 U.S.C. 11343. The GTI carriers are members of the same corporate family, and the Commission has exempted, from the prior approval requirements of 49 U.S.C. 11343, transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. 49 CFR 1180.2(4)(3). Instead of filing an application under 49 U.S.C. 11344, rail carriers file under 49 CFR 1130.4(g) a verified notice with the Commission at least one week before the transaction is to be consummated. The GTI carriers filed notices of their transactions, and the exemptions became effective pursuant to the regulations."

> "Here, GTI contends that ST is a carrier separate from the other GTI carriers and that ST does not intend to be a party to any implementing agreement or negotiations involving the employees of the other GTI carriers. GTI contends that those employees have no right to or expectation of employment with ST, but, nevertheless, if they are offered employment with ST, they must accept it or lose their

benefits from their GTI employer. We find this approach contrary to established practice and we do not approve it.

GTI would treat ST as the typical lessee carrier--as if it were a foreign system with no obligation to offer employment to the work force of the remainder of the GTI family, and no obligation to negotiate over the merging of seniority roster. But, on the other hand, GTI seeks to avoid exposure to the payment of dismissal allowances by claiming that an employee who declines comparable employment with ST has forfeited rights under the Mendocino Coast protection plan." (emphasis added)

The ICC, in Finance Docket No. 31023 with a June 12, 1987 service date, had placed GTI on notice that consummation of this transaction would be done at their own risk. Yet GTI went ahead without a proper implementing agreement in place. Other transactions did take place which adversely affected the MEC's MofW employees. The MEC alleged that all protection rights would be forfeited if the employees did not accept ST employment. The ICC Decision in Finance Docket 30965 came down on February 17, 1988. It decided and advised that those GTI transactions needed a proper implementing agreement. Again, on January 9, 1989, another ICC Decision issued in Finance Docket 30965, therein advising of the same thing. Those anti date these facts and Carrier's letter of June 9, 1989 making another decision thereon.

The Carrier advised in mid 1989 that it would pay six claimants, ostensibly, on grounds that are permissible under the February 7, 1965 BMWE National Agreement. That self serving administrative gesture appears to highlight what has been a procrastinative tendency. These six employees appear to be in the same circumstances as the majority, if not all less one, of the Claimants herein.

The induced interminable delay created because of the Carrier's hyper-technical administrative procedure in payment of separation

allowance, either in a lump sum as per option 1 or in subsistence payments as per option two, was such as to be abusive to the Claimants.

These claims arose in June, July of 1986 and July and August of 1987. The Claimants were granted the separation allowance by congressional decree (PL99-431) on September 30, 1986, when implementing EB-209's Report and Recommendations "although arrived at by agreement of the parties." The October 30, 1986 ARB-466 Award merely spelled out implementing details. In any event some four (4) years have transpired since then and the monies are still due them. Such money, if banked would have earned interest of at least 6 to 10%. We therefore hold that they are entitled to eight (8) percent interest since the date of Judge Carter's latest court decision, i.e., August 8, 1988 rather than since May 16, 1989, when the Court of Appeals Decision became final.

AWARD

1. Claim of Maurice Blanchard is sustained as per findings.
2. Claim of Ernest C. Boulde is sustained as per findings.
3. Claim of Timothy A. Blackstone is sustained as per findings.
4. Claim of Clarance Dill is sustained as per findings.
5. Claim of William Barnes is sustained as per findings.
6. Claim of Normal Bilodeau is sustained as per findings.
7. Claim of James Emerson denied as per findings.
8. Claim of Raymond N. Couture is sustained as per findings.

4885-1

Order: The Carrier is directed to make payment these claims within thirty (30) days of this Award being adopted.

Arthur T. Van Wart, Chairman
and Neutral Member

W. J. LaRue, Employee Member

D. J. Kozak, Carrier Member

Concurring

Concurring

Dissenting

Dissenting

RETRACTING ALL RIGHTS
WITH WRITTEN DISSENT
TO FOLLOW

Dated November 2, 1990
Tampa, FL.