PUBLIC LAW BOARD NO. 4885

Award No. 2
Cases 9 to 16

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

Statement of Claim: As Compiled by Board

Claimants:

Neil J. Francoeur	Ernest Henry
Charles H. Kemp	George M. Poland*
Lloyd G. Beal, Jr.	Lugene W. Wallace
Henry Libby	Walter Maschino

General Sample Claim Reads:

1. The MEC has violated Article V of the imposed Agreement by decision of AB-466 when the position of (Claimants Above), was abolished on date of and has been denied separation pay as provided by Article V Option of the imposed agreement.

2. That (Claimants Above) having met the clear and precise language of the imposed award having exercised his seniority to any and all their positions were furloughed on date of, from the MEC. The Claimant is entitled to his separation allowance from the MEC.

3. (Claimants Above) shall now be paid $26,000 in a lump sum severance payment, and in addition, be paid interest on the total amount of $26,000 at the rate of 9% commencing date of, until the date payment is paid.

Findings

This Board has jurisdiction of these cases by reason of the parties agreement establishing the Board therefor.

This is this Board's second Award. The Board had its

* Elected Option 2 (Subsistence Allowance)

genesis in the Award of Arbitration Board No. 466, issued October 30, 1986, pursuant to Public Law 99-431, implementing the unresolved issues set forth in the Report and Recommendations of PEB No. 209, covering, primarily, employee protection for some, give or take, 100 to 120 BWME Employees. An Interpretation Award followed and Public Law Board (PLB), No. 4885 was created to resolve the disputed claims arising from ARB-466. PLB No. 4885 issued it's first Award November 2, 1990, covering seven cases. All above said Awards by reference thereto and are incorporated herein and made part of this Award No. 2.

The predicate for the above claims for job protection arises from the coverage in the the Agreement awarded by Arbitration Board No. 466, in part, reading:

Article V - Employee Protection

(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 Employees effective March 3, 1986, employed on the Portland Terminal Company on that date shall 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 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: (Options 1 and 2 is not reproduced)."

Article V represents a unique agreement. It's intended purpose, initially, was to belatedly make adjustments to the February 7, 1964, BMWE National Agreement, which covered employees who were displaced by technological, organizational, economic and other changes, causing a lessened need for employees in general. The negotiations arising from the BMWE Section 6 Notice, (seeking to lessen the impact of the February 7, 1964, National Agreement), ultimately changed the character of the agreement sought into a separation allowance agreement. The Awarded Agreement did grant the Carrier a right to have System Production Gangs, which was never utilized, apparently, because of the ST leasing arrangement. The Awarded Agreement assured each covered employee, i.e., "currently active employee", employed on March 3, 1986, that when eligible, i.e.., he was "deprived of employment", and he was unable, "in the normal exercise of seniority", to hold a job, that he would be granted the $26,000 separation allowance. There were and are no time limit provisions in Article V as to when an eligible employee must or can exercise his eligibility, or stated differently, when he/she might lose such eligibility.

The Award issued by ARB-466 indicated a consistant dispute in that the Union had given the Carrier a list of 120 names from which carrier struck 11 names as being disqualified. The Carrier argued that 8 more names should be taken off the list or substituted in lieu of junior men. The Union disagreed and added 1 name but then withdrew 7 names. The BMWE phrased 3 question which they and the Carrier agreed covered "the various categories of

disputed employee". ARB-466 at P-17 found:

> "there is no need for the Board to reach and answer BMWE's question No. 3 as such is no longer in dispute before this Board. Therefore, the list of employees appearing in Carrier's Exhibit 1-A and Employee's Exhibit 8, are, as modified by our finding herein, the corrected list of employees for entitlement to the protection granted." (emphasis added)

Two intervening events thereafter occurred that have served to create circumstances that engrafted themselves as facts in this case and served to place the parties in an extraordinary adversarial position. First, was the litigation by the Carrier after ARB-466 Award of October 30, 1986, was rendered. Some two and one half years passed and ended on April 26, 1989, before the U.S. First Circuit Court of Appeals, at Boston, issued a decision denying the Carrier's request for impeachment of that Award. The second event also involved the passage of time and arose from the series of lease and trackage right transactions taken by and within the subsidiaries of Guilford Industries, Inc., whereby the total operation formerly performed by MEC/PT were thereafter performed by Springfield Terminal Railway Company as purportedly authorized by the Interstate Commerce Commission (ICC) Order. The leases commenced on or about January 30, 1987, through October 30, 1987. However, there was never, any boni-fide implementing agreement negotiated as required by the ICC order.

The ICC, in Finance Docket No. 30963 (Sub-No-1), on September 24, 1990, (P2W) in part ordered:

> "4, ST. shall make offers of employment to all persons in active service (as defined in the Harris Award) with B&M, MEC, PT or ST at the time the first of the lease transaction embodied within this proceeding was consumated.

5.The protective period as set forth in the Mendocino conditions for each employee who accepts the offer required in number 4 above and present himself or herself for service shall commence to run from the date on which such employee commences service pursuant to the implementing agreement approved herein or the date such an employee is adversely affected, whichever occurs later."

However, it took two ICC authorized arbitration awards (Arbitrators Kasher and Harris) and an ICC review of both awards to effectuate the above referred to ICC Awards. The ICC review of the Harris Award resulted in a proper basis for issuance of a boni-fide implementing agreement which thereby legitimized any future ST employment offer.

It was noted that nowhere in the Harris Award, or the referred to ICC order, was mention made of the Award of ARB-466. Nevertheless, the Harris modifications of the MEC/PT agreements were approved by the ICC decision of November 4, 1990.

It is again to be noted that the Chairman of PLB No. 4885 was also the Chairman and Neutral Member of ARB-466. The Chairman was assured by the parties that the primary problems in connection with implementing EB 209's employee protection ($26,000) was defining the groups of employees who were not eligible for coverage. See for instance P-5 & 6 of Volume I of the transcript of the tapes covering the discussions had at the Boston, MA., October 20, 1986 ARB-466 hearing.

The Award of ARB-466 (as stated above) pointed out (P-10), that the parties were only in dispute as to entitlement of certain employees for coverage of the separation allowance. Hence, the conclusion at P-13, and 14, that the dispute centered on the "who" was to be

protected. The Carrier categorized some 16 to 20 employees as being in various non-protected groups. It was pointed out at P-14 that the BMWE had offered three questions, which they believed would resolve the disputed employees entitlement in Employees Exhibit 8 and 9, (some 12 employees). Employee Exhibit 8 was summarized at pages 16-17 as being protected or not protected.

The Interpretation of said Award was rendered on January 26, 1990. That event occurred some 3 years and almost 3 months later. The Interpretation Award pointed out, in essence, that the arbitrator was trying to define "presently active employees" (P-29) and that he was neither excluding or including employees in the coverage of Article 5, but relying on the facts presented in behalf of each disputed employee. The Interpretation hearing discussions led to the establishment of Public Law Board No. 4885, which thereby helped avoid some of the questions raised.

Here, the BMWE grouped the above claims into 8 cases and prepared submissions thereon. It also, in general terms, on behalf of many of the claimants, framed the questions as follows:

Question No.1

Is and employee whose position was abolished on the MEC/PT and who is unable to exercise his seniority either on his seniority district or on a system gang on the MEC/PT, entitled to severance pay as envisioned by Article V, Option 1, of the imposed agreement of AB-466, October 30, 1986?

Question No.2

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

Question No.3

Does a decision to retire more than one (1) year after his being deprived of employment with the MEC/PT change the qualification for severance on June 30, 1987?

All the Claimants, except George Poland, are found on the Carrier's original list of employees that the Carrier presented to ARB-466, in October 1986, as part of their submission.

The Union (A) and the Carrier in (B) presented facts, which are summarized as:

Case No.9 (Carriers No.1) - Neil F. Francoeur

A. BMWE asserts that Claimant Francoeur was affected by the ST lease of his MEC territory effective June 19, 1987, when the ST took over. His job was abolished. There was no other jobs to displace on. The Claimant was furloughed. Francoeur was then employed by the ST on July 14, 1987, as a new employee under the ST UTU Agreement as a "railroader".

Francoeur was removed from service on June 23, 1988, on a disciplinary charge of violating GTI rules and conduct unbecoming to an employee, A/C fired a projectile at and striking an ST employee on March 10, 1988. After an investigation on June 30, he was dismissed from service as discipline therefor on July 14, 1988. His case was handled by the UTU before Public Law Board 4623, which, in Award No. 1 between the UTU and ST, the claimant's dismissal from the ST was upheld. His claim for a separation allowance was re-filed and denied.

B. Carrier agrees to the above essential facts and pointed out that the claimant did not work after November 11,, 1987, that his dismissal arose before his claim for separation was filed October 29, 1991 and was denied November 12, 1991.

Case No.10 (Carrier Case No.2) Claimant Ernest E. Henry

A. BMWE asserts that Henry's MEC job, as Carpenter Foreman, at Waterville, ME., was abolished on August 14, 1987. Henry's name was on Attachment "A: of ARB-466's Award". He filed a claim for separation on August 19, 1987, and was denied benefits Article V. Henry accepted employment with ST on August 17, 1987, and worked there 4 months, until December 19, 1987, at which time he retired from ST.

B. Carrier asserts that claimant was affected by a lease transaction. He was offered and accepted employment with the ST on August 16, 1987. Henry retired therefrom on December 18, 1987. He was re-offered a position pursuant to ICC order of November 4, 1990 and the Harris Implementing Agreement, which Henry declined.

Case No.11 (Carrier Case No.3) Claimant Charles Kemp

A. BMWE asserts that Kemp's job was abolished on June 19, 1987. He was offered and accepted employment with St on July 1, 1987. He filed separation claim on August 17, 1989. Kemp went off on a disability from ST on February 8, 1988.

B. Carrier asserts that the claim was untimely filed, that Claimant Kemp was a MEC employee affected by a lease transaction, that Kemp accepted and went to work for ST July 6, 1987 and worked until November 13, 1987, when he left with a disability. The Claimant's separation claim came therefrom. Kemp filed for separation allowance, August 17, 1989.

Case No.12 (Carrier Case No.4) Claimant George M. Poland

A. BMWE asserts that Claimant, in late February, properly requested MEC to have March 3, 1986 off as a "personal day", which was granted. Poland was thus off on a personal day on March 3, 1986. Therefor, he didn't appear on the original attachment list of employees placed before ARB-466. Poland filed an "application

for benefits" on December 23, 1986 and received subsistence benefits of some $6,700 to $9,000. The Claimant re-filed on May 25, 1992 changing from Option 2 to Option 3.

B. Carrier asserts Poland was not affected by a lease operation. He was in a furloughed status. Poland was offered ST employment on July 13, 1987 and re-offered ST employment on August 19, 1992, Poland refused both times.

Case No.13 (Carrier Case No.5) Claimant Lloyd G. Beal,Jr.

A. BMWE asserts that Beal, following his job abolishment on January 30, 1987, from PT, was unable to exercise his seniority, and therefor, furloughed. Beal requested subsistence benefits on February 28, 1987.

Claimant Beal accepted employment with ST and went off therefrom disabled on July 11, 1990.

B. Carrier asserts that Beal was affected by a lease transaction. He initially refused ST employment but accepted a second offer and commenced ST employment in April 1989. Beal worked continuously and left the ST service because of a disability. Beal has received, on July 11, 1990, $5,500 in subsistence benefits.

Case No.14 (Carrier Case No.6) Claimant Lugene W. Wallace

A. Union asserts that Claimant was employed by MEC on March 3, 1986, at Waterville, ME. His name was therefor included on Attachment A to Article V of the October 30, 1986 Award of ARB-466. He ruptured a back disc on March 13, 1987, while working for MEC and went off on a disability. The territory on which he worked was leased to ST in June 1987. Wallace was medically okay to return to service. He filed for a separation allowance on July 17, 1989.

B. Carrier asserts the Claimant was not affected by a lease transaction. He left active service on March 13, 1987, account of a disability. Wallace was not deprived of employment. He

untimely filed for a separation allowance on July 17, 1989.

Case No.15 (Carrier Case No.7) Claimant Henry Libby

A. BMWE asserts that Claimant Libby on March 3, 1986, was a PT Trackman. His job was abolished as a result of lease transaction. Libby requested a lump sum separation in July 14, 1989, which was never received.

Libby was offered and accept employment on the ST until August 17, 1990, when he became disabled.

B. Carrier asserts that Libby was affected by a lease transaction. While Libby refused the first ST offer of employment he accepted the second such offer and commenced working on ST in April 1989. Libby left active service because of a disability on August 17, 1990.

Case No.16 (Carrier Case No.8) Claimant Walter Maschino

A. The Union asserts that Maschino was affected by a lease transaction and his MEC position was abolished. He filed an application for Article V separation allowance on August 15, 1986. The Carrier argued that the application was not filed until July 17, 1989. The procedural objection was withdrawn on November 12, 1991, by Vice President Kozak.

Claimant accepted employment with ST and retired 4 months later therefrom, on December 17, 1987.

B. Carrier asserts that Claimant was an MEC employee affected by a lease transaction. He was offered and accepted ST employment on August 16, 1987. Maschino worked continuously thereafter until December 17, 1987, when he left active service for retirement. He was re-offered employment pursuant to the Harris implementing agreement in ICC Order of October 4, 1990. Maschino declined and remained retired.

The Board first must find that the ICC Decision and Order in Finance Docket No. 30965 (Sub-No.1) was made effective November 4, 1990. Such date placed the Implementing Agreement of Arbitrator Harris into effect. That fact means that under Harris the MEC/PT employees now can, after November 4, 1990, exercise their MEC/PT seniority rights, albiet somewhat modified, pursuant to Article V (c). They could not do so before that date.

It appears to the Board that the Carrier set up a quagmire of problems by the adoption of a leasing arrangement. Carrier defends against any problem primarily on the basis that the Claimants did not bid in on a ST job. Or if the Claimant did bid or accept ST employment then fault or the defense raised flows from the Claimant's ST employment relationship. In the circumstances prevailing is not the Carrier position akin to that of the young boy who killed his parents and then threw himself on the mercy of the court on the pleading that he was an orphan?

The ICC placed Guilford Industries on notice that Guilford needed an implementing agreement in place before moving any further on with the leasing arrangement. None was sought. The Harris Implementing Agreement was not approved until November 4, 1990. Thus, no MEC employee could exercise MEC seniority to work on ST before November 4, 1990. Hence, anything that occurred on ST before that date cannot be properly used as a basis to deny a proper application of the MEC - BWME's Article V.

Conversely, the defense raised by the Carrier concerning any ST employment offer, whether accepted or refused, which arose before November 3, 1990, involved a meaningless exercise of seniority that as such are found to be not valid or applicable. Therefor such defense is

improper and is denied.

The period of time between the first Guilford lease, or leases involved and November 3, 1990, simply has no relevance to the defense raised against entitlement of the 8 claimants under Article V. The Claimants were, so to speak, placed in a vacuum and were unable to exercise their MEC seniority rights.

The commonalty of facts in the above 8 cases of the claimant are:

1. All Claimants are MEC employees without MEC displacement rights.

2. All Claimants were currently "active employees" on March 3, 1986. -(Article V, (a) (b)). They therefor, in effect, vested the right to a $26,000 separation allowance.

3. All Claimants filed for separation allowances benefits but the dates on which they filed varied. However, their filing took place before November 4, 1990. Article V has no time limits. Carrier strongly asserted Messrs. Francoeur and Poland did not file before November 4, 1992.

4. Two of the 8 Claimants have been paid under Article V, subsistence benefits, i.e., Poland and Beal, Jr.

5. One of the 8 Claimants, Ernest Henry, retired from the ST on December 19, 1987 after only working there 4 months. Three of the 8 Claimants became "on the job disabled", two occurred on the ST, i.e., Lloyd Beal and Charles Kemp and one Lugene Wallace was MEC disabled but returned therefrom to the MEC. Both Beal and Kemp filed for their MEC Article V separation allowances irrespective of their so called disability. Wallace returned from his MEC disability in 1988 and could not displace on the MEC. He had been medically approved to return to service.

The circumstances that involve these questioned

Claimants occurred within the time period during which the Carrier improperly, perhaps illegally, had placed Beal and Kemp, as well as others, in the position that it now is attempting to use against them as a defense.

All Claimants could not properly exercise their MEC seniority to ST employment before November 4, 1990, because the Carrier did not have an authorized right to properly offer ST employment. Hence, whatever occurred on or with ST holds no relevance to these claims.

These circumstances cause the Board to therefor conclude that, as it appears, all 8 Claimants had qualified for an application of Article V, (a) and (b). Also that each Claimant had also been deprived of work in the normal exercise of seniority, prior to November 4, 1990, and as stated in Article V, paragraphs (c) and (d), each Claimant had filed claim for a separation allowance, requesting either Option 1 or 2. Therefor, in such circumstances each such claim must be sustained.

The interest of 9% will commence either as of the date appearing in the Statement of Claim or when the application was filed, whichever date is the later. The awarded difference of the 1% (that between 8% and 9%) claimed is being allowed because of Carrier's additional delay. The claims of Beal and Poland are, of course, subject to an offset i.e., to be less then the $26,000 because of having previously drawn monies in subsistence benefits. Carrier is therefor entitled to make such adjustment.

Award: The claims for $26,000 separation Allowance of the Claimants who appear in the Statement of Claims are sustained less any subsistence payments drawn.

Order: Carrier is directed to make this Award affective within thirty (30) days of date of issuance shown below.

K. R. Mason, Employee Member

R. E. Dinsmore, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued: April 21, 1993