SPECIAL BOARD OF ADJUSTMENT NO. 1018

(Established by Arbitration Agreement dated July 15, 1988
between CSX Transportation, Inc. and certain Labor Organizations)

CSX TRANSPORTATION, INC.

AND

UNITED TRANSPORTATION UNION
UNITED TRANSPORTATION UNION, YARDMASTERS DEPARTMENT
AMERICAN TRAIN DISPATCHERS ASSOCIATION
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TRANSPORTATION·COMMUNICATIONS INTERNATIONAL UNION
TRANSPORTATION·COMMUNICATIONS INTERNATIONAL UNION, CARMEN DIVISION
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
BROTHERHOOD OF RAILROAD SIGNALMEN

Hearing held at National Mediation Board, Washington, D.C.,
October 18, 1988

A P P E A R A N C E S

For the Carrier:

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For the Organizations:

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INTRODUCTION

This matter comes before the Board as the result of a Memorandum of Agreement dated July 15, 1988 between CSXT Transportation, Inc. ("Carrier") and 12 labor organizations representing Carrier employees ("Organizations") establishing a Special Board of Adjustment in accordance with Section 3 Second of the Railway Labor Act ("RLA"). The parties agreed that the Board would "hear and decide issues submitted by the Carrier and the Organizations arising from the sale by the Carrier of its line of railroad between Buffalo, New York and Eidenau, Pennsylvania".

The contentions of the Carrier and the Organizations as to the Carrier's right to dispose of the Buffalo-Eidenau Line without bargaining with the Organizations led to a decision by the United States District Court for the Western District of New York on May 26, 1988 (Decker v. CSX Transportation, Inc. 688 F. Supp. 98, (W.D.N.Y. 1988) ("Decker"). In Decker, the Court found at the outset that:

> The question presented is whether a railroad has a duty to refrain from completing a sale of one of its rail lines pending bargaining under the RLA over the effect of that sale on the employees of that line when the Interstate Commerce Commission [ICC] has granted expedited approval to the proposed sale without imposition of labor protective conditions.

After reviewing the question of whether the dispute was

"major" or "minor" as construed under the RLA, the court concluded:

> [A] plausible interpretation of the collective bargaining agreements in effect between CSXT and the defendant unions would provide a substantial contractual justification for the sale of the Buffalo-Eidenau line without additional bargaining. The dispute between CSXT and the unions is therefore minor, and subject to binding arbitration before the National Railroad Adjustment Board, pursuant to §3 of the RLA, 45 U.S.C. §153.

The Organizations appealed the District Court's ruling, on an expedited basis, to the U.S. Court of Appeals for the Second Circuit. The Organizations obtained from the Court of Appeals a temporary stay of the line sale. On July 18, 1988, the Court of Appeals lifted its stay, allowing the sale to be consummated on July 19, 1988. At that time, the purchaser, Buffalo & Pittsburgh Railroad, Inc., assumed operation of the line with its own employees. The appeal remains with the Court of Appeals for review.

Based on their disparate approaches to the dispute, the Carrier and the Organizations provided the Board with widely divergent views as to the statement of the issues to be resolved by the Board. The Carrier set forth the following as the questions at issue:

> 1. Have the Organizations sustained their burden of proof that the Carrier does not have the unilateral right, under its existing collective bargaining agreements and past practices, to dispose of its rail lines between Buffalo, New York and Eidenau, Pennsylvania?
>
> 2. Have the Organizations sustained their burden of proof that the abolishment of the line and yard

gangs on the Buffalo North, Buffalo South and Pittsburgh West Seniority Districts, as a result of the disposition of the rail lines between Eidenau and Buffalo, violates the current Schedule Agreement of the Brotherhood of Maintenance of Way Employees?

3. Have the Organizations sustained their burden of proof that the sale violated Rule 1(b) of the Schedule Agreement of the Transportation Communications Union (C&O)?

The Organizations presented the following issues:

1. Does this Board have jurisdiction to decide the issue presented by the Carrier?

2. Does the sale of the Buffalo to Eidenau line change the rates of pay, rules, or working conditions of those CSXT employees who work on or in connection with the Buffalo to Eidenau line as those employment terms are embodied in their Agreements?

3. If the answer to the Organizations' Question Number 2 is in the affirmative, which rule (or rules) in the collective bargaining agreements is (are) changed, and is there a rule (or rules) which authorize(s) the Carrier to, or prohibit(s) the Carrier from making each such change?

4. If the answer to Organizations' Question Number 2 is in the affirmative, and there is no rule or rules which authorize(s) the Carrier to take such action, what remedy should this Board impose?

5. Does the Carrier's action in removing clerical work and abolishing clerical positions on the Buffalo to Eidenau line violate Rule 1(b) of the C&O General Clerical Agreement?

6. Does the reduction in the number of line and yard gangs assigned to the Buffalo North, Buffalo South and Pittsburgh West Subdivisions violate Rules 11(b), 67 and 68 of the Agreement between the Baltimore and Ohio Railroad Company and the Brotherhood of Maintenance of Way Employes ("BMWE"), effective October 1, 1968 as supplemented by Addendum 10, effective September 1, 1975?

7. If the answer to either or both Organizations' Question Numbers 5 and 6 is in the affirmative, what remedy should this Board impose?

As further background, the Buffalo-Eidenau Line is a 369-mile segment of the Carrier's 21,000-mile railroad system. Affected by the sale were 230 employees represented by the Organizations. As will be discussed in more detail below, the sale was approved by the Interstate Commerce Commission without the imposition of protective benefits for the affected employees. Beginning on April 15, 1987, some of the Organizations served Notices on the Carrier under Section 6 of the RLA, calling on the Carrier to negotiate agreements as to the impact of the sale on, as stated by the Organizations, "the employees' existing collective bargaining rights". These Section 6 Notices were rejected by the Carrier, based on existing moratoria on such notices until April 1, 1988. The Organizations initiated new Section 6 Notices on April 1, 1988, which Notices remain in active status. As noted above, the sale became effective July 19, 1988, subsequent to Decker, the appeal to the Court of Appeals, and the Memorandum of Agreement establishing this Board.

As a preliminary procedural matter, the Board must first determine the appropriate statement of the issues for its resolution. The Board notes again that the genesis of its jurisdiction is found in the Court's findings in Decker. It follows that the Carrier has the burden to demonstrate its rights under existing collective bargaining agreements or asserted past practice to justify its unilateral action abolishing the positions involved in connection with the sale of the Buffalo-Eidenau line. Insofar as violation of specific contract terms involving agreements

between the Carrier and the Brotherhood of Maintenance of Way Employees and the Transportation·Communications Union, the Organizations are patently required to set forth their bases for such contentions. That the Board has jurisdiction to review and make findings in these questions is clearly found in Decker as well as in the parties' Memorandum of Agreement establishing the Board. The question of jurisdiction will be further reviewed in the discussion below.

As a result, the Board determines that the following questions fairly encompass the issues for resolution:

> 1. Did the Carrier have the unilateral right, under existing collective bargaining provisions or past practice,to abolish its positions in connection with the sale of the Buffalo-Eidenau Line without first negotiating with the Organizations as to the affected employees?
>
> 2. Did the Carrier's action affecting clerical positions on the Buffalo-Eidenau Line violate Rule 1(b) of the Chesapeake and Ohio General Clerical Agreement?
>
> 3. Did the Carrier's action in reference to line and yard gangs assigned to the Buffalo North, Buffalo South, and Pittsburgh West Subdivisions violate Rules 11(b), 67 and 68 of the Agreement between the Baltimore and Ohio Railroad Company and the Brotherhood of Maintenance of Way Employes effective October 1, 1986 as supplemented by Addendum 10, effective September 1, 1975?

(The former Chesapeake and Ohio Railway Company ("C&O") and the former Baltimore and Ohio Railroad Company ("B&O") are surviving components of the Carrier, which administers the collective bargaining agreements of the C&O and B&O.)

FINDINGS

As indicated earlier, the District Court in Decker found that the dispute between the parties was "minor" since "a plausible interpretation of the collective bargaining agreements in effect between CSXT and the defendant unions would provide a substantial contractual justification for the sale of the Buffalo-Eidenau Line without additional bargaining". The Court based its conclusion that the dispute was "minor" on findings that the RIF provisions "at least arguably" supported CSXT's contention that it had a unilateral right to sell, and that therefore this contention was not "frivolous" or "obviously insubstantial"; and further that the reliance by CSXT on past practice was also "arguable".

The Court stopped short of making any substantive findings as to the parties' rights. In its opinion the Court stated:

> [O]nce it has examined the RIF provisions in the existing agreements and the past practices of the parties in prior line sales to determine whether a reasonable interpretation of those provisions and practices would justify CSXT's action, this court's inquiry must end. "[I]t is not for it to weigh, and decide who has the better argument. If the court did this, it overstepped its bounds and usurped the arbitrator's function." Maine Central, 787 F. 2nd at 782.

The Court, in concluding that the dispute was "minor", in effect found that the issues were at least prima facie arbitrable and charged this Board with the responsibility to determine whether, after detailed analysis, the existing agreements or past practice entitled CSXT to take the action that it did.

The Court distinguished this case from RLEA v. Pittsburgh & Lake Erie, 845 F. 2nd 420 (3rd Cir. 1988) (holding the dispute to be "major", and requiring Carrier to bargain over effects of the decision to sell), pointing out that in that case there was no issue as to whether the agreement permitted or prohibited the sale; that past practice of selling without prior bargaining was not in issue; that there was no evidence in that case of any unemployment protections in the event of a sale; and that, unlike the instant case, 500 of the 750 employees would lose their jobs.

While it is arguable, as Carrier asserts, that the Court's remanding a "minor" dispute to the National Railroad Adjustment Board for binding arbitration precludes this Board from examining the Organizations' claim of nonarbitrability, it must be pointed out that these parties, in establishing this Board, agreed that it "will have authority to the same extent that the National Railroad Adjustment Board would have had authority to hear and decide cases submitted by the Carrier and the Organizations arising from the sale by the Carrier of its line of railroad between Buffalo, New York, and Eidenau, Pennsylvania". Section 3 First (i) of the Railway Labor Act empowers the NRAB to resolve disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions . . .". Thus, the determination of whether agreement language exists so as to vest this Board with jurisdiction to consider the dispute on the merits is clearly a power granted to this Board by the parties as permitted under the Railway Labor Act.

Conversely, this Board is empowered to find that the absence of any express contractual language or past practice suggesting an implied agreement precludes it from making any determination on the merits.

Under the circumstances, however, it is unnecessary in the resolution of this dispute to make any determinations with respect to jurisdiction or arbitrability. If the actions of the Carrier were impermissible under either the agreements or Carrier's asserted past practice, then the dispute should be found in favor of the Organizations -- not because the Carrier's contentions are not arbitrable, but because they lack merit.

Carrier's Contentions

The Carrier contends that, under its collective bargaining agreements with the Organizations, it had the unilateral right to dispose of its rail line and permanently abolish positions without first negotiating with the Organizations as to the effect on employees.

The Carrier argues that if it has the inherent managerial prerogative to sell its rail line (which the Organizations concede), it necessarily follows that it has the right to reduce its work force to reflect changes in its operations and in its business as it relates to such sale. Agreement support for this position, the Carrier asserts, is found in the Reduction In Force (RIF) or furlough provisions in the agreements with the various Organizations. An example of such provisions is found in the schedule agreement with the Firemen & Oilers reading:

> (a) When it becomes necessary to reduce expenses, the forces at any point or in any department or subdivision thereof shall be reduced, seniority to govern; and employees affected to take the rate of the job to which they are assigned.
>
> (b) (1) Five working days' advance notice will be given to employees affected before the abolishment of positions or reduction in force . . . .

The Carrier argues that as long as the notice requirements have been met, as they have in this dispute, job abolishments are permitted for any reason, including line sales, under these "broadly drawn" furlough provisions. The Carrier rejects any notion that there is a qualitative difference, under these furlough provisions, between a job that is temporarily abolished because of, for example, a temporary decline in business, and a job that is permanently abolished, as in the case of a line sale. As a practical matter, the Carrier asserts, "[b]ecause of the railroad industry's declining share of the transportation market, virtually every furlough is effectively permanent. Many CSXT employees have been on furlough status for years with no realistic chance of being recalled."

The Carrier further asserts that there is nothing in the collective bargaining agreements with the Organizations that in any way prohibits or restricts the sale of its assets; and there is nothing in these agreements that requires the Carrier to negotiate protective benefits for affected employees before doing so.

The Carrier next contends that the Organizations, over the past 60 years, have had opportunities to bargain limitations on its unilateral right to abolish positions and reduce forces;

and the only limitations sought by the Organizations were that advance notice be given and that furloughs be in reverse seniority order. Moreover, the Carrier points to the fact that some Organizations have bargained for and received labor protective provisions in addition to furlough and seniority provisions; and argues that the inclusion of these provisions was a recognition by the Organizations that "CSXT has the right to take actions such as line sales, which will trigger their applicability".

The Carrier further points to the fact that the Organizations, in their April 1, 1988 Secton 6 Notices, proposed new limitations on the Carrier's right to abolish positions and reduce forces as a result of line sales. The Carrier maintains that this is an admission that the existing RIF and furlough provisions permit unilateral job abolishments in line sales, subject only to the notice and reverse seniority requirements.

Finally, the Carrier argues that the Buffalo-Eidenau sale was consistent with its longstanding past practices of line sales and abandonments, with no claim by the Organizations that the RIF or furlough provisions did not apply to line sales, or that these sales resulted in a change in working conditions, or otherwise violated any rights contrary to their agreements.

The Carrier points to nine line sales on the former B&O spanning a ten-year period, and 102 abandonments on the former B&O since 1972. According to the Carrier, these sales and abandonments resulted in the abolishment or transfer of assignment, abolishment of positions, and furlough of employees through the same RIF,

furlough and other applicable provisions relied upon by the Carrier in the Buffalo-Eidenau sale; and employees affected by the sales received the furlough or labor protection benefits to which they were entitled under their agreements.

The Carrier specifically refers to a sale in 1986 of the Ashford to Rochester, New York segment of the former B&O to a new short line, the Rochester & Southern Railroad Company, as well as a sale of a line segment in January 1982 between Mt. Jewett and Knox, Pennsylvania to another new short line, the Knox & Kane Railroad. In both of these sales, the Carrier contends that the ICC did not impose labor protective requirements on the sales, positions were abolished and employees furloughed, and none of the Organizations objected that the sales violated their agreements, objected that CSXT did not have the right to sell the lines, or argued that the sales were a change in working conditions.

The Carrier maintains that in addition to supporting its construction and application of its agreements, the past practices themselves evidence its unilateral right to sell rail lines and abolish positions as a result of the sale. The Carrier rejects the Organizations' argument that they have not acquiesced in past line sales because they have petitioned the ICC for labor protective conditions. The Carrier points out that the Organizations have never been precluded from complaining that a line sale violated their agreements, even though the sale was approved by the ICC, including sales where the ICC did not impose any labor protective conditions.

Organizations' Contentions

With respect to this Board's jurisdiction, the Organizations contend that this Board has jurisdiction to examine the various collective bargaining agreements to determine if they were violated by the sale. However, the Organizations assert: 1) that this Board has no jurisdiction to determine if the parties, by past practice, had entered into an implied agreement regarding the line sale waiving the Organizations' statutory bargaining rights, such determination being reserved to the courts; 2) that this Board has no jurisdiction to determine whether Carrier has the unilateral right to dispose of its rail lines, because such resolution necessarily requires this Board to analyze and interpret not only contractual obligations but also statutory duties and obligations created by the Railway Labor Act; 3) that this Board's jurisdiction is limited to the interpretation of a written agreement permitting Carrier unilaterally to sell its rail line, and no such provisions exist; and 4) that even if this Board had jurisdiction to create an implied agreement by reason of past practice, such asserted past practice by Carrier did not constitute acquiescence or waiver by the Organizations with respect to their statutory rights in connection with the line sale.

The Organizations submit that the Carrier has conceded that there is no express provision in any of the agreements specifically permitting the Carrier to sell this line unilaterally prior to the conclusion of any bargaining over the impact of the sale on affected employees. The Organizations further assert that

Carrier's reliance on the RIF and furlough provisions is misplaced because they do not provide contractual permission to sell a rail line without negotiation and were not intended to do so. Moreover, the Organizations assert, the "effects of a line sale go far beyond the abolishment of positions . . . [because] not only are the positions on the transferred line abolished, but the work of those positions will never again be available to the affected employees because the Carrier no longer owns the line". As a result, employees' seniority rights are adversely affected, since they no longer have the ability to exercise seniority to obtain the work they had previously performed, even though that work is being performed for the purchasing Carrier at the same location.

As to Carrier's assertion that past practice created an implied agreement, the Organizations contend that there is no probative evidence that there was any consent, acquiescence or waiver by the Organizations that entitled Carrier to sell without first bargaining. With respect to the nine prior sales, the Organizations argue that in each of these sales, either the ICC had imposed labor protective conditions, or the Organizations had sought to obtain employee protections by challenging the ICC's action, or by seeking to negotiate such protections for affected employees. The Organizations emphasize that there was no finding by the District Court that they, by their past reactions to CSXT sales or abandonments, acquiesced to an implied-in-fact term to the various collective bargaining agreements permitting such sales without bargaining over the effects of the sale on employees; and that the Carrier did not request the District Court to make such finding, even though there was full opportunity to do so.

In this connection, the Organizations contend that both they and Carrier management assumed prior to 1982 that the ICC would provide the necessary arrangement to protect employees who were adversely affected; and that when the ICC, for the first time in the Knox & Kane sale, refused to impose conditions, the Organizations sought to obtain ICC imposed protections. The Organizations also point out that in the Rochester & Southern sale, the Organizations sought by both litigation and negotiation to obtain benefits for their members over and above those provided by the existing collective bargaining agreements. These facts, the Organizations submit, do not establish acquiescence so as to create an implied agreement. In any event, the Organizations argue that this Board does not have jurisdiction even to consider this question; that jurisdiction lies with the federal courts, which are the sole arbiters to determine whether an implied contract was created supporting a conclusion that the Organizations waived their statutory right under the Railway Labor Act to notice and to an opportunity to bargain over the impact of the sale on their members before the sale occurred.

With respect to Carrier's argument that prior awards support its contention that the Organizations' April 1, 1988 Section 6 Notices "are an admission that existing reduction-in-force and furlough provisions apply to line sales", the Organizations assert that this argument is misplaced. In their Reply Submission, the Organizations state:

> These awards might provide persuasive argument for the proposition that the applicable agreements

> do not prohibit line sales, and we have not challenged such a proposition in this case. Here, however, the Carrier must somehow demonstrate that the agreements also contain provisions which authorize it to consummate the line sale despite the service of a Section 6 Notice and the bargaining requirements of the Railway Labor Act; in other words, the Carrier must identify a provision which effects a waiver of the Organization's statutory right to bargain for protection of employees affected by the sale. Such was the claim made by CSXT before the U.S. District Court and it was that claim which resulted in the "minor" dispute ruling of that Court. (Underscoring in original)

Finally, the Organizations contend that with the exception of two instances, noted below, the sale neither violated any agreement nor was authorized by any agreement. What transpired, however, according to the Organizations, was that the sale "changed" the established seniority rights of CSXT employees, i.e., causing the work of these jobs to disappear. Under these circumstances, the Organizations maintain that this Board has no jurisdictional basis upon which to fashion a remedy or to make any judgment with respect to Carrier's actions; and any attempt on the Board's part to "rectify the changes in the working conditions occasioned by the sale . . . would be creating new contractual rights where none exist". The Organizations emphasize, however, that the absence of a contract violation with respect to the sale in no way detracts from its contention that the sale violated the Organizations' statutory rights to notice, to bargain, and to the preservation of the status quo, all granted under the provisions of the Railway Labor Act.

CONCLUSIONS

It must be emphasized at the outset that this Board's mandate

does not include any determination of the nature or extent of the Organizations' asserted statutory right, if any, to bargain; that determination is properly before the courts. The Board's inquiry is limited to a determination of whether the parties' written agreements or past practice (as alleged by the Carrier) entitled the Carrier, as it claims, unilaterally to abolish these positions in connection with the sale of one of its lines. As indicated more fully below, this Board unanimously finds that the Carrier was not empowered, either under the written agreements or alleged past practice, to do so.

It is undisputed by the Organizations that Carrier is not precluded, by agreement or otherwise, from selling its assets pursuant to ICC approval. However, the essential question, as far as this Board is concerned, is whether the abolishment of existing positions in connection with such sale was permissible, either by existing contract language or past practice clearly showing that the Organizations acquiesced to such abolishments and effectively waived their statutory right to negotiate the effects upon employees of such sale.

Resolution of this question, essentially, formed the basis of the Court's remand to binding arbitration after it determined that the Carrier's representations as to the existence of contract language and past practice were prima facie sufficient to allow a finding that this was a "minor" dispute. The Organizations' correctly point out that the Court did not, and could not, interpret the agreements or evaluate the validity of the Carrier's claim other than to determine whether it was frivolous.

1. The initial inquiry to be made is whether the RIF or furlough provisions, expressly or by implication, can be construed in such a way as to warrant a conclusion that the Organizations intended to waive their statutory right to bargain for protection of employees affected by a line sale.

It is clear that there is nothing in the terms of these provisions (and the Carrier has not shown that the bargaining history indicated otherwise) that would in any way allow a conclusion that the parties intended or contemplated that the RIF or furlough provisions would apply to a line sale, or, more importantly, that by these provisions, the Organizations intended to waive their statutory right to bargain for employee protection as a consequence of such sale.

That the Carrier did not so intend is evidenced by the following colloquy between John Clarke, attorney for the Organizations, and Brenton Massie, Assistant Vice President-Labor Relations for CSXT (in transcript of Decker hearing, III at p. 72):

> Q. [by Clarke] . . . Do you have anything in your collective bargaining agreements that give you the right to sell this line without bargaining with the unions over the impact of this sale, as you just acknowledged would occur, on the employees?
>
> A. [by Massie] No, sir.

Contrary to Carrier's contention that the RIF or furlough provisions are so "broadly drawn" as to permit job abolishments for any reason, including line sales, this Board finds that such contention is not dispositive. Even assuming, arguendo, that the

RIF or furlough provisions were intended to include line sales, there is simply nothing in these provisions to indicate that the agreement negotiators contemplated, anticipated or intended that this language would apply to line sales in such a manner as to bar the filing of Section 6 Notices, thus depriving the Organizations of statutory recourse to the Railway Labor Act.

Thus, it is clear that there is nothing in these agreements which prohibits the sale of the Carrier's assets; the Carrier is free to do so, and the Organizations do not disagree. It is equally clear, however, that there is nothing in these agreements that waives the right of the Organizations to invoke their statutory rights to bargain over the effects of such sale on the employees they represent.

2. Having determined that there is no written language support for the Carrier's position, the next area of inquiry is the validity of the Carrier's assertion that its past practice of selling or abandoning lines without objection by the Organizations attained contractual status; and that such prior acquiescence by the Organizations permitted Carrier to sell the Buffalo-Eidenau Line without negotiating the effects of such sale on affected employees despite a filed Section 6 Notice.

As a general consideration, past practice and custom constitute an important factor in labor-management relations, and evidence of past practice and custom may be introduced for a number of purposes, including the establishment of an implied agreement not set forth in a written agreement.

In such instances, it is generally held that, in order to be binding, such past practice must be unequivocal; tacitly or mutually agreed upon; clearly enunciated and acted upon; and long standing as a fixed and established practice accepted by both sides without objection or repudiation.

Applying the above criteria to the instant dispute, this Board finds that the Carrier's asserted past practice did not attain binding contractual status precluding the Organizations from recourse to statutory rights under the Railway Labor Act.

It must be kept in mind that the critical matter under consideration is the availability of protective benefits to affected employees in the event of a sale or abandonment. The record reveals that up until 1982, the ICC imposed protective conditions for employees affected by the Carrier's sales or abandonments; and the Organizations, prior to 1982, had no reason to negotiate, litigate or otherwise protest as a means of achieving such protection.

In 1982, the ICC approved the Carrier's sale of 79 miles of line to the Knox & Kane Railroad, and for the first time, imposed no protective conditions. One of the Organizations, whose employees were affected, requested the ICC (without success) to revoke the exemption and provide some form of protection. It also filed a grievance.

Also in 1982 the Carrier sold approximately 10 miles of its line to the Historic Red Clay Valley. The ICC imposed no protective conditions. There was no protest by the Organizations because, as agreed to by the parties, no jobs were abolished.

In July 1986, the Carrier sold approximately 117 miles

of its line to the Rochester & Southern Railway. The ICC imposed no protective conditions, and challenges were filed and attemps made to negotiate in connection with the sale regarding employee protection.

In March 1987, the Carrier sold approximately 53 miles of its line to the City of Jackson, Ohio. The ICC imposed no protective conditions, and challenges were filed or attempts were made to negotiate in connection with the sale regarding employee protection.

It is therefore clear, as the Organizations point out:

> In each of these sales [since 1982], either the ICC had imposed labor protective conditions or the Organizations had sought to obtain employee protections by challenging the ICC's actions or by seeking to negotiate such protections for affected employees.

It simply cannot be concluded, under the circumstances, that the Carrier's asserted past practice attained contractual status enabling the Carrier to sell the Buffalo-Eidenau Line without negotiating the effects of such a sale on affected employees. There is no basis for finding, in the record before this Board, that the Organizations relinquished their right to seek protection, by whatever means, for their affected members.

3. With respect to the Carrier's contention that the April 1, 1988 Section 6 Notice filed by the Organizations is an admission that existing RIF and furlough provisions apply to line sales, this Board finds such contention to be without merit. As indicated earlier, there is nothing in the written agreements that gives Carrier the right to consummate a line sale without first bargaining

under the Railway Labor Act. As the Organizations correctly point out, in order for such contention to have merit, "Carrier must identify a provision which effects a waiver of the Organizations' statutory right to bargain for protection for employees affected by the sale."

For the same reason, this Board is not persuaded by Carrier's arguments that the Organizations waived their right to bargain because, in the past, protective provisions had been negotiated between Carrier and two of the Organizations or because two other Organizations sought to do the same. Neither circumstance warrants a finding that, expressly or by implication, the Organizations waived their right to bargain for protection in the event of a line sale.

* * * * *

The Board has stated previously herein that the Carrier may sell a railroad line, but it has no support in Agreement or practice for the unilateral abolishment of positions as a result of such sale. These findings have an impact on all Organizations involved in this dispute. The Board, nevertheless, is compelled to address the claims made by two of the Organizations that specific rules in their Agreements bar the Carrier from abolishing jobs in connection with a line sale. These Organizations are the Brotherhood of Maintenance of Way Employes ("BMWE") and the Transportation Communications International Union ("TCU").

BMWE Rule 11(b)

The BMWE contends that the Carrier violated its Agreement,

specifically Rule 11(b) when it abolished twenty-four B&O-BMWE jobs.

Rule 11(b) reads as follows:

> There will be no reduction in the number of line gangs and yard gangs assigned on any subdivision except by mutual agreement between the parties. The Company's right to make minor changes in the territorial limits of line gangs or yard gangs is not abridged, but the Organization will be furnished an annual statement reflecting such changes. If, for any reason, the headquarters of a line gang or yard gang is moved from one location to another the employees assigned to such gang may exercise displacement rights within ten (10) calendar days after such change.

The BMWE contends that Rule 11(b) clearly states that there will be no reduction in the number of line gangs and yard gangs assigned on any subdivision, except by mutual agreement between the parties. It also argues that the issue of Carrier's unilateral abolishment of positions in yard and line gangs has been reviewed by Public Law Board 3561. In Award Nos. 28 and 29, that Board, according to the BMWE, unequivocably stated that Carrier could not, for any reason, eliminate yard and line gangs without agreement of the Organization.

The Carrier argues that, despite Award Nos. 28 and 29 of PLB 3561, the Organization has not carried its burden in this instance. Rule 11(b) only applies if Carrier controls the maintenance work on the line. In the instant case, the line has been sold, and the Carrier no longer is responsible for the work.

The Carrier also contends that neither it nor the BMWE has ever considered Rule 11(b) to apply to elimination of yard

or line gangs because of a line sale. It has never raised such an assertion in the past, when Carrier sold portions of its property and line and yard gangs were eliminated.

For reasons set forth below, this Board finds and concludes unanimously that CSXT, by its action in abolishing BMWE positions in connection with the Buffalo-Eidenau Line sale, did not violate Rule 11(b) of the B&O-BMWE Agreement.

An analysis of this rule reveals that it was placed in the Agreement to give the Organizations some protection against reduction in force and dislocation of employees resulting from Carrier's reducing the number of gangs or changing the headquarters points of gangs. The rule was bargained to grant employees protection against loss of work in an environment of consolidation and changing territorial boundaries on the Baltimore and Ohio Railroad, not as protection against a line sale by Carrier.

The Board finds nothing in the rule which could be construed to mean that the parties intended or even remotely contemplated that Rule 11(b) could be raised as a bar to a line sale. In order for the rule to be applied as the Organizations propose, there must be some indication that the parties intended that it would have applicability in the event of job abolishments resulting from a line sale. We find no such intent in this record. Just as this Board rejected Carrier's position on the impact of the RIF and furlough clauses, so too is it compelled to reject the BMWE position on Rule 11(b).

Award Nos. 28 and 29 of Public Law Board 3651 are not applicable. Those Awards dealt with the reduction in force in yard and line gangs, changing of headquarter points of gangs, and elimination of all employees in a gang, except a foreman. Those conditions are all covered under Rule 11(b) and Award Nos. 28 and 29 properly so indicated. None of those conditions is present in this instance.

TCU RULE 1(b)

The TCU contends that the Carrier does not have the right to remove work from under the scope of the C&O-TCU Agreement for any reason. It argues that Carrier can sell its property if it chooses, but it cannot abolish positions or remove work covered under the Agreement without the approval of the Organization.

The TCU relies on Rule 1(b) of the C&O-TCU Agreement to support its position. Rule 1(b) reads as follows:

> Positions or work within the scope of this Agreement belong to employees herein covered and nothing in this Agreement shall be construed to permit the removal of such positions or work from the application of these rules except as provided in Rule 66.
>
> Work covered by this scope rule which is incident to and directly attached to the primary duties of an employee not covered by this Agreement may be performed by such employe, provided the performance of such work does not involve the preponderance of the duties of such other employee. Nothing in this paragraph (b) will permit the abolishment of a clerical position and the transfer of the work of that position to an employe not covered by this Agreement.

The Carrier contends that Rule 1(b) does not apply once the property has been sold and the positions abolished.

As concluded in conjunction with the RIF Rules and with BMWE Rule 11(b), the Board also unanimously finds that the TCU-C&O Scope Rule does not apply in this case. There is nothing in the record to persuade the Board that the Scope Rule can be used to prohibit a line sale by Carrier.

The application of Rule 1(b) to the abolishment of jobs resulting from a sale has no more validity than does Rule 11(b) of the B&O-BMWE Agreement or the RIF rules of the other Agreements involved. Nothing in this record supports the position that the parties ever intended that the Scope Rule would be applied as the Organizations suggest.

In the past, the Organizations relied on legislated employee protection, ICC-imposed protection, and specific employee protection agreements entered into by the parties to safeguard employees from the impact of a line sale. There is no showing that the TCU Scope Rule was intended to replace or serve as a substitute for such protective arrangements. In their absence, the Scope Rule cannot be raised to take their place.

In final consideration of this issue, the Board notes that all affected TCU employees have taken separation allowances, accepted work with the new Employer, or transferred to CSXT positions at other locations.

AWARD

The questions set before the Board are disposed of as provided in the Findings and Conclusions herein.

RODNEY E. DENNIS	HERBERT L. MARX, JR.	NICHOLAS H. ZUMAS
Neutral Member	Neutral Member	Neutral Member

DATED: December 15, 1988