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20531

May 6, 2002



VIA MESSENGER
Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

RE: STB Finance Docket No. 33942 (Sub-No. 1)
USX Corporation–Control Exemption–Transtar, Inc.
Petition for Review of an Arbitration Award

Dear Mr. Williams:

Enclosed please find an original and ten copies of the Transportation•Communications International Union's ("TCU") Response to Tracks Traffic and Management Services, Inc.'s Petition for Review of an Arbitration Award in the above-captioned matter. Also enclosed, please find a 3.5 in floppy diskette containing an electronic copy of the TCU's Response.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Christopher Tully
Assistant General Counsel

Enclosures

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SURFACE TRANSPORTATION BOARD



Finance Docket No. 33942 (Sub-No. 1)

USX CORPORATION–CONTROL EXEMPTION–TRANSTAR, INC.

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION'S RESPONSE TO PETITION FOR REVIEW OF AN ARBITRATION AWARD

The Transportation•Communications International Union ("TCU") hereby submits its Response to the Petition for Review of an Arbitration Award filed by Tracks Traffic and Management Services, Inc. ("TTMS") on April 9, 2002. TTMS' Petition asks the Board to review and set aside the February 28, 2002 award *In the Matter of the New York Dock Arbitration between TTMS and TCU* (John C. Fletcher, Chairman and Neutral Member) ("Fletcher Award"). For the reasons set forth herein, the Board should deny TTMS' Petition.

I. INTRODUCTION

Claimants' positions were abolished and new positions were established as a result of a Board approved transaction in which *New York Dock* protective conditions were imposed. The new positions paid the same wage rates and had the same responsibilities as the old positions. The parties' implementing agreement required that the Carrier provide Test Period Averages (TPAs) upon the request of affected employees. Claimants filed for a displacement allowance when their monthly compensation fell below their TPAs. TTMS urged that Claimants could not be adversely affected when the wage rates of their new position were the same as that of their former positions.

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Chairman Fletcher rejected this argument, finding, consistent with long-standing arbitral precedent from WJPA forward, that *New York Dock* protected compensation, not wage rates.

II. STATEMENT OF THE CASE

This dispute arises from the control exemption proceeding (*USX Corp.-Control Exemption-Transtar, Inc.*) in Finance Docket No. 33942, which the Board approved in a decision dated November 22, 2000. As a condition for approval of this transaction, the Board imposed the labor protective conditions set out in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

One of the results of the Board-approved transaction was that the Bessemer & Lake Erie Railroad (B&LE) became wholly-owned by Transtar Holdings, while control of TTMS shifted from Transtar, Inc. (which was controlled by Transtar Holdings) to USX.

A. *The December 22, 2000 Implementing Agreement.*

In anticipation of the Board's approval of this transaction, W. G. Sjoberg, Director of Labor Relations for the B&LE, contacted Ted Stafford, President of TCU's Allied Services Division, in October of 2000 indicating B&LE's desire to coordinate certain clerical work, that B&LE performed for other railroads, into TTMS. Several conferences and telephone calls followed between October 18 and December 22, 2000, and the parties exchanged various proposals for implementing agreement language.

The Implementing Agreement was consummated on December 22, 2000. Most pertinent to the underlying dispute is Article VII of that Agreement, which reads:

Article VII - Filing Claims for Protective Benefits

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who, pursuant to this agreement:

1) follow their position/work to TTMS; 2) transfer to TTMS; (3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company, TPAs will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits a written request for same.

Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which the claim was made.

It is understood that the sixty-day limit for filing initial claims for displacement or dismissal allowances will commence on the date the carrier furnishes TPAs to affected employees.

In addition, Article V, Section 1 of the Implementing Agreement provided that

Employees affected by this transaction will be entitled to the employee protective conditions set forth in New York Dock, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of New York Dock.

B. *The Claims for* New York Dock *Benefits.*

Following the transfer of work from B&LE to TTMS, several employees filed claims for *New York Dock* benefits, claiming that their monthly earnings fell below their TPAs provided under Article VII. For example, Claimant Anthony Falvo (whose TPA amounted to $3,001.60) received the following amounts of total compensation in May and June of 2001: $2,829.59 in May, and $2,765.86 in June ($235.74 below his TPA). Thus, Falvo was seeking a displacement allowance for

the difference between his TPA and his actual compensation for those two months – May and June of 2001, wherein his monthly compensation fell below his TPA.

TTMS and B&LE rejected the claims on the grounds that the employees were not "displaced" within the meaning of Article I, Section 1(b) of *New York Dock*, and therefore not entitled to displacement allowances. Specifically, the carriers took the position that the Implementing Agreement had not "pre-certified" any employees as "adversely affected", and that fluctuations in compensation – whether attributable to overtime or to "short months" (i.e., February, April, June, September and November, which have fewer work days than the monthly average)[1] – were not sufficient to qualify an employee as "adversely affected," and thereby eligible for *New York Dock* allowances.

On behalf of the employees, TCU International Vice President Jim Quilty engaged in both discussions and correspondence with TTMS' and B&LE's Labor Relations Departments to resolve the dispute. In a letter dated August 28, 2001, Quilty maintained that Article VII had been negotiated in exchange for lessening the impact that would be caused by a "Sadie Hawkins" rundown process.[2] As part of this *quid pro quo*, Quilty noted that both B&LE employees who remained with B&LE as well as those who transferred to TTMS were entitled to their TPAs and to *New York Dock* benefits when their monthly compensation fell below their TPA. Specifically, Quilty asserted that

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[1] In the example of Anthony Falvo, cited above, for the "short month" of June 2001, it is unclear exactly how much of the difference in compensation is attributable to the short month and how much is attributable to the inclusion of overtime into the TPA. The difference in compensation for May of 2001, however, is clearly not attributable to the short month.

[2] A "Sadie Hawkins" rundown is a term of art meaning a rundown process in which all employees would have the opportunity to select their assignments by virtue of their seniority, i.e., the most attractive assignments would go to those with the most seniority regardless of the position occupied before the rundown.

> [t]he calculation and providing of a TPA to employees was in recognition that each was affected and entitled to their respective NYD protective benefit. As previously stated, a subsequent displacement allowance is made by comparison of the employee's TPA versus what he/she earned in that particular month. If an employee worked up to his/her TPA hours and earned the compensation guarantee, then they are not entitled to a displacement allowance in that month.

TCU Exhibit 2, at 3. On September 7, 2001, TTMS' Director for Labor Relations, William G. Sjoberg responded to the Quilty letter, stating that TTMS had agreed to provide the TPAs as a matter of administrative convenience to TCU-represented employees, and that providing TPAs did not amount to "pre-certification" of said employees. TTMS argued that there was an absence of proof that the Claimants were "adversely affected," and, therefore, they were not entitled to *New York Dock* displacement allowances. In TTMS's view, the fact that Claimants' monthly compensation was less than their TPAs was insufficient to establish adverse affect. *See* TCU Arb. Subm., Exh. 6.

Unable to resolve this dispute through negotiations, the parties agreed to submit the dispute to arbitration on January 15, 2002, before a §11 Committee of Arbitration with John C. Fletcher serving as Chairman and Neutral Member.

C. *The Positions Taken Before Chairman Fletcher in Arbitration.*

In its arbitration submission,[3] TCU argued that, in providing for the issuance of TPAs under Article VII, the parties recognized that the employees receiving them were "affected." The purpose of issuing TPAs was to determine whether, on a month-by-month basis, an employee was "placed in a worse position with respect to compensation," and thereby entitled to a displacement allowance.

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[3] A full and accurate copy of TCU's submission to the arbitrator has been attached to this Response as Exhibit 1.

In support of this argument, TCU introduced notes from the Implementing Agreement negotiations, taken by TCU International Vice President James Quilty and Sam Siriano, Assistant to the ASD President. These notes reflected that the Union's position during negotiations was that all employees would be "affected" by the transfer of work to TTMS, and that the granting of the TPAs were secured in return for key concessions – namely, providing preferential rights to incumbents of positions, rather than allowing for a purely seniority-based (i.e., "Sadie Hawkins") rundown. The Union also introduced other evidence as to the *quid pro quo* given for the granting of TPAs, notably the Union's willingness to negotiate the Implementing Agreement on an expedited basis, to enable the parties before the STB to meet the contingencies necessary to consummate the underlying transaction. Unless the TPAs granted under Article VII were to be effective in determining whether employees were "placed in a worse position with respect to compensation," TCU argued, Article VII would effectively be meaningless.

The Union introduced supporting arbitral authority from Arbitrators LaRocco and Sickles. TCU cited the LaRocco Award (*UP/MP v. TCU*, March 1, 1988) (TCU Exhibit 4) for the proposition that an employee may still be "displaced" even though the adverse effect to the employee may not appear until long after the transaction, and that the TPA serves as the benchmark for determining whether an employee is "placed in a worse position with respect to compensation." The Union cited the Sickles Award (*BNSF v. TCU*, May 1, 1999) (TCU Exhibit 5) for the proposition that, in determining whether an employee is in a "worse position," the relevant factor is the average monthly compensation (including overtime) paid the employee during the twelve months preceding displacement, not simply the employee's wage rate. Compensation may fluctuate, and when an employee's monthly compensation falls below his TPA, he is entitled to a displacement allowance.

Based upon the language of Article VII and its negotiating history, as well as the LaRocco and Sickles Awards, TCU argued that the claimants whose monthly compensation were less than their TPAs were entitled to displacement allowances.

In its submission, TTMS argued that employees must be both "affected" by the transaction and "entitled to a monthly displacement...allowance under Article I, Section 5...of *New York Dock*" to receive a displacement allowance under Article VII, which did not "automatically certif[y]" employees for benefits. TTMS did not contend that the Claimants were unaffected. Rather, it argued that employees needed to show "adverse effect" so as to be entitled to displacement allowances, and that the monthly fluctuations in compensation resulting from "short months" like February were insufficient to do so. Significantly, TTMS cited no arbitral or STB authority to support its argument on this point. TTMS contended that the negotiating history demonstrated that Article VII provided employees no substantive rights and that TCU entered the Implementing Agreement in order to secure (a) the granting of incumbency rights; (b) beneficial adjustments to the wage rate schedule; and (c) avoidance of a costly *New York Dock* § 4 interest arbitration. In determining the parties' intent, TTMS urged that TCU's negotiators' notes should not be considered.

D. *The Fletcher Award.*

Chairman Fletcher issued his award on February 28, 2002. After reviewing the factual background and the positions taken by the parties, he defined the issue as follows:

> Were Claimants "affected" by the Transtar reorganization under the December 22, 2000 Implementing Agreement, also "displaced" or "dismissed" within the intent and meaning of Article I, Sections 5 and 6 of *New York Dock* conditions, and if so, are they entitled to applicable monthly displacement allowances (when total

> compensation falls below test period average) *even though* they were awarded positions equivalent in rate of pay [sic] those they held prior to the transaction?

Fletcher Award, at 13-14 (emphasis in original). Fletcher began his analysis by stating that he was:

> convinced that it was the stated intent of the Organization's negotiators that any employee whose position was abolished as a result of the Transtar reorganization . . . was to be considered 'affected' by that transaction. Why would the Organization insist in the negotiations that all employees be given a TPA, which the Carrier agreed to do.

Id., at 14.

Fletcher then noted that the Carrier appeared to concede that the involved employees were affected. Indeed, it could not reasonably be argued to the contrary, as the positions of the employees in question were abolished, and they were assigned to new positions on TTMS as a result of the transaction. See *TCU and Norfolk Southern* (Roukis 1989) (TCU Exhibit 12, *infra*). Instead, the Carrier based its argument on the claim that they were not "adversely affected." According to the pertinent definitions, displaced employees are those placed in a worse position with respect to compensation and/or rules governing working conditions. The "*only* road leading to a definitive determination on that question" – whether an affected employee is placed in worse position with respect to compensation – "is in the calculation of test period averages." *Id.*

While the Carrier provided TPAs, as it was required to do under Article VII, it maintained that this exercise was essentially meaningless, because Claimants were awarded positions with similar if not identical rates of pay to those held prior to the transaction. According to the Carrier, subsequent changes in actual compensation relative to TPAs were irrelevant, even though displaced

employees are defined by Article I, Section 1(b) as those placed in a worse position with regard to compensation, not with respect to wage rates.

Fletcher rejected Carrier's claims, finding that they were contrary to the Implementing Agreement it negotiated:

> The Chairman is not persuaded that Carrier's contentions accurately reflect the result of the bargain it made with the Organization. As if it did accurately reflect its bargain with the Organization it would render a negotiated condition meaningless.

Fletcher Award, at 15 (emphasis in original).

Fletcher found that, under the December 22, 2000 Implementing Agreements, TPAs were given so that employees, who were affected by the transaction, could determine whether they were placed in a worse position with respect to compensation. Careful review of the Implementing Agreement language led Fletcher to conclude that the parties anticipated that at least some, if not all, transferring employees would be entitled to occasional displacement allowances, when their compensation fell below the TPAs. Otherwise, it would have been unnecessary to stipulate any means for affected employees to obtain their TPA.

The Chairman confirmed that the Sickles and LaRocco Awards (discussed more fully below) provided the correct basis for applying the TPAs to determine the amount of the displacement allowances. Noting that "compensation" (as opposed to "rate of pay") is the term used in *New York Dock*, he concluded that "*all* components [of compensation] are applicable when computing and applying TPA's." *Id.*, at 16 (emphasis in original). Fletcher rejected the Carrier's argument that this resulted in a "windfall" during short months, citing the Sickles Award for the proposition that its argument cut both ways, with employees who earn greater compensation than their TPAs due to

"overtime or other arbitraries" not entitled to displacement allowances merely because their rate of pay was lower. *Id.*

Based upon all of these findings, the Chairman sustained the Organization's claim.

III. THE BOARD SHOULD DENY TTMS' PETITION FOR REVIEW AS THE CARRIER'S OBJECTION TO THE FLETCHER AWARD DOES NOT MEET THE STANDARD FOR *LACE CURTAIN REVIEW*

A. *The* Lace Curtain *Standard of Review.*

The Board (and the ICC before it) has set a very limited scope for its review of *New York Dock* awards. In *Chicago & North Western Transp. Co.–Abandonment–Near Dubuque and Oelwein, IA*, 3 I.C.C.2d 729 (1987) ("*Lace Curtain*"), *aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988), the ICC held for the first time that it had the authority to review *New York Dock* arbitration awards, but held that

> . . . .we will limit our review of arbitrators' decisions to recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions . . .
> . . .
> We do not intend to review arbitrators' decisions on issues of causation, the calculation of benefits, or the resolution of other factual questions. Accordingly, we will not become a regular participant in the process as reviewer of arbitration decisions. In applying this standard in future cases, we will treat summarily those that do not meet this standard of review.

Lace Curtain, 3 I.C.C.2d at 736. The Board has held that a dispute over the interpretation of negotiated terms specific to a particular implementing agreement, rather than the *New York Dock* conditions themselves, does not constitute a "recurring or otherwise significant issue[ ]" under *New York Dock. See, Union Pacific–Control and Merger–Southern Pacific (Arbitration Review)*, STB

Fin. Docket No. 32760 (Sub-No. 37), 2000 STB LEXIS 464 (service date August 16, 2000) (TCU Exhibit 6), at *4-5 (where the issue in dispute was arbitrator's interpretation of the effective date of an implementing agreement, issue was not one of "general importance under *Lace Curtain*, "but rather an interpretation of a specific labor agreement, a matter which is well within the expertise of arbitrators" and entitled to *Lace Curtain* deference).

B. *TTMS' Petition for Review Should Be Denied As it Does Not Present a "Recurring or Otherwise Significant Issue of General Importance" Regarding the Interpretation of* New York Dock.

TTMS' petition does not meet the *Lace Curtain* standard for review of a *New York Dock* arbitration award. It does not raise a "recurring or otherwise significant issue[ ] of general importance regarding the interpretation of [the STB's] labor protective conditions." *Lace Curtain*, 3 I.C.C.2d at 736. The critical issue presented before the Fletcher arbitration panel was whether the inclusion of Article VII in the Implementing Agreement constituted an agreement that those TPAs would be used to determine whether employees were placed in a worse position with respect to compensation. This question was resolved based upon the Chairman's interpretation of Article VII and its negotiating history, rather than an interpretation of *New York Dock* itself.

For example, at page 15 of the Award, Fletcher noted:

> Carrier insists that the [negotiation of a term to grant TPAs in Article VII] was essentially meaningless (regardless of actual subsequent compensation relative to their TPAs) because Claimants were awarded positions similar if not identical in rate of pay to those they held prior to the transaction. ***The Chairman is not persuaded that Carrier's contention accurately reflect the result of the bargain it made with the Organization. As if it did accurately reflect its bargain with the Organization it would render a negotiated condition meaningless.***

Fletcher Award, at 15 (emphasis added). Further, the Chairman concluded that, under the Implementing Agreement,

> TPA's represented the only means by which Claimants whom the Chairman already determined were "affected" by the March 23, 2001 transaction, could also determine whether or not they were harmed (or "placed in a worse position with respect to compensation") by it. Careful review of the Implementing Agreement language persuades the Chairman to conclude that the parties indeed anticipated that at least some (if not all) of the transferring employees would be "displaced" under Article I, Section 5 of *New York Dock* and therefore entitled to displacement allowances. Otherwise, in the view of the Chairman, the authors of the applicable Implementing Agreement would have found it unnecessary to stipulate any means by which "affected" employees could obtain TPA's in the first place.

Id.

The key holding of the Award involves the parties' intent in negotiating a discrete term of this Implementing Agreement, rather than the general applicability of *New York Dock*. This finding is not a "recurring or significant issue[ ] of general importance." In this respect, TTMS' argument that the Fletcher Award

> [i]f extended to other carriers and transactions, [ ] would dramatically expand the reach of the *New York Dock* benefits scheme, subjecting carriers to claims for displacement allowances by individuals who have never been considered to be *New York Dock* "displaced employees[ ]"

TTMS Pet., at 12, is a red herring. The interpretation of the parties' intent in negotiating Article VII is *per se* applicable only to the two parties to that agreement, and could not be "extended to other carriers and transactions" unless those carriers in those transactions agreed to such an extension. Like the decision in *UP/SP*, this case cannot be deemed to turn upon an interpretation of *New York*

Dock, and is therefore entitled to the highest degree of deference from the Board. Moreover, as we demonstrate below, the Fletcher Award is consistent with well-established arbitral authority.

C. *Chairman Fletcher's Interpretation of the Implementing Agreement Is Completely Consistent With Prior Precedent.*

TTMS' position is that, because the positions worked by the Claimants after the movement of work on March 23, 2001 carried the same rate of pay as the positions they held before that date, the Claimants cannot show that they have been "placed in a worse position with respect to compensation" for *New York Dock* purposes. The overwhelming body of arbitral precedent – as acknowledged by this Board – has rejected that very premise.

In *Rio Grande Industries, et al.–Control–Southern Pacific Transp. Co. (Arbitration Review)*, STB Fin. Docket No. 32000 (Sub-No. 11), 1996 STB LEXIS 135 (April 15, 1996) (TCU Exhibit 7), this Board reviewed an award (*Southern Pacific Lines and TCU* (Fredenberger 1995)) (TCU Exhibit 8), in which the issue was whether earnings from a higher-paying, non-agreement position held by the Claimant during a portion of her test period, should be included in her TPA. The Claimant had returned to a lower-paid agreement position prior to being affected by the transaction in question. Among other arguments, the Carrier insisted that her non-agreement compensation must be excluded because (1) her loss of the non-agreement position was unrelated to the transaction and (2) the purpose of *New York Dock* was to "maintain an employee's compensation as if the transaction had not occurred." Fredenberger Award, at 6, 8. Arbitrator Fredenberger rejected these arguments, relying upon three arbitration awards cited by TCU[4] for the proposition the *New York Dock* requires

[4] These awards are included as exhibits to TCU's response: *TCU and Union Pacific* (Stallworth 1988) (TCU Exhibit 13); *IBEW v. CSX* (Fletcher 1990) (TCU Exhibit 14); and *CSX*

the calculation of TPAs using the employee's compensation over the previous twelve months, regardless of whether those earnings came from an agreement or non-agreement position. *Id.*, at 6, 8-9.

The Carrier filed a petition for review, and the STB affirmed the arbitrator's decision. First, the Board noted that the literal language of *New York Dock* requires all earnings to be included in the calculation of a TPA, not merely those earned at the employee's immediate pre-transaction rate of pay. Second, the Board noted the arbitral precedent cited by TCU – which included not only the Eischen, Fletcher and Stallworth Awards (discussed below), but also awards issued under the *Oklahoma* and *Burlington* labor protective conditions which preceded *New York Dock* – supported the arbitrator's award. In so finding, the Board effectively rejected the argument TTMS makes herein, concluding that

> [t]he use of a 12-month period to determine the prior compensation of such an employee is a reasonable attempt to paint a more accurate picture of such an employee's earnings than would be achieved by simply looking at his or her earnings in the position occupied at the time the employee was dismissed or displaced.

Rio Grande, 1996 STB LEXIS 135, at *17-18.

As we set forth below, *Rio Grande* and the arbitration awards cited therein are part of a long, unbroken line of authority interpreting *New York Dock* as well as WJPA and ICC-imposed protective conditions which preceded *New York Dock*. This line of authority stands squarely for the proposition that, where an employee's monthly post-transaction compensation (including overtime and other arbitraries) falls below the monthly average of his pre-transaction compensation, the employee is

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Transp., Inc. and TCU (Eischen 1992) (TCU Exhibit 15).

entitled to a displacement allowance even where the position he holds after the transaction has the same pay rate as the position he held before.

1. WJPA and the Bernstein Awards.

Both this Board and the federal courts have repeatedly held up the WJPA as the "blueprint" for rail labor protective conditions, including the *New York Dock* conditions. *See New York Dock Ry. Co. v. United States*, 609 F.2d 83, 95 (2d Cir. 1979); *CSX Corp.–Control–Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715, 739 (1990) ("*Carmen II*") (enactment of direct ancestor legislation to 49 U.S.C. §11326 "was, in effect, Congressional endorsement of the WJPA requiring that the protection afforded by that agreement be mandated for all railroads"). Indeed, all of the definitions and operative terms of *New York Dock* relevant to this matter derive from the WJPA, including the definition of a "displaced employee" and the procedure for calculating displacement allowances. For example, Section 6(a) of the WJPA provides that

> [n]o employee of any of the carriers involved in a particular coordination who is continued in service shall . . . be placed, as a result of such coordination, ***in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination***. . . .

(Emphasis added). Section 6(b) of WJPA states that

> [t]he protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what is hereby designated as a "displacement allowance" . . . ***Any employee entitled to such an allowance is hereinafter referred to as a "displaced employee."***

(Emphasis added). Article I, Section 1(b) of *New York Dock* defines a "displaced employee" in precisely the same manner:

> "Displaced employee" means an employee of the railroad who, as a result of the transaction is placed in a worse position with respect to his compensation and rules governing working conditions.[5]

Likewise, Section 6(c) of the WJPA and Article I, Section 5(b) both use the same formula to determine the amount of the employee's displacement allowance: taking the total compensation received by the employee and his total time paid for in the twelve months preceding his displacement, dividing those by twelve to produce an average monthly compensation and average monthly time paid for, and each month subtracting the amount of total compensation received for that month from the pre-displacement average.

Where *New York Dock* terms have been taken without substantive change from the WJPA, the ICC has ruled that WJPA arbitral awards "present persuasive precedent on which a *New York Dock* arbitration committee may rely."[6] *American Train Dispatchers Assn. v. CSX Transp. Inc. (Arbitration Review)*, 9 I.C.C.2d 1127, 1134 (1993). In that respect, the Board has recognized that

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[5] *See also* Article I, Section 5(a) of *New York Dock*:

> So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position ***producing compensation equal to or exceeding the compensation received in the position from which he was displaced***, he shall . . . be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

(Emphasis added).

[6] While *New York Dock* divided WJPA Section 6 into Article I, Sections 1(b) and 5, it is clear that this change was solely editorial in nature, and not intended to change the meaning of the language.

the seminal WJPA awards issued by Referee Merton Bernstein to be particularly instructive in interpreting *New York Dock. See, e.g., Carmen II*, at 733-35.

In *Brotherhood of Railway and Steamship Clerks v. Chesapeake & Ohio Ry. Co.*, WJPA Docket No. 62 (TCU Exhibit 9), Referee Bernstein dealt with a coordination in which no employees were deprived of employment, nor was any employee continued in service at a rate of pay lower than that received at the time of the coordination. The Claimant therein maintained that, despite receiving the same rate of pay after the coordination, he had received lower compensation in some months, and was therefore entitled to a displacement allowance. In response, like TTMS in this matter, the Carrier therein argued that so long as the Claimant held a full time position with a rate of pay equal or greater than that he held before the coordination, he cannot be eligible for the displacement allowance.

Referee Bernstein rejected the Carrier's argument, noting that the WJPA refers to differences in "compensation" for purposes of determining whether a displacement allowance is owed. He went on to note that

> This "compensation" is the product of this rate of pay, any arbitraries and the amount of time that he worked. It is commonplace of this industry that certain jobs normally involve overtime, e.g., for a sixth day's work when an unassigned employee is not available or usual or recurrent, or at least frequent, overtime on given days. Such overtime at premium pay is desired and considered a prerequisite of the position. ***It seems quite clear that in determining whether an employee is in no "worse position with respect to compensation" after a coordination, the formula is to reflect elements of compensation in addition to the "rate of pay".***
>
> The device employed is an "average" of the "last twelve months in which (the employee) performed service" preceding the adverse effect upon him – thereby reflecting the fluctuations in such compensation that normally occur in the course of a year, e.g.,

> seasonal variations. Obviously, the average will serve only to approximate an equivalence in compensation "before" and "after" coordination. Generally the device is for the protection of the employee. ***In the normal and usual case, applying the formula of Section 6(c) will show whether an employee is "in a worse position with respect to compensation***".

Referee Bernstein went on to note that

> [the WJPA] makes "compensation" the test of "worse(ned) position" and the test period formula provides the normal and usual yardstick of compensation . . . Once the eligibility is shown all the difference between a month's compensation after the coordination and the "test period" average is due the employee. ***By adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur.***

As the above demonstrates, Referee Bernstein clearly held that (1) "compensation" entailed more than simply the employee's rate of pay, (2) the TPA is the device utilized to determine whether the employee is in a "worse position with respect to compensation" and is entitled to a displacement allowance, and (3) the use of an average based on the preceding twelve months' compensation will not result in the calculation of a dismissal allowance that is exact in all cases.

In WJPA Docket No. 65 (TCU Exhibit 10), a dispute arising between the same two parties, Referee Bernstein reaffirmed the holding in his prior award, finding that

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

In addition to the aforementioned interpretations of the WJPA, the rationale of the Fletcher Award is also supported by a number of arbitral awards issued pursuant to *New York Dock* and other

labor protective conditions, including the *Oklahoma*, *Mendocino Coast*, and *Oregon Short Line* Conditions.

2. The LaRocco and Sickles Awards.

In its submission to Chairman Fletcher, TCU submitted two *New York Dock* Awards – issued by Arbitrators John LaRocco and Joseph Sickles – which were directly on point in favor of TCU's position.

In *TCU and Missouri Pacific/Union Pacific* (LaRocco 1988) (TCU Exh. 4) ("LaRocco Award"), the Claimant was bumped from his position as a result of the underlying transaction. The Claimant secured a position with the same job title, identical duties, same location, and equal rate of pay to his former job. The employee was informed by the Carrier of the amount of his protective guarantee under *New York Dock* and under another protective arrangement, so that he could elect which benefits to receive. The Claimant elected to receive *New York Dock* benefits, and began to receive a displacement allowance from the Carrier. The Carrier subsequently notified the Claimant that it had erroneously provided him with protective benefits, and that he was not a "displaced employee" because he was not adversely affected by the transaction.

Before the Arbitrator, the Organization argued that the term "adverse effect" was not used in *New York Dock*, and that the Claimant could show that he was placed in a worse position with respect to compensation even if he were making the same rate of pay, as his aggregate compensation was lower than his TPA. Indeed, the Organization argued, the Claimant's TPA was required to include overtime that he had worked during the test period. The fact that the Claimant's "worse

position" manifested itself well after the transaction occurred does not in itself rebut the notion that the worsening was a result of the transaction.

Conversely, the Carrier argued that the Claimant was not placed in a worse position regarding either his working conditions or his compensation. It argued, as TTMS does herein, that the Claimant was performing the same work in the same location for the same rate of pay, and was therefore not "adversely affected." To the extent that Claimant's monthly earnings fell below his TPA, the Carrier argued that Claimant received an unusual amount of overtime during his test period and cited Referee Bernstein's decision in WJPA Docket No. 137, wherein he found that an unusual increase in overtime earnings caused by the impending coordination are to be excluded from the test period average.

Arbitrator LaRocco upheld the Claimant's entitlement to benefits. He noted first that *New York Dock* sets a two-pronged test for "displaced employees" – the claimant must show that (1) he or she was affected (directly or indirectly) by the transaction, and (2) he or she was "placed in a worse condition with respect to either his compensation or rules governing his working conditions." LaRocco Award, at 9-10. Noting that *New York Dock* does not use the words "adversely affected," he concluded that an employee may be displaced even though the "adverse effect" may not materialize until long after the transaction's implementation. *Id.*, at 10.

He then noted that, if the ICC had wanted to limit test period average earnings to exclude overtime, it would have used a term like "straight time wages," "monthly rate of pay," "hourly rate of pay," or "normal earnings," rather than "monthly compensation" or "total compensation" as is used in *New York Dock*. Instead, the circumstances under which overtime was to be excluded were

extremely narrow: specifically, "the Carrier bears the heavy burden of proving that the overtime was extraordinary and linked directly to the impending implementation of the transaction." *Id.* at 11.

Having reached these conclusions as to the test for "displaced employees" and the inclusion of overtime into the employee's TPA, Arbitrator LaRocco found that the Claimant had been "placed in a worse position regarding compensation." This conclusion was based upon the fact that the Carrier had failed to prove that the overtime included in his TPA was incurred due to the impending implementation of the transaction and, therefore, the Claimant had "incur[red] a reduction in compensation even [though] he retains the same job title, same straight time rate of pay and general duties." *Id.*, at 14. Arbitrator LaRocco then addressed the proper use of TPAs:

> The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after . . ." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month-to-month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accordance with Section 5(a) of the *New York Dock* Conditions.

Id., at 15.

In *Burlington Northern Santa Fe Ry. Co. and TCU* (Sickles 1999) (TCU Exh. 5) ("Sickles Award"), the Carrier transferred a substantial amount of clerical work between Burlington Northern seniority districts in St. Paul and Fort Worth and Santa Fe seniority districts in Topeka. The 26 Claimants in the case were all placed in jobs after the transaction carrying identical wage grades to

those occupied before the transaction. Further, in the two seniority districts in which the Claimants worked, overtime actually increased following the transaction. Nonetheless, the Claimants filed *New York Dock* claims for at least some of the months following the transaction in which they concluded their compensation had fallen, and requested that TPAs be provided. The Carrier refused to compute the TPAs, asserting that the Claimants were not "adversely affected," citing the identical wage rates enjoyed by each of the Claimants and the overall increase in overtime within their seniority districts.

Arbitrator Sickles rejected the Carrier's arguments and upheld the claims. He started by rejecting the Carrier's argument that the Claimants' post-transaction rate of pay was dispositive, reiterating the position taken by Referee Bernstein and Arbitrator LaRocco that the term "compensation" in *New York Dock* contemplates a figure "broad enough to include shift differentials, allowances, overtime, and other elements of pay, in addition to the contractually provided hourly rate." Sickles Award, at 7-8. He proceeded to find that

> [w]ith overtime payments included in their pre- and post-transaction "average monthly compensation," and with the evidence from their pay stubs that their earnings declined in close proximity to the transactions, the claimants have established at least a rebuttable presumption that they are displaced employees entitled to *New York Dock* protective benefits.

Id., at 8. Consequently, he directed that the Carrier must provide the Claimants with TPAs, and followed the principle set forth by Referee Bernstein in WJPA Docket No. 62, that "applying the formula of Section 6(c) [which corresponds to Section 5 of *New York Dock*] will show whether an employee is in a worse position with respect to compensation." *Id.*, at 8-9.

In ordering the Carrier to give TPAs and to use them to determine the amount of displacement allowances, Arbitrator Sickles found that *New York Dock* requires the determination

of a "worse position" to be made month-to-month, which assumes that fluctuations in compensation will occasionally entitle an employee to *New York Dock* benefits. *Id.*, at 10.

3. Other Relevant *New York Dock* Awards

The Bernstein, LaRocco, and Sickles Awards are not isolated holdings. They are well-supported by arbitral precedent. For example, in *BMWE and CSX* (1991) (TCU Exhibit 11) ("Zumas Award"), Arbitrator Zumas rejected an argument made by CSX which was similar to the position taken by TTMS (i.e., that because the employee was working at the same rate of pay after the transaction, he could not be "displaced"). Relying on the Bernstein Award's test for determining whether the employee was placed in a "worsened position," Zumas concluded that because the Claimants' total compensation for the months in question fell below their TPA levels, they were entitled to a displacement allowance despite working on positions which carried the same pay rate as their pre-transaction positions. In making this determination, Arbitrator Zumas made it clear that "[i]t is the compensation ***filtered through the TPA*** that shows whether or not an employee has been placed in a worse position." Zumas Award, at 9 (emphasis added).

Likewise, in *TCU and Norfolk Southern Corp.* (1989) (TCU Exhibit 12) ("Roukis Award"), Arbitrator Roukis addressed the same situation presented before Chairman Fletcher, i.e., whether the Claimants in that case were "displaced employees" within the definition set forth in Article I, Section 1(b) of *New York Dock* when they held positions post-transaction that carried the same wage rate as their pre-transaction positions. Arbitrator Roukis (following the reasoning of the LaRocco Award) rejected the Carrier's argument that the determination of whether the employee was "displaced" should rely only upon a comparison of rates of pay, excluding overtime. Arbitrator Roukis held that,

because the Claimants' total compensation for the months in question was less than the total monthly compensation received by them in the twelve months previous to being affected, "in accordance with Article 1 Section 1(b) of the *New York Dock* Conditions, Claimants were definably displaced employees." Roukis Award, at 13.

In addition to the Roukis and Zumas Awards, numerous *New York Dock* arbitrators have held that all compensation within the twelve-month period preceding being affected by the transaction is to be included in the TPA, and that determination of whether the employee was displaced is to be made based upon the difference between actual monthly compensation and the TPA. *See TCU and Union Pacific* (Stallworth 1988) (TCU Exhibit 13) (cited favorably in *Rio Grande*, New *York Dock* requires all compensation – including that earned in non-agreement positions during twelve-month test period – to be included in TPA); *IBEW v. CSX* (Fletcher 1990) (TCU Exhibit 14) (TPA of employee who had served in non-agreement position for entire twelve month test period was to be based on his compensation in that non-agreement position); *CSX Transp., Inc. and TCU* (Eischen 1992) (TCU Exhibit 15) (same); *TCU and Boston & Maine Corp.* (Sickles 1998) (TCU Exhibit 16) (applying the same principles noted above to the Board's *Mendocino Coast* Conditions); *Soo Line R. Co. and BMWE* (Moore 1993) (TCU Exhibit 17), at 16 (applying these principles to *Oregon Short Line* Conditions).

In *BRAC v. Western Maryland Ry. Co.* (1964) (TCU Exhibit 18) (interpreting the ICC's *Oklahoma* conditions which provided identical displacement protection as *New York Dock* and WJPA), Arbitrator Francis Robertson was called upon to decide the question of whether an employee's TPA should include earnings made on a higher-paying position held by the employee within the twelve months preceding his being affected, even where that specific position was not

held by the employee at the time of displacement. Arbitrator Robertson found that such compensation must be included within the TPA, noting:

> To determine what amount of compensation would be protected it is clear that the Commission adapted [sic] a pragmatic and arbitrary formula. A formula which it must be presumed to have recognized would result in inequities at times against the employe and at times against the Carrier . . . We cannot believe that the Commission was blind to these factors. Its emphasis upon "compensation received" during the test period and "compensation produced" during the protective period indicates that its concern was with the actual earnings attributable to the affected individual's employment status rather than the earnings accrued on a given assignment.

BRAC v. Western Maryland, at 5. In its *Rio Grande* decision, *supra*, the Board found that this analysis in the Robertson Award was a proper construction of Article I, Section 5(a) and consistent with a longstanding line of arbitral precedent. *Rio Grande*, at *17-18

The test for a "displaced employee" is whether he or she is (1) "affected" by the transaction and (2) "placed in a worse position with respect to compensation." *New York Dock* uses the TPA as the measure of an employee's monthly compensation (from all positions worked in the preceding twelve months and including overtime) before being affected by the transaction and it is well accepted that when an employee's monthly compensation after being affected falls below the TPA, the employee is "placed in a worse position," regardless of the rate of pay. Further, it is equally well-accepted that this determination must be made on a month-by-month basis, and may manifest itself long after the transaction itself occurs. The Fletcher Award follows these well-accepted principles.

IV. THE BOARD'S RESTRICTIVE STANDARD FOR OVERTURNING AN ARBITRATION AWARD WOULD REQUIRE AFFIRMANCE OF THE FLETCHER AWARD.

Even if the Board were to conclude that the Petition presented a recurring or significant issue relating to the interpretation of *New York Dock* so as to warrant review, the Fletcher Award should be affirmed under the standards for review set our by the Board. The Board will only set aside arbitration awards where it has concluded that

> the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions.

Delaware & Hudson Ry. Co.–Lease and Trackage Rights Exemption–Springfield Terminal Ry. Co., ICC Fin. Docket No. 30965 (Sub-No. 1), 1990 ICC LEXIS 312 (Sept. 24, 1990) (TCU Exhibit 19), at *43, *remanded on other grounds, Railway Labor Executives' Assn. v. United States*, 987 F.2d 806 (D.C. Cir. 1993); *see also CSX Corp.–Control–Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715, 752 n.31 (1990) (*"Carmen II"*).

The Board has equated "irrational" with "egregious error," which it has defined as "'wholly baseless and completely without reason,' or 'actually and indisputably with foundation in reason and fact.'" *Brotherhood of Maintenance of Way Employees v. Union Pacific R. Co.*, ICC Fin. Docket No. 30964 (Sub-No. 1), 1991 ICC LEXIS 71 (March 21, 1991) (TCU Exhibit 20), at *5 (*quoting Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982). As demonstrated above, Chairman Fletcher's Award is based upon carefully considered factual findings regarding specific language in Article VII, in light of negotiating history. Fletcher's conclusions are consistent with the well established methodology for calculating displacement allowances first set forth under WJPA and used in each subsequent labor protective conditions, including *New York Dock*.

Accordingly, even if the Board were to conclude that this case should be reviewed under *Lace Curtain*, TTMS cannot meet the standards the Board has set to overturn this award.

Consequently, if the Board were to review the Fletcher Award, its standard of review requires that the Award be affirmed.

V. TTMS' ARGUMENTS IN SUPPORT OF ITS PETITION LACK MERIT.

In its petition, TTMS raises several arguments urging this Board to review and reverse Chairman Fletcher's award. TCU will address each of these arguments in turn.

First, TTMS' core argument – that an employee is not "placed in a worse position" when he's placed in a position performing the same duties in the same location at the same rate of pay, even where the employee's actual monthly compensation may fall below his pre-transaction monthly average – is clearly wrong, as demonstrated by the Bernstein, LaRocco, Sickles, Zumas, Roukis and Robertson Awards cited above. The *New York Dock* Conditions use "compensation"– not wage rate – as the determinant for whether the employee is placed in a "worse position." Further, *New York Dock* sets a formula for calculating displacement allowances on a monthly basis. That formula, which is based on WJPA, calls for comparing the employee's actual monthly compensation with his monthly TPA. As confirmed in the above-cited awards, when an employee, who is affected by transaction, monthly compensation is less than his TPA, the difference constitutes his monthly displacement allowance. TTMS' citation of *ATDA v. Norfolk Southern*, 9 I.C.C.2d 1127 (1993) is inapposite. In that case, the issue was whether ***transaction-related overtime*** (i.e., pre-transaction overtime which is specifically generated by the carrier's preparations to effect the transaction) was includable within the TPA. The ICC held that it was not, finding that to do so would artificially inflate the TPA and allow the employee compensation for "lost" overtime wages that, but for the transaction, wouldn't have existed in the first place.

Second, TTMS' contentions that its claims raise an issue of first impression and that "most of the industry" shares its interpretation are simply wrong. As noted above, the proper use of TPAs has been dealt with repeatedly in arbitration (with endorsement by the Board) and has been long settled. As we discuss above, the overwhelming body of arbitral precedent establish that "affected" employees are "placed in a worse position" when their monthly earnings fall below the pre-transaction "average monthly compensation" as expressed in the TPA.

Third, TTMS' argument that the TPA cannot be the basis for determining whether an employee has been "placed in a worse position with respect to compensation" frankly makes little sense. The TPA is designed as a reasonable approximation of the monthly wages earned by the employee prior to being affected by the transaction and has been universally relied upon to calculate the amount of displacement allowance, if any, to which the employee is entitled.

Fourth, TTMS seems to confuse the showing an employee must make to get a TPA with the proper use of a TPA once received. Prior to receipt of a TPA, no "benchmark" (Bernstein, WJPA Award No. 62) exists to determine whether the employee is placed in a worse position with respect to compensation. However, once a TPA is received, it constitutes the benchmark to determine whether employees have been placed in a worse position with respect to compensation.

TTMS points out that this Board previously rejected claims that carriers be required to give TPAs on demand, finding they were of little or no use to an employee exercising seniority to a new job. In reaching this conclusion, the Board noted that employees receive paycheck stubs twice monthly, which include year to date earnings. Thus, employees already had the relevant information concerning their prior compensation. However, the decision made clear that it was total compensation, not just rates of pay, that was relevant to the calculation of displacement allowances.

Wisconsin Central - Purchase Exemption - Soo Line Between Superior and Ladysmith, WI, Finance Docket No. 31922 (Sub-No. 1), 1995 ICC LEXIS 77 (April 3, 1995) (TCU Exhibit 21), at *16.[7]

TTMS correctly notes that Rail Labor attempted to have this decision effectively reversed in the Major Rail Consolidation Procedures proceeding. Rail Labor argued that TPAs should be available upon request so as to avoid placing the employee in a "Catch-22" situation:

> The railroads place the employees in a "Catch-22" situation–they can not obtain benefits without showing adverse effect as a result of the transaction by loss of earnings, but they can not obtain the data necessary to show loss of earnings until they are found to be adversely affected as a result of the transaction.

See TTMS Petition, Exh. 9, at 28.

In rejecting Rail Labor's proposal, the Board stated "we believe that issue should be resolved through negotiation and the collective bargaining process." *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1) (service date June 11, 2001), at 34 n.34. TCU and TTMS took precisely the route suggested by the Board in negotiation Article VII.

Of course, in the instant matter TPAs were provided on request as required by the Implementing Agreement, so that employees were not placed in this Catch 22. They were able to establish that their monthly compensation were lower than their TPA and, therefore, they were entitled to a displacement allowance.

Fifth, TTMS argues that, in the Major Rail Consolidation proceedings, Rail Labor conceded the requirement to provide a TPA does not constitute "automatic certification" or "precertification." While accurate, this point is irrelevant. These terms, while not contained within *New York Dock*,

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[7] In footnote 8 of its petition, TTMS relies upon the arbitration award (*BMWE and Soo Line R.* (Peterson 1992)) which gave rise to, and addressed the same issues as, this decision. For the same reasons expressed here, that award's distinguishable from both this case and the Sickles Award.

have come to mean that the parties can in an implementing agreement provide that employees are certified as adversely affected without being required to identify or establish a causal connection to the transaction. In the instant matter, Fletcher found the Claimants were affected by the transaction and that TTMS did not contend otherwise. Neither the Carrier submission to the arbitration board, nor its petition for review, argues that Claimants were not affected by the transaction. TPAs are traditionally used to determine whether affected employees are placed in a worse condition regarding compensation, and that is precisely how Fletcher found the parties intended TPAs to be used in the instant matter.

Sixth, TTMS argues that the Fletcher Award results in a windfall for Claimants. As Referee Bernstein noted in WJPA Docket No. 62, "by adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur." Arbitrator Robertson, in a decision cited with approval by the ICC, characterized the formula used to calculate displacement allowances as "pragmatic and arbitrary." This formula would occasionally "result in inequities at times against the employee and at times against the carrier." As Chairman Fletcher noted, "the knife does cut both ways." Specifically, while the monthly guarantee for an employee may be slightly more than he would have earned working the fewer hours that occur in a short month, that same guarantee will naturally be less than the amount of compensation he would earn working more hours in a longer month, yet the employee is only protected up to the amount of the guarantee.

For example, an employee who, as a result of a transaction, is placed in a position carrying a lower rate of pay can still be precluded from collecting a displacement allowance if, on his new position, he works a sufficient amount of overtime within his test period hours (i.e., the amount of available work hours – including overtime – that the employee can work up to the "average monthly

time paid for" in his TPA) to bring him above the monetary amount of his pre-transaction average monthly compensation. Under these circumstances, the employee would not be entitled to a displacement allowance, regardless of differential in his rate of pay.[8] *See* WJPA Docket No. 65 (defining how overtime is figured into calculating displacement allowances). Similarly, as noted above, by using the average for the twelve months prior to being affected, the same employee who received an advantage in a "short" month would be disadvantaged in a "long month." While Claimants herein may have been advantaged in the short months of April and June, they were disadvantaged in the long months of May and July.

Finally, with respect to TTMS' efforts to discredit the Sickles Award in footnote 8 of its Petition, each of the awards cited by Petitioner is readily distinguishable from both the Sickles Award and this case. In the Marx (TTMS Exh. 6) and Scheinman (see TTMS Exh. 3) Awards – unlike in the Sickles Award or in this case – the arbitrators determined that, based upon the facts before them, the employees had failed to demonstrate that they were affected by the transaction or that any adverse effect was traceable to the underlying transaction.[9] In *Conrail and IAM* (Peterson

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[8] For example, if prior to a transaction, an employee worked a position that paid $100/day, and his position had little or no overtime, meaning that he worked an average of 21.5 days/172 hours per month. His TPA would presumably be $2,150.00 per month for 21.5 days/172 hours worked. After the transaction, his position is abolished and he bids into a position paying $95/day, but which requires employees to work substantial overtime. In his first 21.5 days/172 hours of work on the new position, he works 3 days/24 hours of overtime, and he would therefore earn $1,757.50 in straight time earnings (18.5 days x $95/day) and $427.50 (3 days x $142.5/day) in overtime earnings, for a total of $2,185.00 – an amount greater than his $2,150.00 TPA – and would be ineligible to receive a displacement allowance for that month.

[9] For example, in the Marx Award, none of the Claimants had been bumped from their positions or had their positions abolished. Instead, the sole basis for a loss in earnings stemmed from the removal of certain territory from the jurisdiction covered by the gangs to which the Claimants were assigned. The Carrier, however, demonstrated to the arbitrator, that overtime in the maintenance of way craft fluctuated wildly before the transaction and that, in light of these facts, the

1995) (TTMS Exh. 5), although the employer agreed to give employees a TPA, it was done pursuant to the express stipulation that doing so did not, in itself, establish that the employees were adversely affected. *See* TTMS Exh. 5, at 3. Further, the Carrier in that arbitration demonstrated that the claimants' actual compensation during the relevant period were, in fact, higher than their pre-transaction compensation.

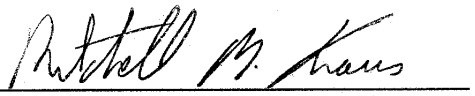
VI. CONCLUSION

We have established that the Fletcher Award is based on his conclusions regarding the meaning of Article VII of the parties' Implementing Agreement in light of the parties' intent as revealed in the negotiating history. Further, his conclusions are consistent with a long line of arbitration decisions from WJPA going forward, as well as decisions by this Board. Accordingly, the Petition for Review should be denied.

Claimants "offer[ed] no convincing proof that overall earnings were affected by loss of the Akron Branch." Marx Award, at 5.

Likewise, in the Scheinman Award, the critical finding of the arbitrator is distinguishable from this case. In Scheinman, the arbitrator concluded that "[t]here is no evidence to suggest that Claimants Jackson and Allen failed to obtain a position with ***compensation*** equal to the position from which they were displaced[,]" Scheinman Award, at 4-5 (emphasis added), acknowledging that "compensation" rather than "rate of pay" is the touchstone for determining if an employee is displaced. In this case, Fletcher found that the evidence to determine whether employees were placed in a worse position regarding compensation was to be found in a comparison of the TPA to the employee's monthly compensation, and that the parties had agreed to grant TPAs for precisely that purpose. Fletcher Award, at 14-15.

Respectfully submitted,



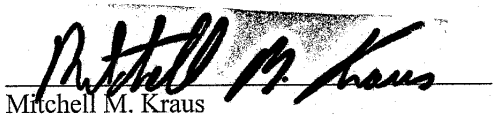
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Dated: May 6, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Transportation•Communications International Union's Response to Petition for Review of an Arbitration Award was sent via UPS overnight mail to Jeffrey S. Berlin, Sidley & Austin, Brown & Wood, LLP, 1501 K Street, NW, Washington, DC 20005.



Mitchell M. Kraus

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION
RESPONSE TO TTMS PETITION FOR ARBITRATION REVIEW
EXHIBIT LIST

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3. September 7, 2001 response from TTMS Director of Labor Relations William G. Sjoberg to Quilty's 8/28/01 letter

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6. *Union Pacific–Control and Merger–Southern Pacific (Arbitration Review)*, STB Finance Docket No. 32760 (Sub-No. 37), 2000 STB LEXIS 464 (service date August 16, 2000)

7. *Rio Grande Industries, et al.–Control–Southern Pacific Transp. Co. (Arbitration Review)*, STB Finance Docket No. 32000 (Sub-No. 11), 1996 STB LEXIS 135 (April 15, 1996)

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SUBMISSION OF DISPUTE PURSUANT TO
ARTICLE I, SECTION 11 OF NEW YORK DOCK
JOHN C. FLETCHER, CHAIRMAN AND NEUTRAL MEMBER
January 15, 2002 – Chicago, Illinois

TRANSPORTATION •COMMUNICATIONS INTERNATIONAL UNION (TCU) V. TRACKS, TRAFFIC MANAGEMENT SERVICES, INC. (TTMS) BESSEMER AND LAKE ERIE RAILROAD CO.	**PARTIES TO DISPUTE**

EMPLOYEES' EX PARTE SUBMISSION

Organization's "*Questions at Issue*":

1) Did Article VII of the parties' December 22, 2000 Implementing Agreement recognized affected employees by providing them with a test period average (TPA) and an entitlement to New York Dock protective benefits when they: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE; and,

2) Did Article VII also recognized BLE employees dismissed by the transaction and unable to follow or remain with their position/work on either company as affected and provide them with NYD protection in accordance with Article I, Section 5 of New York Dock?

3) If the answer to either Question No. 1 or No. 2 is in the affirmative, will the carriers now be required to accept the election of benefits by all employees desiring same and make each whole for all benefits from the date they were initially affected under either Section 5 or 6 of New York Dock, if submitting claims for these such within sixty (60) days following the date of this § 11 Committee's decision?

INTRODUCTION:

THE ACQUISITION

On October 5, 2000, Transtar Holdings, L.P., Transtar, Inc. and USX Corporation petitioned the Surface Transportation Board (STB) for exemption from the prior approval requirements of 49 U.S.C. §§ 11323 - 11325 of a transaction involving the acquisition by USX of control of Transtar and 5 rail carriers currently owned 100% by Transtar (TCU Exhibit 1). The 5 involved rail carriers included: Birmingham Southern Railroad Company (BSRC); Elgin, Joliet and Eastern Railway Company (EJE); the Lake Terminal Railroad Company (LT); McKeesport Connecting Railroad (McKeesport); and the Union Railroad Company (URR). USX also acquired control of 4 other entities: 1) Warrior & Gulf Navigation Company; 2) Mobile River Terminal Company; 3) Fairfield Southern Company; and, 4) Tracks, Traffic and Management Services, Inc. (TTMS), a non-carrier subsidiary of Transtar.

As a result of the transaction, Transtar Holdings ceased control of Transtar and the USX Carriers and became the direct parent, through ownership of 100% of the stock, of the following 3 rail carriers: Bessemer and Lake Erie Railroad Company (BLE); Duluth, Missabe and Iron Range Company (DMIR); and, Pittsburgh & Conneaut Dock Company (P&C). Holdings also became the direct parent, through 100% stock ownership, of 5 other entities: 1) USS Great Lakes Fleet; 2) GLF Credit Corp.; 3) GLF Great Lakes Corp; and two subsidiaries of P&C Dock; 4) Cuyahoga Dock Inc.; and, 5) Mon Valley Railway .Company.

THE IMPACT ON TCU EMPLOYEES

Outlined by Transtar and USX in the acquisition filings before the STB was the fact that:

> *In connection with implementation of the transaction, Petitioners intend to reorganize certain administrative and support functions, as provided in Article VII of the Reorganization and Exchange Agreement; these change will have no effect on transportation services. It is anticipated that ongoing efforts by management to improve the utilization of personnel, operations and facilities of the carriers involved, both separately and in combination, will be continued, including new initiatives in that regard when deemed appropriate by management.*
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> * * *
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> *The transaction will require only limited rearrangement of employees. Certain B&LE employees, who currently perform consolidated functions for the Transtar subsidiaries, will become employees of TTMS, and will continue to perform the same consolidate support functions, including payroll, claims, operating systems, engineering, benefits, and information systems, for both the USX Carriers and the Holdings Carriers. This arrangement will enable the parties to continue receiving the benefits of the consolidated support functions, with the Holdings Carriers purchasing services under the terms of a Services Agreement. The transfer of B&LE employees to TTMS will include approximately 100 employees represented by the Transportation Communications International Union ("TCIU"). Subject to the terms of an implementing agreement with TCIU, TTMS will assume the terms of the existing B&LE/TCIU labor agreement.*

LABOR PROTECTION IMPOSED

In their STB acquisition filings, Transtar and USX stated:

> *Pursuant to 49 U.S.C. §§ 11326(a) and 10502(g), the Board must impose employee protective conditions, for the benefit of the applicants' railroad employees, in approving or exempting a transaction subject to 49 U.S.C. §§ 11324 and 11325. Petitioners anticipate that the Board will impose its standard employee protective conditions, as set forth in New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), on its exemption of the proposed transaction.*

On November 22, 2000, the STB exempted from the prior approval requirements

of 49 U.S.C. 11323-25 the petitioners' request for acquisition/control in Finance Docket No. 33942 (TCU Exhibit 2). The STB accepted the petitioners' indication that the New York Dock protective conditions were appropriate and imposed such conditions upon the transaction and subsequent actions made pursuant to such authority.

STATEMENT OF FACTS:

In anticipation of STB approval of the petitioners' acquisition and control, Mr. William G. Sjoberg, Director- Labor Relations, Bessemer & Lake Erie Railroad, telephoned Mr. Ted Stafford, President ASD/TCU, in October 2000, indicating that the Carriers desired to create a new company called TTMS to perform railroad accounting work now performed by B&LE. It was agreed that the parties would meet the week of October 18th in Monroeville, Pa, to discuss the matter (TCU Exhibit 3).

Although not required to negotiate any NYD § 4 Implementing Agreement (IA) prior to such time as the STB made its determination in FD 33042 (Nov. 22nd) – the Organization agreed to meet to discuss the matter. Subsequent conferences were held on October 18, November 15, 16, 17(as well as numerous telephone conversations on November 20, 28, 30; and, December 22) which provided the parties with ample opportunities to submit proposals for specific language later to be incorporated in the IA. Throughout the § 4 process, the Carriers were harmonious in their desire to reach a timely and prompt IA.

The IA was consummated by the parties on December 22, 2000 (TCU Exhibit 4). Pertinent to this dispute are the provisions found in Article VII of the parties' IA dealing with the Carriers providing of test period averages (TPAs) and protective entitlements to

employees affected by the acquisition/control transaction. Article VII states:

> *BLE will, on written request, furnish a test period average (TPA) to all BLE employees who pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPA's will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits written request for same.*
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> *Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.*
>
> *It is understood that the sixty-day time limit for filing initial claims for displacement or dismissal allowances will commence on the date the carrier furnishes TPA's to affected employees.*

As outlined in the following on-property correspondence, the dispute that arose involved the specific language of Article VII of the IA. It is the Organization's position that inclusion of Article VII during the § 4 process implicitly recognized the fact that all B&LE employees were affected by the transaction and were being provided with their respective elective entitlements to NYD. Contrary to our understanding, it is the Carriers' position that inclusion of Article VII did not recognize that any employee was affected by the transaction and that providing TPAs was nothing more than a means to make the IA attractive to the employees. Below are the on-property correspondence which outline the development of this dispute.

On August 28, 2001, IVP James Quilty wrote to Messrs. Jim Street, Transtar (B&LE), and John Ingham, TTMS, stating in pertinent part (TCU Exhibit 5):

This is regarding our conversations of July 24th through 26th involving, among other issues, the explicit provisions of our New York Dock (NYD) Article I, § 4 Implementing Agreement (IA) of December 22, 2000. More specifically, the focus of this letter is the dispute we have over the provisions of Article VII of that IA.

For reference, Article VII states:

* * *

In the discussions I pointed out that it is TCU's position that all TCU represented employees of BLE were directly affected by the transaction which coordinated certain clerical work into Tracks, Traffic and Management Services, Inc. I also referenced the negotiations that took place during the §4 process and the actual framing of Article VII which supported my position.

I have since had the opportunity to review my notes of the negotiating sessions leading up to our IA along with the numerous telephone conversation that we had during that process. Gentlemen, my notes reflect that the explicit language of Article VII was fashioned, by your requests, to lessen the impact of a so-called "Sadie Hawkins" rundown process.[1] In exchange for lessening that impact, it was agreed that if employees remained with BLE they would be recognized as affected by the transaction and provided with a TPA and NYD entitlement as stated in Article VII.[2]

Article VII also plainly stated that BLE employees transferring to TTMS either with work, or by choice, would be provided with their TPAs and NYD entitlement (see items 1 & 2 of IA Article VII).

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[1]Sadie Hawkins is a term of art which describes the rundown process by which all BLE employees would have had the opportunity to choose the most attractive assignments and exercised their respective seniority displacement rights to that choice.

[2]Article V of our IA also provided that:

Section 1 – Employees affected by this transaction will be entitled to the employee protective conditions set forth in New York Dock, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of New York Dock.

As I pointed out to both of you in July, BLE employees that remained with BLE, and former BLE employees presently working for TTMS, have been denied their NYD entitlements in violation of our IA. The reasons given to TCU members by BLE and TTMS in denying their NYD claims contained conflicting reasoning and contradict each other. What bothers me the most is that both BLE and TTMS are ignoring the provisions of Article VII and the good faith bargaining that lead up to its inclusion in our IA – again at your requests.

While employees affected by the coordination may or may not be due displacement allowances in a particular month, they nonetheless <u>are</u> protected under the auspices of NYD and our IA. Article I §§ 1 & 5 of NYD mandate this inescapable fact and each protective period commences at the very first instance of being affected by the transaction (again see IA Articles V & VII).

What you gentlemen have proffered to me in our discussions is that although you have provided each affected employee with a TPA, that fact does not mean that they are entitled to the NYD protection mandated by our IA. This reasoning I find insupportable and contradictory to the clear language of our IA.

The calculation and providing of a TPA to employees was in recognition that each was affected and entitled their respective NYD protective benefit. As I previously stated, a subsequent displacement allowance is made by comparison of the employee's TPA versus what he or her earned in that particular month. If an employee worked up to his or her TPA hours and earned the compensation guarantee, then they are not entitled to a displacement allowance in that month. However, this elemental operation of NYD does not relieve the Carrier from its full term responsibilities to the employee under NYD and our IA.

TPAs are composed of the total compensation and total hours which the employee earned and worked in the prior 12 month period.[3] Once that

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[3]The protective period starts from the first instance of being affected (displaced or dismissed) and continues so long after the employee is unable to obtain a position producing total compensation equal to or exceeding the TPA. The protective entitlement is calculated based upon the individual's TPA and the compensation earned in any month. If the compensation is less than his TPA, then he is due the difference. See Article I, § 5 of NYD.

figure is derived, these totals are divided by 12 to calculate a monthly average by which each ensuing month is compared to determine if a displacement allowance is due. When an employee suffers a loss in compensation it is their explicit right to a displacement allowance for that month as dictated by the NYD TPA and our IA.

One reason you have denied our members their NYD protection is because, in your words, they were not "adversely affected" by the transaction. Let me point out that employees affected by a NYD transaction may not suffer an immediate loss in compensation, but that fact does not negate future entitlements. Moreover, your use of the terminology "adversely affected" is also misplaced. See for instance the decision of John LaRocco (FD 30000) in UP/MP v TCU (3-1-88) wherein he observed that:

> As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented ... The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.[4]

In all of this, your assertions that providing the TPA to affected

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[4]See Docket No. 67 of the Section 13 Committee (WJPA) wherein it was reasoned: "The five year protective period for a displaced employee would make little sense and provide little protection if each subsequent loss of earnings in the period had to be directly related to the coordination."

employees did not also provide them with an entitlement to NYD is both insupportable and a misrepresentation of our IA. It is TCU's position that the IA is clear on this matter. I suggest that you reflect upon the facts surrounding Article VII, and that we arrange to meet once again on this matter with the aim of settling this dispute. [footnotes in original]

On September 7th William Sjoberg, Director Labor Relations TTMS, responded (TCU Exhibit 6):

Prior to the March 23, 2001 transaction, TCU-represented clerks employed by the Bessemer and Lake Erie Railroad (BLE) performed the headquarters clerical work (primarily accounting) for all 11 Transtar companies. The transaction resulted in BLE and three other companies splitting off from Transtar, and 83 BLE clerks transferring to Tracks Traffic and Management Services Inc. (TTMS), a Transtar company. TTMS provides accounting services for the remaining Transtar companies and it provides some clerical services for the four companies that split away.

As New York Dock coordination go, this should have been simple. No employees were to be relocated, and every employee would have a job after the transaction. The negotiations to develop an Implementing Agreement focused mainly on developing an orderly system whereby employees would be able to move to the job of their choice. We needed a system that would permit employees to "follow their work" in accordance with their incumbency rights under New York Dock, while simultaneously honoring each employee's seniority. Those two goals are not entirely compatible. As example, what were the parties to do if the senior-most employee wanted to take the job held by the junior-most employee, yet that junior employee had a right under NYD to follow his/her work.

Over the course of our negotiations, the parties overcame that problem by pooling similar jobs so that the incumbents in each such pool would be protected for purposes of obtaining a post-transaction job in the same pool. If an employee chose to bid to a different pool, he/she would be at risk of being outbid by a junior employee who was protected account of his/her status as an incumbent of the "different" pool.

The parties were not inexperienced at developing implementing agreements; the Organization recognized that the Carriers could force a prompt parties-pay arbitration under New York Dock if progress were to drag in the voluntary talks, and that such arbitration routinely yields a barebones

award. The Carriers recognized that nonetheless, some incentive would be needed to expedite the process. Accordingly, the Carriers proposed to increase the wage rates for a number of positions and the Organization agreed.

Finally, as you are well aware, carriers in similar circumstances can simply refuse to provide TPA information when claimants are unable to readily demonstrate that there were adversely affected by a transaction. As a further incentive to make the agreement acceptable to your members, the Carrier agreed to provide TPA information to virtually all headquarters TCU-represented employees who requested such information, without requiring such employees to demonstrate that they were adversely affected. On written request, BLE would "furnish a test period average to all BLE employees who, pursuant to this agreement:

1) follow(ed) their position/work to TTMS;
2) transfer(red) to TTMS;
3) or remain(ed) with their position/work on BLE.

In addition, BLE agreed that it would also... "on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company."

At no time during the negotiations to reach an Implementing Agreement did the carriers ever promise, suggest or even imply that our offer to provide TPA information was tantamount to pre-certifying any employees. The commitment to provide TPA information was nothing more than a good will gesture that we felt would be of interest to the employees. It was not a commitment of pre-certification of all headquarters employees; and it certainly was not a six-year commitment by the Carriers to pay over a hundred employees a displacement allowance every month that their earnings would randomly fall short of their TPA.

The Organization responded on October 15th wherein it was pointed out that (TCU Exhibit 7):

As you are aware, it was the carriers that desired a prompt IA with TCU and pressed for such. Assuredly, the carriers wanted an IA with TCU in place before the closing date of its reorganization for a number of reasons – saving additional expense and avoiding delay being foremost.

It was in this atmosphere the carriers approached TCU and our IA was fashioned. One quid pro quo for TCU's timely handling during the § 4 process was the prompt election of benefits outlined in Article VII of our Agreement and the record bears me out on this. The providing of test period averages (TPA) to all affected employees was in recognition of their displacements and to provide each with an informed source for election of NYD benefits.

Notwithstanding, as the carriers refuse to accept the clear and unambiguous language of our Agreement, we jointly have agreed to establish a NYD § 11 Committee to resolve the matter. It has been agreed that Mr. J. C. Flectcher will serve as the § 11 Committee's Neutral Member with March 21, 2002 agreeable to all parties for its meeting.[5]

Finally, on October 31st the Carriers responded in (TCU Exhibit 8):

The parties have jointly agreed to establish a New York Dock § 11 Committee of Arbitration with Mr. J. C. Fletcher to serve as the Neutral Member. We further agreed to hold the hearing on Tuesday, January 15, 2002 in the Chicago area. Your footnote suggestion that the parties exchange their respective submissions on January 10, 2002 is agreeable to the Carrier.

Based upon your remarks at conference on October 4, 2001, the Carrier felt that the parties would work together to pose the "Question at Issue" addressing eligibility for active employees first. Depending on the resulting answer, a question may or may not need to be framed later to cover inactive employees. In short, I thought that we would simply be resolving whether or not certain TCU-represented employees were automatically certified as displaced employees when the Carrier provided them with their individual test period average information.

It was with some surprise, therefore, that I noted the series of perplexing compound questions that you had posed, and your declaration that those questions constitute "the Organization's Questions at Issue." The Carrier felt that the dispute was, as you stated in the penultimate paragraph (page 4) of your August 28, 2001 letter, over the Carrier's "assertion that providing the TPA to affected employees did not also provide them with an

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[5]It is suggested the parties exchange their respective submissions on January 10, 2002. [footnote in original]

entitlement to NYD..." You went on to argue that the Carrier's position was insupportable, etc., and you suggested that "we arrange to meet once again on this matter with the aim of settling this dispute."

Unable to settle this matter in on-property handling the parties mutually agreed to to present this matter of interpretation/application to this NYD § 11 Committee.

POSITION OF THE EMPLOYEES:

It is the position of the Employees that the parties' IA explicitly recognizes that all employees of the B&LE and those transferring to the TTMS were affected by the acquisition/control transaction. Moreover, the parties' negotiated IA was crafted in such a manner that all TCU represented affected employees were provided with an elective entitlement to the protective arrangement imposed by the STB.

Contrary to this, the Carriers assert that inclusion of Article VII in the IA: "*was nothing more than a good will gesture that we felt would be of interest to the employees.*" Additionally, the Carriers contend that even though the IA provided TPAs to affected employees, such proviso did not equate to a recognition that such employees were entitled to NYD since they were not "*adversely affected*" as the standard term is understood within NYD. (See TCU Exhibit 6)[6]

Adversely Affected

In regard to the Carriers' contention the affected employees were not adversely affected, the Employees point out to this Committee that nowhere within the four-corners

[6]Carrier has also contended in certain correspondence to individual employees that simply because their earnings fluctuated after the transaction did not justify filing a claim for their displacement allowances.

of NYD can the term "*adversely affected*" be found. The Carriers' secondary argument that merely providing TPAs to affected employees did not, in its view, extend protection to employees that otherwise might not be considered as entitled to NYD protection is disingenuous and counter to the spirit and intent of the parties' IA. This adverse affect argument made by the Carriers must be viewed for what it really is – an attempt to mitigate the commitment made in Article VII of the IA to provide NYD protection for all employees.

As this Committee is aware, there are two usual and customary ways in which employees are affected by a NYD transaction – these are found in Article I, § 1 of NYD wherein it states:

> 1. Definitions. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
>
> (b) "**Displaced employee**" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
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> (c) "**Dismissed employee**" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction. [**bold** emphasis applied]

In the transaction under review it was without question that all the B&LE employees were directly affected by the abolishment of their assignments and the transfer of their work to TTMS. As such, TCU took the position that each employee was being displaced

by the transaction and directly affected by either being displaced or dismissed.[7] Since the rearrangement and realignment of B&LE work contemplated the establishment of an equal number of clerical assignments (at TTMS and B&LE) existing prior to the transaction the IA did not contemplate any dismissed employees.

Article II – Effects of the Transfer of the parties' IA provided that:

> *Notwithstanding the provisions of Article II of the February 7th Agreement, BLE employees entitled to preservation of employment who do not select their incumbent position and who refuse transfer assignment with TTMS (a position not requiring a change-in-residence) subsequently becoming furloughed will not be considered as affected by this transaction and will have their present protective entitlement under February 7th Agreement suspended until they are recalled to a regular position in accordance with the agreement rules. Furthermore, such employees will not be considered "dismissed" or "displaced" employees and they will not be entitled to the protective arrangement attached to this Agreement.*

It was understood that employees not availing themselves of the opportunity to continued employment (either TTMS or B&LE) were arbitrarily placing themselves in a dismissed status.[8] The affect and entitlement to the protective scheme was clearly

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[7]The preamble of the parties' IA provided for the coordination of "certain clerical work in the areas of Payroll, Tax, Financial Services, General Accounting, Benefits Administration, Engineering, Transportation, Mechanical, Marketing, Asset Management, MIS, and Revenue Accounting into TTMS, a Transtar subsidiary, at Monroeville, PA." In all, 83 B&LE employees transferred to TTMS; those employees remaining with B&LE on the newly established assignments found themselves on jobs with markedly different duties and responsibilities than before and with greatly reduced employment opportunities.

[8]The fact that such employees would also suspend their Feb. 7th protective entitlement is in harmony with the decision found in SBA No. 1095 involving these same parties which involved a prior NYD transaction (TCU Exhibit 9). The importance of this background and impact upon this dispute will also be addressed in this submission.

contemplated by Article II – a specific warning was incorporated regarding retention of Feb. 7th protection if employees arbitrarily placed themselves in a dismissed status.

The decision found in UP/MP v. TCU (3-1-88) bears repeating (TCU Exhibit 10):

> *As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented ... The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.*

By providing affected employees with their respective TPAs the IA fully contemplated that each was entitled to their election of NYD benefits if they so desired. Moreover, Article VII made the extension of NYD (via the TPA) mandatory. It was only when the employee was entitled to a displacement allowance was a claim to be filed. That is, if the employee's compensation exceeded their TPA calculation (with associate comparison to the hourly average), then no claim was filed. If, however, compensation was less than the TPA calculation, then the displacement claim was to be made within 60-days.

The IA incorporation specific references to §§ 5 & 6 of NYD – § 5 (a) of NYD

dictates that:

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

As noted by Arbitrator LaRocco, *supra*, an adverse affect may not materialize immediately when a transaction first takes place. It is understood that the earnings of any employee fluctuates from month to month – this is precisely the reason the Interstate Commerce Commission (ICC) fashioned the averages found in §§ 5 & 6. This brings us to an ancillary argument which the Carriers have attempted to inflict upon affected employees, that being that "*fluctuations in gross earnings from month to month do not, in and of themselves, justify a claim for a displacement allowance.*"

In reply to the Carriers' assertion that fluctuating earnings do not justify a displacement claim is the § 11 decision found in BNSF v. TCU (5-1-99). In that decision Neutral Member Joseph Sickles held that (TCU Exhibit 11):

> *We also reject the Carrier's argument that fluctuations in earnings are normal and, therefore, an occasional drop in earnings does not mean an employee is "displaced." We find that the New York Dock conditions require a monthly determination for the duration of the protective period as to whether an individual employee is in a "worse position" with respect to compensation, i.e., if his monthly earnings are less than his monthly average compensation in the test period.*
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> *Therefore, the Carrier must compute the TPAs for each claimant. This amount must include all overtime worked during the test period and during the protective period. In any month that a claimant's compensation falls below his TPA, the Carrier must pay a displacement allowance. The only exception that would allow a denial of the displacement allowance is if a*

claimant refuses to work overtime for which he is qualified and consequently does not work enough hours in the month to match his TPA for hours paid.

As a means to minimize the amount of protective benefits it must pay, the Carrier is entitled to require employees to qualify for the available overtime work-on the Carrier's time. In the absence of such a requirement, however, the Carrier may not shift the burden onto the claimants if they do not work their TPA hours because there is insufficient overtime for which they are already qualified.

Mirroring the argument proffered by the Carriers in the instant case, it was held by Referee Sickles that compensation and not rate of pay was the determining factor in whether an affected employee was due a displacement allowance.[9] In holding that each employee was affected by the transaction, BNSF was obligated to compute TPAs for compensation paid and hours worked as requested by the Organization. It was then a simple matter to apply the principles articulate by Referee Bernstein in Docket No. 62 (TCU Exhibit 12) under the Washington Job Protection Agreement (WJPA) to determine whether a displacement allowance was due an employee.

The TPA is the benchmark in the monthly determination of whether or not the affected employee is due any displacement allowance. The purpose of providing a TPA is to determine the extent upon which the employee's monthly displacement allowance is affected by post transaction earnings. NYD requires a monthly determination of the individual's compensation based upon the TPA calculation for the duration of the

[9]The factual circumstances in the BNSF dispute involved employees displacing to assignments with the exact same rate of pay as the assignments vacated. Quite rightly Referee Sickles found that the ICC did not intend hourly pay or rate of pay as the criterion for assessing the impact a transaction had upon employees.

employee's protective period – this procedure is elemental to NYD.

It was for this very reason, and the acceptance that all B&LE employees were being affected by the transaction that prompted the inclusion of Article VII in the IA. If, in fact, Article VII was merely to humor employees or a goodwill gesture the Carriers felt would be of interest to employees, then inclusion of that explicit language in the IA would have form without function.[10]

The Employees will now turn to the events surrounding the parties' IA and inclusion of Article VII.

§ 4 Process

As stated in our letter of October 15, 2001 (TCU Exhibit 7) it was the Carriers that pressed for a prompt IA and approached the Organization as early as October 5, 2000.

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[10]See CSX v. IBEW (10-3-90) wherein Neutral Member J. Fletcher held that:

The language in Section 5(a) has been in place since 1979. And even before that similar, if not identical, language appeared in Section 6 of the May 1936, Washington Job Protective Agreement, which, by all accounts, was the precedent establishing forerunner for the I.C.C.'s earlier, Oklahoma, New Orleans and Southern-Central of Georgia, Employee Protective Conditions, required to be imposed in abandonment and merger transactions by Section 5 (2) (f) [§ 11347) of the Interstate Commerce Act. From time to time negotiators in drafting employee protective and implementing agreements have altered the formula established by WJPA Section 5 and/or sections of I.C.C. employees protective conditions, to suit their situations, but this was not done in the transaction under review here.

The fact that the parties to the Implementing Agreement did not, intentionally or unintentionally, see fit to alter, what others have termed "the straightforward language of Section 5(a)", as it concerns the establishment of Test Period Averages, must be given great weight and precludes subsequent alteration, on our part thru the Arbitration process... (TCU Exhibit 13)

As the Committee is aware, TCU was under no requirement to enter the §4 process until such time as the STB had made its determination in FD 33942, which occurred on November 30, 2000. The Organization did enter into conference discussions regarding the proposed transaction commencing on October 18, 2000.

During the initial conference discussion, it became clear the Carriers had some very pressing reasons in pursuing a timely IA. It their Form 8-K report to the Securities and Exchange Commission (SEC) the Carriers outlined the reorganization of their operations that "*will allow USX and Holdings to follow their independent strategies for the units they will control.*" (TCU Exhibit 14)

At the Closing Date the parties were required to exchange stock (voting and non-voting) to consummate the deal.[11] Importantly and the impetus for the Carriers' negotiators to get a prompt IA were certain provisions of the reorganization agreement such as:

> *o Article XI – conditions of closing – provided for the consummation of all documents of good standing; opinions of counsel; warranties; covenants and agreements; no termination of pension plans or additional liability on USX; execution of documents; exchange of stock; etc.*
>
> *o Article III – Employee Matters: provides for the continuation of employment for non-union and union employees. Also, (b) CBAs remain in place and USX and Holdings will "continue to provide all employment and entitlements with the terms of such CBAs except as modified by agreement of the parties or by an arbitrator in order to permit the transfer of employees..."*

[11]Closing date was the 2ND Business Day following satisfaction of the conditions set forth in Article XI of the Agreement.

If "Union BLE Transferees have not signed a TCIU Implementation Agreement indicating TCIU approval of the transfer ...as of Closing Date, all pension liabilities and any assets held in trust... will be transferred from the Transtar Inc... to a Spinoff Plan..."

o Article III, Section 3.3 -- Thrift Plans: Transtar will remain sponsor of the Savings Plan for represented employees (the Thrift Plan).

(d) If TCIU Approval has not been obtained by Closing Date... all Transtar assets attributable to Union BLE Transferees will be transferred to the trust association and transferred back after agreement.

o Section 3.4 Insurance and other Welfare Benefits Plans – Transtar will continue all H/W, life and other insurance programs currently provided to employees and retirees of the USX companies.

If TCIU approval not obtained... such will be held in trust until agreement.

Obvious from this and other conditions of the reorganization plan, having an IA in place before the Closing Date alleviated a lot of problems or complication arrangements necessary if TCU was not receptive to the Carriers' overtures. Therefore, the parties held conference discussions; what transpired during those negotiations as well as the ultimate document reflected both the usual *quid pro quo* atmosphere inherit in § 4 negotiations and accommodations insuring timely acceptance by the Employees.

One of the Organization's primary requirements in accommodating the Carriers in a timely IA was the explicit recognition that all B&LE employees at the headquarters facility were affected by the transaction and entitled to NYD protection. From the very first conference discussion (October 18th) the Organization made this condition clear to the Carriers.

Attached as TCU Exhibit Nos. 15 & 16 are notes taken by Sam Siriano, Asst. to the

President/ASD, and TCU IVP Jim Quilty during these negotiations (Siriano notes; Quilty notes).[12]

Siriano Notes

The Siriano notes start on October 18th; they outlined that 118 positions at B&LE will be affected with 88 transferring to the USX side (TTMS) – 27 in a shared area and 61 non shared – with 30 positions to remain on the B&LE. Important is the notation stating TCU's position that an: "*Employee who refused to go or bump – NYD apply – to all employees.*"

On page 2 of the notes, TS (Ted Stafford, Pres. ASD) asks: "*Will [employees be] entitled to new 6 year protection – [with choice] of the new or old one [protection*]. John Ingham, on behalf of the Carriers, responds that they will "*furnish new TPA 1st* [to affected employees]."

On page 3 Jim Quilty asks: "*Do you want incumbency?*" To which John Ingham answers that Carriers' wish employees to go to TTMS *"by seniority - when filling jobs under TTMS*". Amplifying this desire for the incumbents to go to TTMS, Ingham on page 4 states that arrangement would be most appealing and the Carriers were: *"willing to give TPAs - [if employees] bid in position under incumbency rule."* This is again referenced on page 5

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[12]Parole evidence "*doctrine does not preclude the admissibility of evidence designed to explain an ambiguity or to establish the meaning of terms or provisions which have a particular trade or occupational meaning.*" Bringham Apparel Corp. 52 LA 420, 431 (1969) Arbitrator Anderson. Also see How Arbitration Works, Elkouri and Elkouri, "*...evidence of the precontract negotiations is admissible to aid in the interpretation of the ambiguous language.*" (citing Bringham *supra*)

where Ingham states Carriers have a "*Preference [to] incumbency prior rights.*"[13]

Finally, the Siriano notes conclude on page 6 with the return to the question of applying NYD by Ted Stafford and Jim Quilty asking: "*Does protection overlap?*"[14] And, Quilty asks if the employee is *"Drawing protection from two years - / new TPAs if you have 4 years remaining opt to stay on the 1st or new [and] higher [protective entitlement] opt to elect the 2nd NYD."* This discussion involves the fact that employees with pre-existing NYD protection and given a new TPA (lower) may wish to stay on that pre-existing or prior NYD protection until it expires and then elect the remainder of the 2nd NYD entitlement until such time as it expires.

This particular question over the application of a secondary entitlement to NYD was subsequently addressed by the Carriers when providing employees with their TPAs and will be discussed later.

Quilty Notes

The Quilty notes reference the November 16th meeting. Reference to the issue before this Committee and the Carriers' commitment to NYD entitlement cited in the Siriano notes is also found on page 1 of the Quilty notes. In his reference IVP Quilty notes that Carriers are "*willing to give TPA [to employees] who bid in job under incumbency*

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[13]See TCU Exhibit 5 wherein the Organization references the Carriers' dissatisfaction with a "Sadie Hawkins" rundown process and the importance it placed on avoiding same.

[14]This statement refers to the fact that some B&LE employees were already under NYD protection from a prior transaction – see footnote no. 7 and TCU Exhibit 9.

rule."[15]

Additionally, TCU Exhibit 17 is the e-mail sent from District Chairman Bennett to ASD President Stafford which outlines the Carriers' informational session with the employees held on October 27, 2000. In item no. 3 DC Bennett states that the Carriers committed to TPAs to employees, but "danced" around the issue of employees staying on pre-existing NYD protection when given their option to a new NYD entitlement under the TTMS transaction.

By the commitment of the Carriers via Article VII of the IA as well as the negotiations that lead up to the IA, it is clear that extension of NYD protection to all affected employees was accepted by all parties.[16]

Secondary NYD entitlement

Evident from the negotiating record, the issue of NYD entitlement for all B&LE affected employees was put to rest by Article VII. Further, with the initial transfer of employees and work it appeared that the Carriers understood the impact of their negotiations. TCU Exhibit 18 is presented as the proverbial smoking gun.

In addressing the secondary entitlement to NYD and what would become of a pre-existing NYD protective period, the Carriers wrote to employee W. J. Barman on May 15,

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[15]As the Committee is aware, subsequent negotiations expanded such recognition as found in the final draft of Article VII.

[16]As a sidebar, the Carriers did not provide TPAs to 3 janitors at its Monroeville facility. When asked why these 3 employees were excluded, the Carriers asserted that they were not affected by the transaction and therefore under the terms of the IA were not given TPAs.

2001, that:

> *This letter is in reply to your request for Test Period Average (TPA) information in accordance with the December 22, 2000 Implementing Agreement between the Bessemer & Lake Erie Railroad, Tracks, Traffic & Management Services, Inc., and the Transportation Communications International Union.*
>
> *Those employees who are still covered under New York Dock (NYD) from an earlier coordination must elect whether to remain under such coverage, or to come under the coverage of the December 22, 2000 Implementing Agreement using the new TPA and the average hours per month set forth above. The maximum duration of coverage under either coordination is six years or the individual employee's length of service prior to the applicable transaction, whichever is least. An employee who chooses to remain covered by a prior NYD transaction will continue to be covered only for his/her eligibility period remaining from such prior transaction. Enclosed is an election form for you use in choosing coverage; please complete and return it within ten (10) days form the date of this letter.* [underline added]

Additionally, in another letter to an employees (K. Shepard) dated June 13, 2001 (TCU Exhibit 19) the Carriers wrote:

> *This is to advise you that your monthly TPA allowance is $3,330.73 and your monthly average hours worked are 178.71.*
>
> *You are reminded that the foregoing in dollar amount and hours are not simply a compensation guarantee, but rather such allowance is payable on "so long after a displaced employee's displacement allowance as he is unable, in the normal exercise of seniority rights under existing agreements, rules and practices, to obtain a position producing..."* [underline applied][17]

The Employees assert that both of these documents are irrefutable evidence that the Carriers fully understood the application of NYD via Article VII of the IA. Moreover, in view of the negotiating record any contention to the contrary by the Carriers is

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[17]Carriers are quoting from § 5(a) of NYD.

disingenuous and insupportable on its face.[18]

As previously pointed out (footnote no.7) these same parties have previously been involved in § 4 negotiations and arbitration (TCU Exhibit 9). The Carriers are not novices in this arena and were fully aware of what Article VII and their commitment to the Employees entailed.[19] Contentions to the side, the Carriers knew full well what Article VII meant to the negotiations; the ultimate consummation of the IA; and, admission that all B&LE affected employees were entitled to NYD protection.

Therefore, the Employees aver that Article VII was not placed within the IA to humor the employees or as a goodwill gesture by the Carriers. Article VII is what it is – an understanding between the parties under the auspices of § 4 of NYD to provide protective entitlements to all B&LE affected employees.

CONCLUSION:

The Employees have shown by the factual record presented herein that:

1) During the § 4 process the parties agreed that all B&LE employees were displaced as that term is understood within §1 of NYD and affected by the transaction;

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[18] See GTW v BRC (1-10-97) (J. Fletcher) wherein it was reasoned: "*One of the basic principles of labor relations is that negotiators must be prepared to stand behind their statements.*"

[19] In applying a strict interpretation to a contested provision, Umpire Harry Shulman emphasized that: "*The negotiators were not tyros in the art. They were skilled hands who worked hard, intelligently, and alertly. The agreement was not negotiated in a hurry or under pressure. Careful scrutiny was given to the language after agreement was reached on the substance.*" Ford Motor Co., 1 ALAA ¶67, 126, p. 67, 265 (1945). Also see Carriers' letter of September 7th (TCU Exhibit 6) wherein they admit they "*were not inexperienced at developing implementing agreements.*"

2) Article VII recognized that all B&LE employees were affected and provided each with an election of the NYD protective benefits based upon consideration of their respective TPAs;

3) Employees with pre-existing NYD protection were given the opportunity to retain prior entitlement until expiration and then continue on with the remaining term of the secondary protective period;

4) The straight-forward language of §§ 5 & 6 of NYD renders nugatory the Carriers' excuse that fluctuations in earnings do not provide entitlement to displacement or dismissal allowance;

5) The negotiating process gives evidence of the parties' intent in fashioning Article VII;

6) The Carriers' written statements to Claimants attests to the fact that it was fully aware of the application of Article VII NYD entitlement; and,

7) Inclusion of Article VII was not to humor or make the IA attractive to the Employees, but a viable provision which mandated the extension of NYD protection to all B&LE employees.

Therefore, the Employees pray this Committee will answer all the "*Organization's Questions at Issue*" in the affirmative and instruct the Carriers to allow each employee desiring Article VII protection their entitlement making each whole for any loss in displacement or dismissal allowances.

Respectfully,

T. P. Stafford,
President, ASD/TCU

APPROVED
INTERNATIONAL PRESIDENT
Date 12/15/2001

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33942

TRANSTAR HOLDINGS, L.P.,
TRANSTAR, INC. and USX CORPORATION

PETITION FOR EXEMPTION FROM 49 U.S.C. §§ 11323-11325
PURSUANT TO 49 U.S.C. §10502
AND REQUEST FOR EXPEDITED TREATMENT

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33942

TRANSTAR HOLDINGS, L.P.,
TRANSTAR, INC. and USX CORPORATION

PETITION FOR EXEMPTION FROM 49 U.S.C. §§ 11323-11325
PURSUANT TO 49 U.S.C. §10502
AND REQUEST FOR EXPEDITED TREATMENT

I. INTRODUCTION

Pursuant to 49 U.S.C. §10502, Transtar Holdings, L.P. ("Holdings"), Transtar, Inc. ("Transtar") and USX Corporation ("USX") (collectively "Petitioners") hereby petition for exemption from the prior approval requirements of 49 U.S.C. §§ 11323-11325 of a transaction involving the acquisition by USX of control of Transtar and the following rail carriers currently owned 100% by Transtar:

Birmingham Southern Railroad Company ("BSRC")
Elgin, Joliet and Eastern Railway Company ("EJE")
The Lake Terminal Railroad Company ("Lake Terminal")
McKeesport Connecting Railroad ("McKeesport")
Union Railroad Company ("URR")

The five Board-regulated rail carriers listed above will be collectively referred to herein as the "USX Carriers". All of the USX Carriers are wholly owned direct subsidiaries of Transtar, which currently is controlled by Holdings through its majority ownership interest (54% economic interest and 51% voting interest), with USX having a significant minority interest

(46% economic interest and 49% voting interest). USX will also be acquiring control of four other entities for which Board approval is not required: (1) Warrior & Gulf Navigation Company ("WGN"), a water contract carrier providing service on the Black Warrior and Tombigbee river systems between Mobile and Port Birmingham, Alabama; (2) WGN's subsidiary, Mobile River Terminal Company ("MRT"), a non-carrier which operates a marine bulk terminal at Mobile, Alabama; (3) BSRC's subsidiary, Fairfield Southern Company ("FS"), a non-carrier, which provides private rail services at a USX facility in Alabama, and (4) Tracks, Traffic and Management Services, Inc. ("TTMS"), a non-carrier subsidiary of Transtar.

As a result of the proposed transaction, Holdings will cease to control Transtar and the USX Carriers and will become the direct parent, through ownership of 100% of the stock, of the following rail carriers currently owned by Transtar (collectively, the "Holdings Carriers"):

Bessemer and Lake Erie Railroad Company ("B&LE")
Duluth, Missabe and Iron Range Railway Company ("DM&IR")
Pittsburgh & Conneaut Dock Company ("P&C Dock")

Holdings also will become the direct parent, through 100% stock ownership, of five other entities, for which Board approval is not required: USS Great Lakes Fleet, Inc. ("Fleet"), a water carrier that is exempt from the Board's regulation pursuant to 49 U.S.C. § 13541(f); two non-carrier subsidiaries of Fleet, GLF Credit Corp. and GLF Great Lakes Corp.; and two non-carrier subsidiaries of P&C Dock, Cuyahoga Dock, Inc. and Mon Valley Railway Company.

The common control of the USX Carriers and Holdings Carriers was authorized by the Interstate Commerce Commission ("Commission") in Finance Docket 31363, Blackstone Capital Partners L.P., Blackstone Transportation Partners L.P. and USX Corporation - Exemption From 49 U.S.C. 10746, 11321 and 11343, served December 23, 1988 (attached as Exhibit A); Finance Docket 32028, Blackstone Capital Partners L.P., Blackstone Transportation

Partners L.P. - Control Exemption - The Pittsburgh and Conneaut Dock Company, served August 14, 1992 (attached as Exhibit B); and Finance Docket No. 32411, Transtar Holdings, L.P. - Corporate Family Exemption - Transtar, Inc., served December 29, 1993 (attached as Exhibit C).

The proposed transaction will involve the transfer by Holdings of its stock in Transtar to Transtar, in exchange for the transfer by Transtar to Holdings of the stock of each of the Holdings Carriers. The effect of the proposed transaction will be to (1) increase Holdings' control of the Holdings Carriers, from its current control through its 51% voting interest in Transtar to complete control through direct ownership of 100% of the stock; (2) divest Holdings of its interest in Transtar and the USX Carriers; and (3) leave USX with ownership of 100% of Transtar, and, through that ownership, control of the USX Carriers.

II. REQUEST FOR EXPEDITED TREATMENT

Petitioners respectfully request that this petition be given expedited treatment in order to allow the transaction to go forward without delay. Delay, and the uncertainty associated with it, will adversely affect employee morale both at Transtar and at Transtar's subsidiaries, and could lead to the loss of qualified and capable management personnel. Uncertainty may also adversely impact the commercial relationships of Transtar's subsidiaries through the loss of business as contracts on competitive movements expire. USX, Transtar and Holdings would like to be able to very promptly assure customers that the proposed transaction will not in any way affect service. The parties seek to close this transaction before the end of the year, and would appreciate receiving Board action effective on or before December 15, 2000.

B. USX Corporation

USX Corporation, formerly named "United States Steel Corporation", is a Delaware corporation and the parent corporation of a diversified group of companies, with significant interests in the production and distribution of steel and petroleum products. Prior to the 1988 change of control proceeding, Blackstone Capital Partners, L.P., Blackstone Transportation Partners, L.P. and USX Corporation - Exemption From 49 U.S.C. 10746, 11321 and 11343, supra (Exhibit A), USX controlled all of the Board-regulated Transtar subsidiaries involved in this proceeding.

C. Transtar, Inc.

Transtar, a Delaware corporation, is a non-carrier holding company controlled by Holdings through ownership of its stock (51% voting interest and 54% economic interest), with USX Corporation maintaining a 49% voting interest and a 46% economic interest. Five percent of Transtar's equity is either held by its management or available to be held by its management. As a part of the proposed transaction, management's interest in Transtar will be exchanged, and USX will own 100% of Transtar's stock.

D. Entities To Be Controlled By USX

USX will control five Board-regulated rail carriers (described in detail herein) through ownership of Transtar as a result of the proposed transaction. As noted above, USX will also be acquiring control of a water contract carrier (WGN), for which no Board approval is required, and three other companies that are not regulated by the Board (FS, MRT and TTMS).

The five rail carriers that will again be controlled by USX as a result of the proposed transaction are as follows:

1. Birmingham Southern Railroad Company ("BSRC"), located in the Birmingham, Alabama area, is a Class III terminal and switching carrier serving industries in Ensley, Fairfield and Bessemer, Alabama. BSRC chiefly transports raw materials, such as export coal to Port Birmingham and coke and iron ore pellets to iron and steel manufacturing plants. It also transports finished products from the plants to local users, connecting trunk lines, and Port Birmingham and moves general commodities to plants and businesses located on its line. BSRC has connections with Burlington Northern and Santa Fe Railway Company ("BNSF"), CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NS").

2. Elgin, Joliet and Eastern Railway Company ("EJE") is a Class II carrier that owns and operates 575 miles of trackage in and around Chicago in the states of Illinois and Indiana. EJE's main-line track runs from Waukegan, Illinois through Joliet, Illinois to Gary, Indiana. Branch lines run out of Joliet from Plainfield to East Morris and out of Gary to Whiting, East Chicago, Hegewisch and South Chicago. EJE connects with BNSF, NS, Canadian National/Illinois Central ("CNIC"), Canadian Pacific Railway ("CP"), I&M Rail Link, L.L.C., Iowa Interstate Railroad Ltd., CSXT, Union Pacific ("UP"), and Wisconsin Central Ltd. ("WC"). EJE also maintains connections with the following short lines: Chicago Heights Terminal Transfer Railroad, Chicago Short Line Railroad Company, Chicago Rail Link L.L.C., Indiana Harbor Belt Railroad Company, The Belt Railway Company of Chicago, and Chicago, Southshore and South Bend Railroad. EJE serves approximately 200 customers, including USX. EJE's route map is attached as Exhibit D.

3. The Lake Terminal Railroad Company ("Lake Terminal") is a Class III switching carrier located in Lorain, Ohio. It primarily serves a steel plant owned by Republic Technologies International, Inc. and a tubular products plant owned by Lorain Tubular

Company L.L.C., a subsidiary of USX. Lake Terminal operates approximately 20 miles of yard tracks and sidings adjacent to and within its two industrial customers, and has connections with CSXT and NS. Lake Terminal transports primarily coke, steel bars and pipe.

4. Union Railroad Company ("URR") originates at its connection with B&LE in North Bessemer, Pennsylvania and runs southwest through East Pittsburgh/Braddock, Pennsylvania to Duquesne/Homestead, Pennsylvania and on to Clairton Junction, Pennsylvania, where it divides, with the main line going south through Irvin to Clairton, where it ends, and with a branch line going west to Mifflin Junction, Pennsylvania. A Class III carrier, URR maintains interchanges with B&LE, McKeesport, NS, CSXT and the Wheeling and Lake Erie Railroad Company ("WE"). URR serves a number of customers, including various USX plants. A route map of URR is attached as Exhibit E.

5. McKeesport Connecting Railroad Company ("McKeesport") is a Class III switching carrier that operates eight miles of track at McKeesport, Pennsylvania. Its principal function is to serve one customer, the Camp Hill Corporation. McKeesport maintains connections with URR and CSXT.

E. **Entities To Continue To Be Controlled By Holdings**

Following consummation of the proposed transaction, Holdings will continue to control the following Board-regulated rail carriers:

1. Bessemer and Lake Erie Railroad Company ("B&LE") is a Class II carrier located in western Pennsylvania and northeastern Ohio. It operates approximately 344 miles of track from North Bessemer, Pennsylvania to its bulk material handling facility at Conneaut, Ohio on Lake Erie. B&LE's system interchanges at North Bessemer with URR and runs north through Butler and Greenville, Pennsylvania to Albion, Pennsylvania where it divides, with one artery

running east to a connection with NS at Wallace Junction, Pennsylvania, and the other running west into the port at Conneaut, Ohio, where it connects with CSXT. B&LE also connects to CSXT via NS trackage rights at Shenango, Pennsylvania; directly to the Buffalo and Pittsburgh Railroad, Inc. at Butler, Pennsylvania; and, via URR, to NS, CSXT, WE and McKeesport. It primarily handles bulk commodities, particularly iron ore, coal and limestone and serves more than 50 customers, including USX. B&LE's route map is attached as Exhibit F.

2. Duluth, Missabe and Iron Range Railway Company ("DM&IR") is a Class II carrier that operates approximately 438 miles of track in northeastern Minnesota and northwestern Wisconsin. DM&IR serves major mining areas throughout the Missabe Iron Range between Coleraine, Minnesota on the west and Hoyt Lakes, Minnesota on the east, and extends southward to the ports of Duluth and Two Harbors on Lake Superior. DM&IR's western artery runs to Duluth and south into Wisconsin with connections to BNSF, CP, UP and WC. DM&IR also connects in Minnesota to Duluth, Winnepeg & Pacific Railway (acquired by CN). DM&IR's eastern artery connects with private railroads owned by mining companies. The principal commodities carried by DM&IR are iron ore, taconite pellets and limestone. A route map of DM&IR is attached as Exhibit G.

3. Pittsburgh & Conneaut Dock Company ("P&C Dock") is a Class III carrier conducting stevedoring operations at B&LE's bulk material handling facility at Conneaut, Ohio. See Blackstone Capital Partners, L.P., Blackstone Transportation Partners, L.P. - Control Exemption - The Pittsburgh and Conneaut Dock Company, supra (Exhibit B).

IV. THE PROPOSED TRANSACTION AND THE EXEMPTION REQUESTED

The terms of the proposed transaction are set forth in the Reorganization and Exchange Agreement, which is attached as Exhibit H hereto. The proposed transaction will

involve the transfer by Holdings of its stock in Transtar to Transtar, in exchange for the transfer by Transtar to Holdings of its stock in B&LE, DM&IR, P&C Dock and its non-carrier subsidiaries, and Fleet and its non-carrier subsidiaries. The exchange of stock will leave USX with ownership of 100% of Transtar and, through that ownership, control of five Board-regulated rail carriers, BSRC, EJE, Lake Terminal, McKeesport and URR, along with four entities whose acquisition is not regulated by the Board. Petitioners seek exemption, pursuant to 49 U.S.C. §10502, from the prior approval requirements of 49 U.S.C. §§ 11323-11325 for the acquisition of control by USX of the five Board-regulated rail carriers identified herein as the "USX Carriers."

The proposed transaction will not result in any material changes in transportation services to the public. Petitioners intend to maintain the same level of transportation services currently provided by the Transtar subsidiaries. In connection with implementation of the transaction, Petitioners intend to reorganize certain administrative and support functions, as provided in Article VII of the Reorganization and Exchange Agreement; these changes will have no effect on transportation services. It is anticipated that ongoing efforts by management to improve the utilization of personnel, operations and facilities of the carriers involved, both separately and in combination, will be continued, including new initiatives in that regard when deemed appropriate by management.

The proposed transaction will have no significant impact on employees. Petitioners do not intend to change overall employment levels or to relocate employees as a result of the transaction. As provided in Section 3.1(b) of the Reorganization and Exchange Agreement, the current Transtar subsidiaries will remain bound by the collective bargaining agreements in effect at the time the proposed transaction is consummated.

The transaction will require only limited rearrangement of employees. Certain B&LE employees, who currently perform consolidated functions for the Transtar subsidiaries, will become employees of TTMS, and will continue to perform the same consolidated support functions, including payroll, claims, operating systems, engineering, benefits, and information systems, for both the USX Carriers and the Holdings Carriers.[1] This arrangement will enable the parties to continue receiving the benefits of the consolidated support functions, with the Holdings Carriers purchasing services under the terms of a Services Agreement. The transfer of B&LE employees to TTMS will include approximately 100 employees represented by the Transportation Communications International Union ("TCIU"). Subject to the terms of an implementing agreement with TCIU, TTMS will assume the terms of the existing B&LE/TCIU labor agreement.

Because the proposed transaction will not affect the transportation services offered by the carriers, the relief requested will not involve significant environmental impact under the National Environmental Policy Act of 1969, will not have a significant effect upon energy consumption or the quality of the environment and will not be a major regulatory action under the Energy Policy and Conservation Act of 1975. No environmental or historic reporting is required pursuant to 49 C.F.R. part 1105.

[1] Beginning in 1998, Transtar transferred certain clerical functions and employees from its other railroad subsidiaries to B&LE, pursuant to implementing agreements reached through negotiation and arbitration under the New York Dock conditions. The Board's decision in Finance Docket No. 31363 (Sub-No. 3), Union R.R. and Bessemer and Lake Erie R.R.--Arbitration Review--United Steel Workers of America, served December 17, 1998 (attached as Exhibit J), petition for review pending, No.98-6511 (3rd Cir., filed December 29, 1998), denied a petition for review of the arbitration award that imposed an implementing agreement covering the transfer of certain accounting work and employees from URR to B&LE.

V. ARGUMENT

A. The Proposed Transaction Meets All The Standards For Exemption Under Section 10502.

In a rail-related matter, 49 U.S.C. ')502(a) requires the Board to exempt a transaction if it finds that detailed examination through the procedures of Sections 11323-11325 is not necessary to carry out the rail transportation policy of Section 10101 and, in addition, either the transaction is of limited scope or regulation is not needed to protect shippers from the abuse of market power. The proposed transaction meets all of these criteria.

1. Exemption of the proposed transaction is consistent with the national transportation policy.

A detailed review under Sections 11323-11325 is not necessary to carry out the transportation policies set out in Section 10101 because the Board-regulated rail carriers involved here will continue to provide the same transportation services to the public following consummation of the proposed transaction. Most of the management personnel currently in place will continue to serve the USX Carriers and/or the Holdings Carriers immediately following consummation of the transaction. Thus, the proposed transaction will assure the continuation of efficient rail and water carriage by persons experienced in the transportation industry, consistently with the stated policy of Section 10101(3) to "promote a safe and efficient transportation system" and with the policy of Section 10101(5) to "foster sound economic conditions in transportation." By minimizing the delay and expense of a formal application proceeding, an exemption will expedite regulatory decisions and reduce regulatory barriers to entry into and exit from the industry, consistently with the policy of Sections 10101(2) and (7).

2. The proposed transaction is of limited scope.

The proposed transaction is of limited scope, principally involving a reorganization and division of ownership of eight commonly-controlled Board-regulated rail carriers. The Board-regulated rail carriers are currently controlled by a non-carrier, Holdings, through its 51% voting interest in Transtar. Through the proposed transaction, three Board-regulated rail carriers (the Holdings Carriers) will continue to be controlled by Holdings, and five Board-regulated rail carriers (the USX Carriers) will be controlled by another non-carrier, USX. The USX Carriers are relatively small railroads that operate in separate and geographically distinct markets. Prior to 1988, the USX Carriers, along with the Holdings Carriers, were wholly owned subsidiaries of USX. After the creation of Transtar in 1988, USX continued to retain a substantial minority ownership interest in Transtar. The proposed transaction merely restores to USX sole control and ownership of five of the rail carriers that it owned and controlled prior to 1988.

3. Exemption of the proposed transaction will not result in an abuse of market power.

The Board-regulated rail carriers involved in this transaction are relatively small. The largest rail carriers involved are Class II carriers. There is no concentration of market power in the present circumstances, in which common control of the rail carriers was authorized by the Commission. As a result of the proposed transaction, there will be a diminution of market power, because the Board-regulated rail carriers currently owned by Transtar will be divided between the owners of Transtar, three remaining under the control of Holdings and five coming under the control of USX. No concentration of market power or the potential for any abuse of market power will result from the proposed ownership changes.

B. Exemption Of The Proposed Transaction Is Consistent With Sections 11326 And 10502(g).

Pursuant to 49 U.S.C. §§ 11326(a) and 10502(g), the Board must impose employee protective conditions, for the benefit of the applicants' railroad employees, in approving or exempting a transaction subject to 49 U.S.C. §§ 11324 and 11325. Petitioners anticipate that the Board will impose its standard employee protective conditions, as set forth in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), on its exemption of the proposed transaction.

VI. CONCLUSION

For the reasons set forth above, Holdings, Transtar and USX respectfully request that the Board exempt this transaction from the prior approval requirements of Sections 11323-11325.

Respectfully submitted,

Anne D. Smith
WHITE & CASE LLP
601 Thirteenth Street, N.W.
Suite 600 South
Washington, D.C. 20005-3807

Counsel for Transtar Holdings, L.P.

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Monroeville, PA 15146

Counsel for Transtar, Inc.

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 2

31424
EB

SERVICE DATE - NOVEMBER 30, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33942

USX CORPORATION–CONTROL EXEMPTION–TRANSTAR, INC.

Decided: November 22, 2000

On October 5, 2000, Transtar Holdings, L.P. (Holdings), Transtar, Inc. (Transtar), and USX Corporation (USX) (jointly, petitioners) filed a petition under 49 U.S.C. 10502 to exempt from the prior approval requirements of 49 U.S.C. 11323-25 the acquisition by USX of control of Transtar and five rail carriers currently owned by Transtar. We will grant the exemption.

BACKGROUND

Prior to 1988, USX controlled 8 rail carriers: (1) the Bessemer and Lake Erie Railroad Company (BLE), a Class II carrier operating in western Pennsylvania and northeastern Ohio; (2) the Birmingham Southern Railroad Company (BSRC), a Class III terminal and switching carrier serving industries in Ensley, Fairfield and Bessemer, AL; (3) the Duluth, Missabe and Iron Range Railway Company (DMIR), a Class II carrier operating in northeastern Minnesota and northwestern Wisconsin; (4) the Elgin, Joliet and Eastern Railway Company (EJE), a Class II carrier operating in and around Chicago from Waukegan, IL to Gary, IN; (5) the Lake Terminal Railroad Company (LT), a Class III switching carrier operating in Lorain, OH; (6) the McKeesport Connecting Railroad Company (MKC), a Class III switching carrier operating in McKeesport, PA.; (7) the Pittsburgh & Conneaut Dock Company (P&C), a Class III carrier conducting stevedoring operations at B&LE's bulk material handling facility at Conneaut, OH; and (8) the Union Railroad Company (URR), a Class III carrier operating from North Bessemer, PA, to Clairton Junction, PA, where it divides, with the main line running to Clairton, and a branch line running to Mifflin Junction, PA. In 1988, USX formed Transtar as a corporate subsidiary to hold the stock of the 8 rail carriers.

Blackstone Capital Partners, L.P. (BCP) and Blackstone Transportation Partners, L.P (BTP) subsequently acquired control of Transtar and USX's carrier subsidiaries, although USX retained a minority interest in Transtar. See Blackstone Capital Partners L.P., Blackstone Transportation Partners L.P., and USX Corporation–Exemption from 49 U.S.C. 10746, 11321, and 11343, Finance Docket No. 31363 (ICC served Dec. 23, 1988), and Blackstone Capital Partners L.P., Blackstone Transportation Partners L.P.–Control Exemption–The Pittsburgh and Conneaut Dock Company, Finance Docker No. 32028 (ICC served Aug. 14, 1992). In 1993, BTP and BCP reorganized their holdings of Transtar voting stock and changed BTP's corporate name to Holdings. See Transtar Holdings, L.P.–Corporate Family Exemption–Transtar, Inc., Finance

Docket No. 32411 (ICC served Dec. 29, 1993). At present, Holdings controls Transtar by owning 51% of Transtar's voting stock, while USX holds 49% of Transtar's voting stock.

Petitioners indicate that they have entered into a Reorganization and Exchange Agreement,[1] under which Holdings will transfer its Transtar stock to Transtar. In exchange, Transtar will transfer to Holdings its stock in BLE, DMIR, and P&C. [2] After the stock is exchanged, Holdings will have divested its interests in Transtar, BSRC, EJE, LT, MKC, and URR and become direct owner of 100% of the stock of BLE, DMIR, and P&C. USX would own 100% of the stock of Transtar and re-acquire sole control of BSRC, EJE, LT, MKC, and URR.[3] USX's re-acquisition of control is subject to our jurisdiction.

Petitioners indicate that they intend to maintain the same level of transportation services currently provided by the Transtar subsidiaries. Petitioners state further that they intend to reorganize certain administrative and support functions, but that these changes are not expected to affect transportation services.

DISCUSSION AND CONCLUSIONS

The acquisition of control of at least 2 rail carriers by an entity that is not a rail carrier requires prior approval by the Board under 49 U.S.C. 11323(a)(4). Under 49 U.S.C. 10502(a), however, we must exempt a transaction or service from regulation if we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is limited in scope; or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transaction is not necessary to carry out the rail transportation policy. Rather, an exemption will promote that policy by minimizing the need for Federal regulatory control over the transaction and reducing regulatory barriers to entry [49 U.S.C. 10101(2) and (7)] and ensuring that a sound rail transportation system will continue to

---

[1] A copy of the Reorganization and Exchange Agreement was submitted as Exhibit H to the petition.

[2] Additional authorization is not required for Holdings to increase its controlling interests in BLE, DMIR and P&C.

[3] USX would also acquire control of the Warrior and Gulf Navigation Company (WGN), a water contract carrier that operates primarily on the Black Warrior and Tombigbee Rivers between Birmingham and Mobile, AL. Board approval is not required for USX to acquire control of WGN, and the statute no longer restricts a rail carrier from controlling or having an interest in a competing water carrier .

meet the needs of the shipping public [49 U.S.C. 10101(4)]. Petitioners will unify the ownership interests in the Transtar subsidiaries while maintaining the same level of transportation services currently provided by those carriers, thus fostering sound economic conditions in transportation, ensuring effective coordination among carriers, and encouraging efficient management [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the transaction is not needed to protect shippers from an abuse of market power. There would be no adverse impact on rail operations or any lessening of rail competition as a result of the proposed transaction. The proposed transaction, if anything, would diminish market power because the carriers presently controlled by Transtar would be divided between USX and Holdings. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Petitioners assert that the proposed transaction would have no significant impact on employees but would require only a limited rearrangement of employees. They claim that they do not intend to change overall employment levels or to relocate employees. Petitioners state further that they will remain bound by the collective bargaining agreements in effect at the time the proposed transaction is consummated. Finally, petitioners indicate they would agree that the labor protection conditions in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), are appropriate. Those conditions will be imposed here.

This control transaction is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because it will not result in any significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 CFR 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

Petitioners request expedited action on the petition for exemption so that they can close the transaction by December 15, 2000. The request is reasonable. We will grant the request by shortening the effective date of the exemption from the normal 30-day period to 15 days.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt, from the prior approval requirements of 49 U.S.C. 11323-25, USX's control of Transtar and BSRC, EJE, LT, MKC, and URR, subject to the labor

protection conditions in New York Dock Ry.–Control–Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

2. Notice will be published in the Federal Register on November 30, 2000.

3. This exemption will be effective on December 15, 2000. Petitions for stay must be filed by December 5, 2000. Petitions for reconsideration must be filed by December 20, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 3

ALLIED SERVICES DIVISION/TCU
53 W. SEEGERS ROAD
ARLINGTON HEIGHTS, ILLINOIS 60005
(847) 981-1290
FAX (847) 981-1890

Fax MEMO

Date: 10-5-00, 1:00 PM

To: TCU IVP'sBob Davis, Jim Quilty, Joel Parker
Mitch Krause, General Council, Richard Arndt, Gen Chairman
Stan Steeves, GST/ASD, Sam Siriano VP/ASD

From: Ted Stafford

Subject: Transtar announcement of Breakup (Update)

I received a call from Mr. William G. Sjoberg, Director/Labor Relations Bessemer & Lake Erie Railroad a little while ago. He has confirmed that they desire to create a new company called TTMS that would perform all of the accounting work that it now performs for all of the Railroads listed in the letter to the employees.

We have agreed to meet with them on the 18th of October in Monroeville, PA. Jim Quilty will accompany myself and Sam Siriano to this meeting. More as it becomes available.

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 4

DK

IMPLEMENTING AGREEMENT

between

BESSEMER AND LAKE ERIE RAILROAD COMPANY

and

TRACKS, TRAFFIC AND MANAGEMENT SERVICES, INC.

and the employees of the Bessemer and Lake Erie Railroad Company represented by

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

WHEREAS, the Surface Transportation Board (STB), in a decision published in the Federal Register on November 30, 2000 (Finance Docket No. 33942), has exempted from prior approval the acquisition by USX of control of Transtar and the following rail carriers currently owned 100% by Transtar:

Birmingham Southern Railroad Company (BS)
Elgin, Joliet and Eastern Railway Company (EJE)
Lake Terminal Railroad Company (LT)
McKeesport Connecting Railroad (McK)
Union Railroad Company (URR);

and the acquisition and control by Transtar Holdings, L. P. (formerly Blackstone Transportation Partners, L. P.) of the following rail carriers:

Bessemer and Lake Erie Railroad Company (BLE)
Duluth, Missabe and Iron Range Railway Company (DMIR)
Pittsburgh and Conneaut Dock Company (PCD);

and has imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District Terminal, 360 ICC 60 (1979) (New York Dock conditions), as a condition of this transaction; and

WHEREAS, the BLE has advised the Transportation Communications International Union (TCIU), consistent with Article I, Section 4 of the New York Dock conditions (NYD), of its desire to coordinate certain clerical work in the areas of Payroll, Tax, Financial Services, General Accounting, Benefits Administration, Engineering, Transportation, Mechanical, Marketing, Asset Management, MIS, and Revenue Accounting into Tracks, Traffic and Managements Services, Inc. (TTMS), a Transtar subsidiary, at Monroeville, PA; and

WHEREAS, the parties signatory hereto desire to reach an Implementing Agreement satisfying and consistent with Article I, Section 4 of the NYD conditions with respect to the transaction described in this Agreement;

NOW, THEREFORE, IT IS AGREED, among BLE, TTMS and TCIU as follows:

ARTICLE I - TRANSFER OF EMPLOYEES AND WORK

On Wednesday, January 3, 2001, BLE will post a special bulletin advertising all of the proposed BLE and TTMS positions listed in Attachment "A" hereto, consistent with the requirements of Rule 30(a) of the BLE-TCIU collective bargaining agreement, for seniority bid by only those employees holding permanent or temporary positions within the Monroeville headquarters, including those on leave of absence from such positions. Employees desiring these positions must file their bid with the designated official by 12 noon on Thursday, January 11, 2000.

Incumbents will have preferential rights to select their respective assignments and will be assigned thereto regardless of seniority. Employees presently holding a BLE position listed in Attachment "A" shall have prior rights to follow their position/work to TTMS or remain with their position/work on BLE, provided they indicate their desire to use their prior rights as their first preference on their bid. (Employees holding positions listed in Attachment "A" for which there will be comparable TTMS and BLE positions, who wish to take full advantage of their prior rights, should indicate the TTMS position as their first preference on their bid and the BLE position as their second preference, or vice versa.) A special bid form will be provided for this bidding. Once TTMS and BLE positions have been filled by employees using their prior rights, the remaining unfilled positions will be awarded to the senior bidders for these positions, from among the employees who elected not to use their prior rights in this bidding process, or who did not have any prior rights to use. An employee's prior rights will be based on the position he or she is holding at 12 noon on the date the special bulletin is posted.

Employees who could not avail themselves of this bidding process as a result of being on a leave-of-absence will have the right to reconstruct to the extent that their seniority and the provisions above entitled them. Such employees will be entitled to all the rights and benefits available to employees in active service on the effective date of this Agreement.

The new assignments will be effective on the day following the date the owners (USX and Transtar Holdings, L. P.) finalize this transaction.

If no bids are received for proposed TTMS positions, the positions shall be offered to qualified BLE employees, in seniority order, who were not the successful bidders for any of the advertised BLE or TTMS positions. In the event the positions remain unfilled because the BLE employees decline to transfer, TTMS may fill the positions in accordance with Rule 30.

If no bids are received for proposed BLE positions, the positions shall be filled by assignment in seniority order.

ARTICLE II - EFFECTS OF TRANSFER

On the effective date of the transfer of TCIU-represented BLE employees to TTMS pursuant to this agreement, TTMS will recognize TCIU as the duly accredited representative of these employees. At the same time, TTMS and TCIU will adopt the existing BLE-TCIU collective bargaining agreement as the exclusive agreement concerning the rates of pay, rules and working conditions of TTMS's employees represented by TCIU. That agreement will remain in effect until changed or modified by TTMS and TCIU in accordance with the provisions of the Railway Labor Act, as amended.

BLE employees who transfer to TTMS pursuant to the terms of this agreement will become TTMS employees, covered by the TTMS-TCIU collective bargaining agreement, and will cease to be BLE employees. Transferring employees will be placed on a new TTMS clerical seniority roster, using their seniority date on the BLE system clerical roster, and their names will be removed from the BLE system clerical seniority roster.

Transferring employees will be credited with all prior service attained under the BLE-TCIU agreement for vacation, sick leave, protected status under the February 7, 1965 Mediation Agreement (Case No. A-7128), and any other benefits which are granted on the basis of qualifying years of service, in the same manner as though all such time had been accrued under the TTMS-TCIU Agreement.

Transferring employees who are entitled to preservation of employment under the February 7, 1965 Agreement will retain their protected status under the TTMS-TCIU Agreement. Their protected rate will be the protected rate they held as a BLE employee immediately prior to their transfer.

Notwithstanding the provisions of Article II of the February 7th Agreement, BLE employees entitled to preservation of employment who do not select their incumbent position and who refuse transfer assignment with TTMS (a position not requiring a change-in-residence) subsequently becoming furloughed will not be considered as affected by this transaction and will have their present protective entitlement under the February 7th Agreement suspended until they are recalled to a regular position in accordance with agreement rules. Furthermore, such employees will not be considered "dismissed" or "displaced" employees and they will not be entitled to the protective arrangement attached to this Agreement.

BLE employees who fail to bid so as to follow their position/work to TTMS or remain with their position/work on BLE in Monroeville will not be considered "dismissed" or "displaced" employees and they will not be entitled to any protective benefits under New York Dock.

ARTICLE III - AMENDMENTS TO FEBRUARY 7, 1965 AGREEMENT

Section 1 - On the effective date of this implementing agreement, Article I, Section 3, of Mediation Agreement, Case No. A-7128, dated February 7, 1965, as amended, between BLE and TCIU, is further amended to read as follows:

In the event of a decline in B&LE's business in excess of 10% in any calendar month, as determined by comparing B&LE's and DM&IR's combined monthly gross operating revenue with B&LE's gross operating revenue base (adjusted for inflation), B&LE may furlough protected employees at any time during that month (subject to the advance notice requirements of the current schedule agreement) below the number of employees entitled to preservation of employment under this agreement, to the extent of one percent for each one percent said decline exceeds 10%.

Following any such force reduction, B&LE will make similar decline-in-business determinations in succeeding months, for as long as these protected employees remain furloughed. If the determination for a succeeding month shows a lesser decline in business, B&LE will recall protected employees to the extent indicated by the formula, within 15 calendar days. Upon complete restoration of B&LE's business, or when the measured decline in business no longer exceeds 10%, B&LE will recall the remaining protected employees within 15 calendar days.

"Gross operating revenue" as used herein shall be determined on the basis of the operating revenues reportable on ICC Form 210 (Results of Operations) under regulations in effect as of October 9, 1985.

B&LE's "gross operating revenue base" as used herein means the average of BLE's and DM&IR's combined monthly gross operating revenues for the period 1978 through 1982, adjusted for inflation.

Adjustments to B&LE's gross operating revenue base for inflation shall be made semi-annually (January 1 and July 1 of each year) based on the Consumer Price Index for Urban Wage Earners and Clerical Workers - United States (CPI-W) published by the Bureau of Labor Statistics. B&LE's gross operating revenue base shall be increased (or decreased) by one percent for each one percent increase (or decrease) between the average Consumer Price Index for the period between 1978 through 1982 (241.8) and the Consumer Price Index for the current month.

If, at some future date, the government ceases to calculate or publish the CPI-W, or this index becomes otherwise unavailable, the parties will attempt to negotiate a replacement consistent with the intent of this Agreement. If unable to mutually agree upon a replacement within a

reasonable amount of time, the dispute will be subject to interest arbitration under Section 7 of the Railway Labor Act, which may be invoked by either party and to which procedure both parties hereby consent and agree.

Section 2 - On the effective date of this implementing agreement, with respect to TTMS and TCIU, Article I, Section 3, of Mediation Agreement, Case No. A-7128, dated February 7, 1965, as amended, is further amended to read as follows:

In the event of a decline in TTMS's business in excess of 10% in any calendar month, as determined by comparing the combined monthly gross operating revenues of the following railroads: BS, EJ&E, LT and URR, with TTMS's gross operating revenue base (adjusted for inflation), TTMS may furlough protected employees at any time during that month (subject to the advance notice requirements of the current schedule agreement) below the number of employees entitled to preservation of employment under this agreement, to the extent of one percent for each one percent said decline exceeds 10%.

Following any such force reduction, TTMS will make similar decline-in-business determinations in succeeding months, for as long as these protected employees remain furloughed. If the determination for a succeeding month shows a lesser decline in business, TTMS will recall protected employees to the extent indicated by the formula, within 15 calendar days. Upon complete restoration of TTMS's business, or when the measured decline in business no longer exceeds 10%, TTMS will recall the remaining protected employees within 15 calendar days.

"Gross operating revenue" as used herein shall be determined on the basis of the operating revenues reportable on ICC Form 210 (Results of Operations) under regulations in effect as of October 9, 1985.

TTMS's "gross operating revenue base" as used herein means the average of the combined monthly gross operating revenues for the period 1978 through 1982, adjusted for inflation, of the following railroads: BS, EJ&E, LT and URR.

Adjustments to TTMS's gross operating revenue base for inflation shall be made semi-annually (January 1 and July 1 of each year) based on the Consumer Price Index for Urban Wage Earners and Clerical Workers - United States (CPI-W) published by the Bureau of Labor Statistics. TTMS's gross operating revenue base shall be increased (or decreased) by one percent for each one percent increase (or decrease) between the average Consumer Price Index for the period between 1978 through 1982 (241.8) and the Consumer Price Index for the current month.

If, at some future date, the government ceases to calculate or publish the CPI-W, or this index becomes otherwise unavailable, the parties will attempt to negotiate a replacement consistent with the intent of this Agreement. If unable to mutually agree upon a replacement within a reasonable amount of time, the dispute will be subject to interest arbitration under Section 7 of the Railway Labor Act, which may be invoked by either party and to which procedure both parties hereby consent and agree.

ARTICLE IV - PENSION CREDIT

Continuous service for pension purposes under the Transtar, Inc. Non-Contributory Pension Plan and the United States Steel Corporation Plan for Employee Pension Benefits (Revision of 1950) shall be determined under the rules of the Plans. BLE employees who become TTMS employees pursuant to this implementing agreement shall not be deemed to have broken continuous service for pension purposes simply as a result of the change in their employing company.

ARTICLE V - ELECTION OF BENEFITS

Section 1 - Employees affected by this transaction will be entitled to the employee protective conditions set forth in New York Dock, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of New York Dock.

Section 2 - Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, he shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit (regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of his protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

ARTICLE VI - TREATMENT OF BENEFITS

Where required by law or regulation, applicable federal, state, local and Railroad Retirement taxes will be withheld on the taxable portions of all benefit payments.

ARTICLE VII - FILING CLAIMS FOR PROTECTIVE BENEFITS

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who, pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA

to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPA's will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits a written request for same.

Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.

It is understood that the sixty-day time limit for filing initial claims for displacement or dismissal allowances will commence on the date the carrier furnishes TPA's to affected employees.

* * * * *

This agreement constitutes an Implementing Agreement, fulfilling the requirements of Article I, Section 4 of the New York Dock conditions.

For BLE and TTMS:

J. F. Ingham, Sr. Director Labor Relations

For the Organization:

T. P. Stafford, President-ASD

S. Siriano, Vice President-ASD

APPROVED:

J. L. Quilty, Int'l. Vice President-TCIU

December 22, 2000
T:versionfinal.nyd.TTMS Inc.

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Side Letter #1

December 22, 2000

Gentlemen:

The parties have agreed that TTMS and TCIU will adopt the existing collective bargaining agreement (CBA) between the Bessemer and Lake Erie Railroad Company (B&LE) and the Transportation Communications International Union (TCIU) as the exclusive CBA concerning the rates of pay, rules, working conditions, rights, privileges and benefits (including pension and health and welfare benefits) of TCIU-represented employees of TTMS. In the future application of this agreement, all existing references to the B&LE in this CBA shall be read and understood to mean TTMS.

The adoption by TTMS of this CBA will in no way affect the independent nature of the B&LE/TCIU CBA covering TCIU-represented B&LE employees.

Agreements in effect prior to the effective date of this Agreement, including National Agreements in connection with Wages, Vacations, Holidays, Personal Days, Job Stabilization, and other National Agreements to which the Organization and B&LE were party, as well as the contents of agreed-upon circulars, Memorandum Agreements and Letters of Agreement not in conflict with this Agreement, shall also be adopted by TTMS and continue to remain in effect unless and until changed in accordance with the Railway Labor Act.

Any dispute arising under the provisions of this implementing agreement, excepting those disputes which are properly referable to a New York Dock arbitration committee, will be handled pursuant to Section 3 of the Railway Labor Act.

This will confirm our commitment that TTMS will adopt the terms of the next national agreement between TCIU and the railroads represented by the NCCC, with respect to wages and rules.

Respectfully,

J. F. Ingham
Senior Director Labor Relations

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Side Letter #2

December 22, 2000

Gentlemen:

This will confirm our understanding that Tracks, Traffic and Management Services, Inc. ("TTMS") is an "employer" as defined under 45 U.S.C.A. § 231. Accordingly, TTMS employees will be covered by the Railroad Retirement Act of 1974, as amended.

Respectfully,

J. F. Ingham
Senior Director Labor Relations

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Side Letter #3

December 22, 2000

Gentlemen:

This will confirm that following the effective date of this transaction, BLE and TTMS will separately continue to preserve the "protected" rates of the "red-circled" employees listed below, under the same terms and conditions established when these rates were first preserved.

Red-Circled Employees as of December 11, 2000

Name	Position	Base Rate	Protected Rate
T. Boguslawski	Hd. Invoice Proc.	$155.61	$156.38
M. E. Cox	**Chief Clerk	$148.71	$148.79
T. A. Smathers	Steno Clerk-Machine Operator	$145.53	$146.13
C. C. Weismann	Control Clerk	$145.53	$146.13
D. R. Bruce	Rate Clerk	$153.10	$153.84*
M. A. Myerburg	Record Clk-K.P.	$143.20	$143.76
D. J. Curry	Cust. Svce. Rep.	$148.71	$155.61

* Mr. Bruce is also eligible for a further allowance based upon his having at least three years experience in the rate area, and having passed a traffic management test(s).

* * * * *

Respectfully,

J. F. Ingham
Senior Director Labor Relations

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Side Letter #4

December 22, 2000

Gentlemen:

On January 18, 1999, nine clerical employees transferred from Union Railroad to BLE under New York Dock. On April 23, 1999, BLE confirmed that it would provide Sickness and Accident Benefit coverage to those employees "for a period of up to six years of Bessemer employment, or the equivalent length of their individual Union Railroad service, whichever is less." The employees were listed as follows:

JoAnne Anthony	Michael Fisher
Ralph DiVincenzo	Ruby Greiner
Karen Farren	Pat Schartner
Mary Moyer	Martina Phillips
Jane Foshee	

Ms. Greiner has since retired, and Ms. Phillips' coverage has expired account her BLE service has exceeded the length of her prior URR service.

This will confirm that following the effective date of this transaction, BLE and TTMS will separately continue to provide such S&A Benefit coverage to the remaining seven employees under the same terms and conditions as established in the April 23, 1999 commitment.

Respectfully,

J. F. Ingham
Senior Director Labor Relations

PROPOSED STATUS TCIU CLERKS

REVENUE ACCOUNTING - B&LE MONROEVILLE

Position	No.	Rate	New Position Title	New Rate	
Circulating Clerks #1	2	$153.10	Circulating & Relief Clerk	$153.10	
Circulating Clerk #2	1	$148.71	Circulating & Relief Clerk	$153.10	(+4.39)
Revenue Clerks	3	$155.61	Revenue Clerk	$155.61	
**Statistical Clerk	1	$153.10	**Car Accounting Clerk	$153.10	
**Chief Per Diem Clerk	1	$153.10	**Car Accounting Clerk	$153.10	
**Car Distributor	1	$148.71	**Car Distributor	$148.71	
TOTAL	9				

REVENUE ACCOUNTING - Transtar (non-shared positions)

Position	No.	Rate	New Position Title	New Rate
Revenue Clerks	4	$155.61	Revenue Clerk/Rev. & Rel. Clk.	$155.61
Revenue Clerks	3	$155.61	Revenue Clerk-ISS/Rev. & Rel. Clk.	$155.61
Revenue Clerk - ISS	1	$155.61	Revenue Clerk-ISS/Rev. & Rel. Clk.	$155.61
Circulating Clerks #1	10	$153.10	Circulating Clerk #1	$153.10
Circulating Clerks #2	12	$148.71	Circulating Clk #2/Cust. Svc. Clk.	$148.71
Customer Svc. Reps.	5	$148.71	Circulating Clk #2/Cust. Svc. Clk.	$148.71
TOTAL	35			

PROPOSED STATUS TCIU CLERKS

OPERATIONS - B&LE MONROEVILLE

Position	No.	Rate
**Chf Clerk to Eng Trk	1	$148.71
**Chf Clerk Sup Mech	1	$155.61
Janitor	6	$95.79
TOTAL	8	

OPERATIONS - Transtar (shared positions)

Position	No.	Rate		
**Chief Clerk to Eng (BB)	1	$155.61	(rate incr. from $148.71)	(+6.90)
Clerk	1	$148.71	(rate incr. from $143.20)	(+5.51)
TOTAL	2			

OPERATIONS - Transtar (non-shared positions)

Position	No.	Rate
**Chf Clerk to Chf Engineer*	1	$148.71
Car Distributor*	1	$148.71
TOTAL	2	

*Joint facility position - will continue to perform certain B&LE work

MARKETING - B&LE

Position	No.	Rate
Rate Clerk	1	$153.10
TOTAL	1	

ASSET MANAGEMENT - B&LE

Position	No.	Rate		
Control Clerk	1	$148.71	(rate incr. from $145.53)	(+3.18)
TOTAL	1			

ASSET MANAGEMENT - Transtar (non-shared positions)

Position	No.	Rate
**Chief Clerk	1	$148.71
Steno Clerk-Mach Op	1	$145.53
TOTAL	2	

MIS - Transtar (shared positions)

Position	No.	Rate
Machine Operators	4	$155.61
Relief Clerk	1	$153.10
Asst. Machine Operator	1	$145.53
Record Clerk/KeyPunch	1	$143.20
TOTAL	7	

PROPOSED STATUS TCIU CLERKS

GENERAL ACCOUNTING - B&LE MONROEVILLE

Position	No.	Rate	New Position Title	New Rate	
Head Invoice Processor	1	$155.61	Accounting Clerk*	$148.71	(-6.90)
Invoice Processor	1	$155.61	Accounting Clerk*	$148.71	(-6.90)
Accts. Payable Clerks	2*	$148.71	Accounting Clerk	$148.71	
Accts. Receivable Clerks	2	$148.71	Accounting Clerk	$148.71	
**Clerk-Steno	1	$145.53	**Clerk Steno	$145.53	
**Head Clerk Property	1	$155.61	**General Acctng. Clerk	$155.61	
Property Clerk	1	$153.10	General Acctng. Clerk	$155.61	(+6.90)
Bookkeepers	2	$155.61	Bookkeeper	$155.61	
Mailroom Clerks	2	$136.62	Mailroom Clerk	$136.62	
TOTAL	13				

*Added 1 A/P Clk to replace 1 Rate Clk in Mkt.

*Incumbents will retain former rate

GENERAL ACCOUNTING - Transtar (non-shared positions)

Position	No.	Rate	New Position Title	New Rate	
Invoice Processor	1	$155.61	Accounting Clerk #1	$155.61	
Bookkeepers	3	$155.61	Accounting Clerk #1/Bookkeeper	$155.61	
Clerk Property Records	1	$155.61	Accounting Clerk #1	$155.61	
A/P Clerks	6	$148.71	Accounting Clerk #2	$148.71	
A/P - A/R Clerk	1	$148.71	Accounting Clerk #2	$148.71	
A/R Clerks	3	$148.71	Accounting Clerk #2	$148.71	
Property Clerk	1	$153.10	Accounting Clerk #2*	$148.71	(-4.39)
Property Clerk	1	$148.71	Accounting Clerk #2	$148.71	
A/P/Mail Clerk	1	$145.53	Accounting Clerk #2	$148.71	(+3.18)
Steno Clerk	1	$145.53	Steno Clerk	$148.71	(+3.18)
TOTAL	19				

*Incumbent will retain former rate

PROPOSED STATUS TCIU CLERKS
MONROEVILLE

PAYROLL - Transtar (shared positions)

Position	No.	Rate
**Head Payroll Clerk	1	$155.61
Payroll Clerks	10	$148.71
**Salary Payroll Clerks	2	$148.71
TOTAL	13	

OTHER FINANCE - Transtar (non-shared positions)

Position	No.	Rate
Tax Clerk/Steno*	1	$148.71
Steno Clerk (Fin. Svcs.)	1	$145.53
TOTAL	2	

OTHER FINANCE - B&LE

Position	No.	Rate	
**Tax Clerk*	1	$153.10	(+4.39)
TOTAL	1		

*New position; will replace AP/Tax Clerk in Gen. Acct. which has a rate of $148.71

BENEFITS - Transtar (shared positions)

Position	No.	Rate
Benefits Clerks (DMIR Class 2)	3	$153.10
TOTAL	3	

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 5

279-102 I K
RAS

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Transportation Communications International Union

Challenging the future with over a century of pride!

Robert A. Scardelletti, *International President*
James L. Quilty, *International Vice President*

August 28, 2001

File: BLE/TTMS

Mr. Jim Street
Transtar (BLE)
P. O. Box 68
Monroeville, PA 15146

Mr. John F. Ingham
Tracks, Traffic Management Services, Inc. (TTMS)
P. O. Box 68
Monroeville, PA 15146

RECEIVED
SEP - 5 2001
INT'L PRES. OFFICE

Dear Sirs:

This is regarding our conversations of July 24th through 26th involving, among other issues, the explicit provisions of our New York Dock (NYD) Article I, § 4 Implementing Agreement (IA) of December 22, 2000. More specifically, the focus of this letter is the dispute we have over the provisions of Article VII of that IA.

For reference, Article VII states:

> BLE will, on written request, furnish a test period average (TPA) to all BLE employees who pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPS/s will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits written request for same.
>
> Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.

In the discussions I pointed out that it is TCU's position that all TCU represented employees of BLE were directly affected by the transaction which coordinated certain

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clerical work into Tracks, Traffic and Management Services, Inc. I also referenced the negotiations that took place during the §4 process and the actual framing of Article VII which supported my position.

I have since had the opportunity to review my notes of the negotiating sessions leading up to our IA along with the numerous telephone conversations that we had during that process. Gentlemen, my notes reflect that the explicit language of Article VII was fashioned, by your requests, to lessen the impact of a so-called "Sadie Hawkins" rundown process.[1] In exchange for lessening that impact, it was agreed that if employees remained with BLE on their original positions, they would be recognized as affected by the transaction and provided with a TPA and NYD entitlement, as stated in Article VII.[2]

Article VII also plainly stated that BLE employees transferring to TTMS either with work, or by choice, would be provided with their TPAs and NYD entitlement (see Items 1 & 2 of IA Article VII).

As I pointed out to both of you in July, BLE employees that remained with BLE on their original positions, and former BLE employees presently working for TTMS, have been denied their NYD entitlements in violation of our IA. The reasons given to TCU members by BLE and TTMS in denying their NYD claims contained conflicting reasoning and contradict each other. What bothers me the most is that both BLE and TTMS are ignoring the provisions of Article VII and the good faith bargaining that lead up to its inclusion in our IA – again at your requests.

While employees affected by the coordination may or may not be due displacement allowances in a particular month, they nonetheless <u>are</u> protected under the auspices of NYD and our IA. Article I §§ 1 & 5 of NYD mandate this inescapable fact and each protective period commences at the very first instance of being affected by the transaction (again see IA Articles V & VII).

What you gentlemen have proffered to me in our discussions is that although you have provided each affected employee with a TPA, that fact does not mean that they are entitled to the NYD protection mandated by our IA. This reasoning I find insupportable and contradictory to the clear language of our IA.

---

[1] Sadie Hawkins is a term of art which describes the rundown process by which all BLE employees would have had the opportunity to choose the most attractive assignments and exercised their respective seniority displacement rights to that choice.

[2] Article V of our IA also provided that:

Section 1 – Employees affected by this transaction will be entitled to the employee protective conditions set forth in New York Dock, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of New York Dock.

The calculation and providing of a TPA to employees was in recognition that each was affected and entitled to their respective NYD protective benefit. As previously stated, a subsequent displacement allowance is made by comparison of the employee's TPA versus what he/she earned in that particular month. If an employee worked up to his/her TPA hours and earned the compensation guarantee, then they are not entitled to a displacement allowance in that month. However, this elemental operation of NYD does not relieve the Carrier from its full term responsibilities to the employee under NYD and our IA.

TPAs are composed of the total compensation and total hours which the employee earned and worked in the prior twelve (12) month period.[3] Once that figure is derived, these totals are divided by twelve (12) to calculate a monthly average by which each ensuing month is compared to determine if a displacaement allowance is due. When an employee suffers a loss in compensation, it is their explicit right to a displacement allowance for that month, as dictated by the NYD TPA and our IA.

One reason you have denied our members their NYD protection is because, in your words, they were not "adversely affected" by the transaction. Let me point out that employees affected by a NYD transaction may not suffer an immediate loss in compensation, but that fact does not negate future entitlements. Moreover, your use of the terminology "adversely affected" is also misplaced. See for instance the decision of John LaRocco (FD 30000) in UP/MP v TCU (3-1-88) wherein he observed that:

> "As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even the though an adverse effect may not materialize until long after the transaction is implemented . . . . The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after . . ." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to

[3] The protective period starts from the first instance of being affected (displaced or dismissed) and continues so long after the employee is unable to obtain a position producing total compensation equal to or exceeding the TPA. The protective entitlement is calculated based upon the individual's TPA and the compensation earned in any month. If the compensation is less than his TPA, then he/she is due the difference. See Article I, § 5 of NYD.

pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions."[4]

Your assertions that providing the TPA to affected employees did not also provide them with an entitlement to NYD is both insupportable and a misrepresentation of our IA. It is TCU's position that the IA is clear on this matter. I suggest that you reflect upon the facts surrounding Article VII, and that we arrange to meet once again on this matter with the aim of settling this dispute.

Please promptly advise me of an available date to discuss this matter.

Yours,

J. L. Quilty

J. L. Quilty
International Vice President

Cc: R. A. Scaradelletti, IP TCU
T. P. Stafford, Pres. ASD/TCU
S. Siriano, Vice Pres. ASD/TCU

[4] See Docket No. 67 of the Section 13 Committee (WJPA) wherein it was reasoned: "The five year protective period for a displaced employee would make little sense and provide little protection if each subsequent loss of earnings in the period had to be directly related to the coordination."

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 6

Tracks Traffic and Management Services, Inc.

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

William G. Sjoberg
Director Labor Relations

Phone: 412/829-6730
Fax: 412/829-3455

September 7, 2001

Mr. James L. Quilty
International Vice President
Transportation Communications International Union
12712 Miami Circle
Omaha, NE 68164

Dear Mr. Quilty:

Reference is made to your August 28, 2001 letter addressed to Mr. Ingham and received on September 4, 2001 regarding our dispute over the Carrier's application of the December 22, 2000 Implementing Agreement. Your letter has been referred to me for response.

Prior to the March 23, 2001 transaction, TCU-represented clerks employed by the Bessemer and Lake Erie Railroad (BLE) performed the headquarters clerical work (primarily accounting) for all 11 Transtar companies. The transaction resulted in BLE and three other companies splitting off from Transtar, and 83 BLE clerks transferring to Tracks Traffic and Management Services Inc. (TTMS), a Transtar company. TTMS provides accounting services for the remaining Transtar companies and it provides some clerical services for the four companies that split away.

As *New York Dock* coordinations go, this should have been simple. No employees were to be relocated, and every employee would have a job after the transaction. The negotiations to develop an Implementing Agreement focused mainly on developing an orderly system whereby employees would be able to move to the job of their choice. We needed a system that would permit employees to "follow their work" in accordance with their incumbency rights under *New York Dock*, while simultaneously honoring each employee's seniority. Those two goals are not entirely compatible. As example, what were the parties to do if the senior-most employee wanted to take the job held by the junior-most employee, yet that junior employee had a right under *NYD* to follow his/her work.

Over the course of our negotiations, the parties overcame that problem by pooling similar jobs so that the incumbents in each such pool would be protected for purposes of

obtaining a post-transaction job in the same pool. If an employee chose to bid to a different pool, he/she would be at risk of being outbid by a junior employee who was protected account of his/her status as an incumbent of the "different" pool.

The parties were not inexperienced at developing implementing agreements; the Organization recognized that the Carriers could force a prompt parties-pay arbitration under *New York Dock* if progress were to drag in the voluntary talks, and that such arbitration routinely yields a barebones award. The Carriers recognized that nonetheless, some incentive would be needed to expedite the process. Accordingly, the Carriers proposed to increase the wage rates for a number of positions and the Organization agreed.

Finally, as you are well aware, carriers in similar circumstances can simply refuse to provide TPA information when claimants are unable to readily demonstrate that they were adversely affected by a transaction. As a further incentive to make the agreement acceptable to your members, the Carrier agreed to provide TPA information to virtually all headquarters TCU-represented employees who requested such information, without requiring such employees to demonstrate that they were adversely affected. On written request, BLE would "furnish a test period average to all BLE employees who, pursuant to this agreement:

1) follow(ed) their position/work to TTMS;
2) transfer(red) to TTMS;
3) or remain(ed) with their position/work on BLE."

In addition, BLE agreed that it would also..."on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company."

At no time during the negotiations to reach an Implementing Agreement did the carriers ever promise, suggest or even imply that our offer to provide TPA information was tantamount to pre-certifying any employees. The commitment to provide TPA information was nothing more than a good will gesture that we felt would be of interest to the employees. It was not a commitment of pre-certification of all headquarters employees; and it certainly was not a six-year commitment by the Carriers to pay over a hundred employees a displacement allowance every month that their earnings would randomly fall short of their TPA.

We said repeatedly throughout the negotiations that we did not envision any employees being adversely affected by the transaction. It is unimaginable that we would simply waive our right to argue that they were not "adversely" affected, and make the six-year commitment that you allege.

In the next paragraph of Article VII of the Implementing Agreement, the parties agreed as follows:

> "Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claim for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made."

* * * * *

The Organization argued at our July 2001 meetings that because that sentence used the single word "affected" and not the standard *NYD* term "adversely affected," the parties must have mutually intended that everybody was somehow certified as being displaced. We disagree; we never agreed that all such employees would be deemed "displaced."

Regardless, eligibility for such allowances does not hinge on the presence or absence of the word "adversely" in the Implementing Agreement. The obvious purpose of that sentence is to make clear that **the only eligible employees** are those employees "who are entitled to a monthly displacement or dismissal allowance under...New York Dock." (underlining added)

Employees are not eligible for displacement or dismissal allowances under *New York Dock* unless they can demonstrate that they were adversely affected, i.e., displaced or dismissed as a direct result of the transaction.

I suggest that we meet here in Conference Room 1-A at 10:00 a.m. on Wednesday, October 3, 2001 to discuss this further.

Respectfully,

W. G. Sjoberg

cc: J. F. Ingham
S. Siriano
T. P. Stafford
J. E. Streett

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 7

Founded December 29,1899

Transportation Communications International Union

Challenging the future with over a century of pride!

Robert A. Scardelletti, ***International President***
James L. Quilty, ***International Vice President***

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October 15, 2001

File: BLD/TTMS

Mr. William G. Sjoberg
Director Labor Relations
Tracks, Traffic Management Services, Inc.
135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Dear Sir:

This is in response to your letter of September 7th and discussions involving the dispute over our § 4 Implementing Agreement (IA) of December 22, 2000. Although in your letter you have characterized the underlining New York Dock (NYD) transaction giving impetus to the dispute as simple, it has proven anything but that.

As you are aware, it was the carriers that desired a prompt IA with TCU and pressed for such. Assuredly, the carriers wanted an IA with TCU in place before the closing date of its reorganization for a number of reasons – saving additional expense and avoiding delay being foremost.

It was in this atmosphere the carriers approached TCU and our IA was fashioned. One quid pro quo for TCU's timely handling during the § 4 process was the prompt election of benefits outlined in Article VII of our Agreement and the record bears me out on this. The providing of test period averages (TPA) to all affected employees was in recognition of their displacements and to provide each with an informed source for election of NYD benefits.

Notwithstanding, as the carriers refuse to accept the clear and unambiguous language of our Agreement, we jointly have agreed to establish a NYD § 11 Committee to resolve the matter. It has been agreed that Mr. J. C. Flectcher will serve as the § 11 Committee's Neutral Member with January 15, 2001 agreeable to all parties for its meeting.[1]

[1] It is suggested the parties exchange their respective submissions on January 10, 2002.

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This will advise you that the Organization's "Questions at Issue" will be:

1) Did Article VII of the parties' December 22, 2000 Implementing Agreement recognize affected employees by providing them with a test period average (TPA) and an entitlement to New York Dock protective benefits when they: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE; and,

2) Did Article VII also recognize BLE employees dismissed by the transaction and unable to follow or remain with their position/work on either company as affected and provide them with NYD protection in accordance with Article I, Section 5 of New York Dock?

3) If the answer to either Question No. 1 or No. 2 is in the affirmative, will the carriers now be required to accept the election of benefits by all employees desiring same and make each whole for all benefits from the date they were initially affected under either Section 5 or 6 of New York dock, if submitting claims for such within sixty (60) days following the date of this § 11 Committee's decision?

Please advise if the carriers are in agreement with the questions as outlined above.

Very truly yours,

James L. Quilty

James L. Quilty
International Vice President

cc: R. A. Scardelletti, IP
T. P. Stafford, Pres. ASD
S. Siriano, VGC ASD

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 8

Tracks Traffic and Management Services, Inc.

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

William G. Sjoberg
Director Labor Relations

Phone: 412/829-6730
Fax: 412/829-3455

October 31, 2001

VIA FACSIMILE TO 402-964-0136

Mr. James L. Quilty, International Vice President
Transportation Communications International Union
12712 Miami Circle
Omaha, NE 68164

Dear Mr. Quilty:

This is in reply to your October 15, 2001 letter received October 19, 2001 in connection with our *New York Dock* dispute.

The parties have jointly agreed to establish a *New York Dock* §11 Committee of Arbitration with Mr. J. C. Fletcher to serve as the Neutral Member. We further agreed to hold the hearing on Tuesday, January 15, 2002 in the Chicago area. Your footnote suggestion that the parties exchange their respective submissions on January 10, 2002 is agreeable to the Carrier.

Based upon your remarks at conference on October 4, 2001, the Carrier felt that the parties would work together to pose the "Question at Issue" addressing eligibility for active employees first. Depending on the resulting answer, a question may or may not need to be framed later to cover inactive employees. In short, I thought that we would simply be resolving whether or not certain TCU-represented employees were automatically certified as displaced employees when the Carrier provided them with their individual test period average information.

It was with some surprise, therefore, that I noted the series of perplexing compound questions that you had posed, and your declaration that those questions constitute "the Organization's 'Questions at Issue.'" The Carrier felt that the dispute was, as you stated in the penultimate paragraph (page 4) of your August 28, 2001 letter, over the Carrier's "assertions that providing the TPA to affected employees did not also provide them with an entitlement to NYD..." You went on to argue that the Carrier's position was insupportable, etc., and you suggested that

"we arrange to meet once again on this matter with the aim of settling this dispute." (Underscoring added)

In keeping with your August 28, 2001 description of this dispute, the Carrier suggests that the parties agree to pose the Question at Issue as follows:

> "Under the terms of Article VII of the Implementing Agreement dated 12-22-00, when the Carrier agreed to provide TPA information to the employees who would be "affected" by the transaction, did this constitute an automatic certification that these employees would be eligible for monthly displacement or dismissal allowances under New York Dock following the transaction, without regard to whether they actually met the definition of a "displaced" or "dismissed" employee under New York Dock or were otherwise adversely affected by the transaction?"

Allied Services Division Vice President Siriano has called and arranged a tentative meeting here for November 6th or 7th, 2001, depending on your committee's schedule. We can discuss this further at that time.

Respectfully,

W. G. Sjoberg

cc: Sam Siriano

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 9

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1095

John C. FLETCHER, Chairman & Neutral Member
John C. CAMPBELL, Labor Member
John F. INGHAM, Carrier Member

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

and

BESSEMER & LAKE ERIE RAILROAD COMPANY
DULUTH, MISSABE & IRON RANGE RAILROAD COMPANY
ELGIN, JOLIET & EASTERN RAILWAY COMPANY
LAKE TERMINAL RAILROAD COMPANY

Date of hearing - July 15, 1997
Date of Award - July 28, 1997

Background: Under Finance Docket No. 31363,[1] the Interstate Commerce Commission approved the control by Transtar, Inc. over the Bessemer & Lake Erie Railroad Company (B&LE), the Duluth, Missabe & Iron Range Railroad Company (DM&IR), the Elgin, Joliet & Eastern Railway Company (EJ&E) and the Lake Terminal Railroad Company (LT). In doing so, the Commission imposed employee protective conditions as set forth in *New York Dock Ry. - Control - Brooklyn Eastern District Terminal*[2] (NYD).

On November 26, 1996, the Carriers served notice upon the Organization and their clerical employees of the Carriers' intent to "coordinate their accounts payable; accounts receivable; wage payroll; car hire and demurrage; revenue accounting; general accounting; property accounting; customer accounting and agency work; stores accounting; and typing, stenography and personal computer work into the Bessemer and Lake Erie Railroad Company." According to this notice, which was served pursuant to Article I, Section 4 of the NYD Conditions, the work would be performed by clerical employees of the B&LE following the coordination. The notice then identified seventy-four (74) positions and incumbents whose work would be transferred to the B&LE, which would increase its

[1] *Blackstone Capital Partners L.P., Blackstone Transportation Partners L.P. and USC Corp. - Exemption* (1988).

clerical force by sixty-two (62) positions. The notice further advised that employees adversely affected by the coordination would be allowed NYD benefits. Finally, the Carriers advised that these changes would be placed into effect March 1, 1997, or as soon thereafter as practicable.

The parties commenced negotiations toward reaching an implementing agreement concerning this coordination. Unable to reach an agreement, the Carriers requested arbitration. The National Mediation Board, by letter dated March 11, 1997, has designated Helen M. Witt as the Arbitrator in that matter. The parties continued to meet with the objective of reaching an implementing agreement. They have been unable, however, to reach agreement on an issue relating to the impact of an employee's declination of a position on the B&LE upon the employee's protective benefits under the February 7, 1965, Job Stabilization Agreement (JSA). They consequently agreed to submit this question to this Special Board of Adjustment for resolution, selecting John C. FLETCHER, Arbitrator, as Chairman and Neutral Member.

STATEMENT OF THE ISSUE

The Carriers state the issue before the Board as follows:

> *Does an employee cease to be a protected employee under the February 7, 1965 Agreement if he fails to obtain a position available to him in the exercise of his seniority rights, or fails to accept offered employment in his craft, in connection with a coordination and transfer of work covered by the New York Dock employee protective conditions involving several railroads under common control?*

The Organization states the issue before the Board as follows:

> *Where an employee affected by a New York Dock transaction declines an offer of transfer and exercises seniority on his/her home railroad and obtains a regular position or has meaningful work opportunities while in a furloughed status, may the Carrier deprive such employee the entitlement benefits under the February 7, 1965 Agreement, as amended?*

---

[2]Finance Docket No. 28905, 360 ICC 60 (1979).

The Position of the Carriers: The Carriers argue that an employee who voluntarily declines to follow his work to the B&LE as part of the NYD transaction, and is also unable to hold a position on his home road, would cease to be protected under the JSA. Carriers assert they served a proper notice in accordance with Article I, Section 4 of NYD. They now say there are seventy-four (74) positions that will be abolished[3] and sixty (60) new positions will be established on the B&LE at Monroeville, Pennsylvania. This, notes the Carriers, would leave a net reduction of fourteen (14) positions as a result of the coordination.[4]

The Carriers aver the parties have tentatively agreed that offers for the new positions will be made in seniority order on each of the involved properties. On the EJ&E, for example, the Carriers note that fifty-one (51) positions will be abolished, but only forty-two (42) will move to the B&LE. According to the Carriers, the affected employees have two options, namely following their work to the B&LE with NYD protection or exercise seniority to the six (6) remaining positions on the EJ&E. Employees who cannot hold one of the remaining jobs, say the Carriers, will be furloughed. It is these employees, who decline a move to the B&LE but cannot hold a job on their own road, who are the subject of this arbitration.

The Carriers note the entire coordination has been handled as a NYD transaction and the JSA, therefore, is not applicable. They cite Award No. 485 of Special Board of Adjustment No. 605, involving a dispute between the Brotherhood of Railroad Signalmen and CSX Transportation wherein the claimant's work had been transferred from Saginaw, Michigan, on the former Pere Marquette, to Savannah, Georgia. Instead of transferring or displacing junior employees on the former Pere Marquette, the claimant sought a separation allowance under the JSA. In denying the claim, the Board concluded that the JSA lacked

[3]Fifty-one (51) on the EJ&E, seventeen (17) on the DM&IR and six (6) on the LT.

"relevance and applicability" to the claimant's situation and that the transaction "falls within the direct purview of the New York Dock conditions." The Carriers cite additional Awards of Referees Fredenberger, Sharp, O'Brien and Zack in New York Dock arbitrations holding that employees who decline to move are not entitled to dismissal or separation allowances under NYD conditions.

The Carriers quote an agreed interpretation to Article V of the JSA as follows:

> Question No. 2: If there are more than one qualified protected employees available for a position to which an employee is required to transfer under this Article V, which employee, in the final analysis, must accept the transfer?
>
> Answer to Question No. 2: The position at the new location will first be offered to the senior protected qualified employee. If he elects to decline such position and retain his present position or exercises seniority on another position in his home seniority district, the position will then be offered to other protected qualified employees in seniority order, with the understanding that the junior qualified protected employee must accept the position which is offered.

The Carriers acknowledge that employees may elect protection under the JSA in lieu of NYD protection, but they deny that an employee may elect to be furloughed and remain protected under the JSA if he refuses to follow his work to the B&LE. In further support of this position, the Carriers quote Article II, Section 1 of the JSA, which provides:

> An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements.

In this respect, the Carriers argue the refusal to follow work to the B&LE is a "failure to retain or obtain a position available. . . in the exercise of . . . seniority rights in accordance with existing rules or agreements. They contend the JSA, in consideration for retaining employees in protected service, gave them the right to make technological, operational and

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*Carriers say that nine (9) of the eliminated positions will come from the EJ&E, three (3) from the DM&IR and two (2) from the LT

organizational changes and to transfer work and/or employees throughout the system. They also point to Article III, Section 1 of the JSA, which states:

> One of the purposes of such implementing agreements shall be to provide a force adequate to meet the carrier's requirements.

The Carriers conclude that an employee who declines the offer of a position at a new location cannot be considered a "dismissed employee" under NYD or the JSA. Accordingly, they ask the Board to find that employees cease to be protected under the JSA if they refuse to follow their work to the B&LE and cannot hold a job on their home road.

The Position of the Organization: The Organization argues that a NYD transaction is governed by specific guidelines and is separate and apart from those types of circumstances contemplated by the JSA. The Organization insists there is nothing in NYD that would either modify or eliminate the terms and conditions governing employees who remain on individual carriers where facilities are not coordinated by NYD.

The Organization notes that the two protective conditions were derived from vastly different circumstances and by differing means. NYD, says the Organization, was imposed by the Interstate Commerce Commission to set forth certain minimal levels of benefits to which affected employees were entitled when their employment circumstances were altered due to two or more carriers merging facilities or work.

The Organization cites Sections 2 and 3 of Article I of NYD in support of its position. Those sections read, in part, as follows:

> 2. The rate of pay, rules, and working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statute.
>
> 3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such

employee may have under any existing job security or other protective conditions or arrangements. . . .

The JSA, on the other hand, was reached through collective bargaining prior to NYD, says the Organization, and was intended to apply in wholly different circumstances. According to the Organization, the JSA was written to protect employees against the loss of employment in the railroad industry due to the advent of technology then being developed and implemented by carriers. In exchange for a guarantee that jobs would not be eliminated except through attrition and that earnings would not be affected by technological change, the Organization notes carriers obtained the right to make technological, operational and organizational changes throughout the system within craft lines.

The Organization points out that this transaction will not result in the system-wide elimination of all clerical work, and that the Carriers have the right to utilize the remaining employees, whether they hold positions through the exercise of seniority or are furloughed. The Carriers have the right, says the Organization, to transfer these employees throughout the system to fill existing or subsequent positions, or to assign them to extra work from furloughed status.

The Organization cites a Special Arbitration Board decision in a dispute between the Transportation-Communications International Union and the Grand Trunk Western Railroad (Referee LaRocco) setting forth guidelines under which the protection afforded by the JSA may be extinguished. The Organization quotes the following portion of that Award:

> The common threads running through the above discussed line of authorities are that the drafters of the Agreement did not intend for employees to continue receiving protective benefits when: 1.) a carrier completely ceased operating a segregated segment of its transportation business; 2.) the protected employees could not exercise their seniority to any other positions on their seniority district because all the work which they had previously performed was eliminated; 3.) there was no reasonable likelihood that the protected employees would perform meaningful work for the carrier in the future; and 4.) the cessation of operations with the consequential elimination of work could not be traced to a transfer of work.

All four elements must be present to justify a company's termination of benefits under the February 7, 1965 Agreement.

Applying the LaRocco decision, the Organization argues that at least the first three criteria have not been met in this case. It avers the Carriers' business will continue to operate as it did prior to the transaction and the employees will retain seniority rights on their respective districts where clerical work will remain. Because this work remains, the Organization asserts there is a reasonable likelihood the protected employees will perform meaningful service in the future. For these reasons, the Organization concludes both statements of issue must be answered in the negative as their protection cannot be eliminated.

DISCUSSION

Although the parties have stated their questions to this Board in broader terms, the real issue in this dispute is the status of an employee who, after being given the opportunity to transfer to Monroeville to follow his work, declines the transfer and becomes furloughed because of insufficient seniority to work on his seniority district. To answer this question, the Board must examine both the NYD conditions and the JSA. The fact that this transaction is under the aegis of NYD does not vitiate the employees' protection under the JSA. To be sure, the individual employees have the option of electing which conditions under which they wish to be protected.

As noted in the Awards cited by the Carriers, the Interstate Commerce Commission recognized the efficiencies that would result through a reallocation of work forces as a result of mergers of railroads. To achieve such efficiencies, the NYD conditions were drafted to permit the carriers to integrate the work forces of the separate properties and move work and employees to central locations. The Commission obviously saw that these efficiencies could be frustrated if employees refused to relocate and the carriers were required to hire new employees at the centralized locations. To avert such a situation, the

Commission created both an incentive to relocate and a disincentive not to relocate. As an incentive, NYD contains provisions for relocation expenses as well as protection against losses as a result of the sale of a residence or an early termination of a lease. As a disincentive, the Commission has declined to extend earnings protection to employees who decline opportunities to work that require relocation. This was not an oversight. As noted by Referee Fredenberger in his decision involving the International Association of Machinists and Aerospace Workers and the Baltimore and Ohio Railroad Company and the Louisville and Nashville Railroad Company:

> In support of its contention the Organization analyzes the treatment of the terms "dismissed employee" and "change of residence" in various protective agreements and arrangements. The Organization argues that it is the intent of those conditions and arrangements that employees not be forced to move against their wishes if such move involves a change of residence. The Organization seeks specific language in the arbitrated implementing agreement which it contends would apply this protection to the coordination in this case.
>
> The basis defect in the Organization's argument, as the Carrier notes, is that it ignores the history of this issue before the ICC. In its Decision in Finance Docket No. 28905 the Commission was requested by labor organizations to expand the definition under Article I, Section 1(c) of the New York Dock Conditions of a dismissed employee so as to protect employees from having to relocate. The ICC specifically rejected the organizations' request. The ICC has spoken authoritatively on the matter, and this Neutral must follow the ICC's pronouncement.

As a result of the NYD conditions, Carriers' employees will have work available to them at Monroeville. Whatever rights they would have to take the Monroeville positions would arise through an implementing agreement made pursuant to NYD. In this regard, it is important to note that the implementing agreement is *not* an agreement made pursuant to Article III of the JSA. For this reason, Article II, Section 2 of the JSA does not apply. Further, Article V, which includes a provision for separation pay, does not apply because it anticipates the relocation of employees under an implementing agreement pursuant to the JSA.

Instead, Section 1 of Article II applies. It reads as follows:

> An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, *or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements*, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement. [emphasis added]

An implementing agreement made pursuant to NYD would entitle the Carriers' employees to transfer to Monroeville by virtue of their seniority on their individual properties. Such an arrangement would be more than a mere preference to employment in that it would additionally permit transferred employees to dovetail their seniority on the new district. Thus, the Carrier is correct that an employee who fails to accept a transfer and cannot work in his own seniority district would cease to be a protected employee under the JSA. Accordingly, he would be entitled to neither a wage guarantee nor separation pay.

The LaRocco Award cited by the Organization is not on point in that it involved a dispute arising from the carrier's decision to terminated protective benefits that had already accrued and were being paid. The dispute herein relates to the initial accrual of such benefits.

AWARD

The question at issue proposed by the Carriers is answered in the affirmative.

The question at issue proposed by the Organization is answered in the negative if the employee is able to hold a position, but is answered in the affirmative if the employee is furloughed while declining a transfer.

John C. Fletcher, Chairman & Neutral Member

John C. CAMPBELL, Employee Member

John F. INGHAM, Carrier Member

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 10

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	
TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, (BRAC) Organization,	OPINION AND AWARD Pursuant to Article I, Section 11 of the New York Dock Conditions
and	
MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY, Carriers.	Case No. 4 Award No. 5

Hearing Date: November 11, 1987
Hearing Location: Sacramento, California
Date of Award: March 1, 1988

MEMBERS OF THE COMMITTEE

Employees' Member: F. T. Lynch
Carriers' Member: L. A. Lambert
Neutral Member: John B. LaRocco

ORGANIZATION'S QUESTIONS AT ISSUE

(1) Is James Brewer a displaced employe pursuant to New York Dock?

(2) Shall Carrier now be required to restore James Brewer's displacement allowance retroactive to the date he was affected by displacement pursuant to Implementing Agreement No. 28?

CARRIER'S QUESTION AT ISSUE

(1) Is Omaha Clerk J. Brewer entitled to the restoration of New York Dock Conditions under Merger Implementing Agreement No. 28?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (MP) and the Western Pacific Railroad (WP). [ICC Finance Docket No. 30000.] To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

By stipulation, the Organization and the Carrier filed post hearing letter briefs with this Committee. The Neutral Member received the final correspondence (from the Organization) on Februay 13, 1988. Thus, this decision is being issued within the Section 11(c) time limitation.[1]

II. BACKGROUND AND SUMMARY OF THE FACTS

Pursuant to Section 4 of the New York Dock Conditions, the MP and UP served written notice, dated January 14, 1986, on the Organization of their intent to transfer and coordinate UP

[1]All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will only cite one particular section number.

Operation Control Specialists with MP On-line System Support Specialists. On April 16, 1986, the parties entered into Implementing Agreement No. 28 to cover employees affected by the transaction. The Carrier executed the transaction during September, 1986. The work was transferred from Omaha and coordinated with similar work performed at St. Louis.

As part of the coordination, the Carrier abolished Clerk Roth's Operation Control Specialist position effective September 18, 1986. In accord with Implementing Agreement No. 28, Clerk Roth exercised his seniority to displace Claimant from his General Clerk position in the Banking Operation Bureau of the UP Accounting Department. The record is unclear if thereafter a General Clerk vacancy arose or if the Carrier created a new General Clerk position. The evidence, however, strongly suggests that the latter occurred because the Carrier wanted to stop the chain of displacements. Whether old or new, Claimant procured a position with the same job title, identical duties, equal pay rate and same location, bureau, and department as the position from which he was displaced.

On September 23, 1986, the Carrier told Claimant the amount of his protective guarantee under both the New York Dock Conditions and the February 7, 1965 Job Stabilization Agreement so Claimant could elect his protective benefits in compliance with the first proviso of Section 3 of the New York Dock Conditions. The Carrier computed Claimant's test period monthly average

earnings under the New York Dock Conditions to be $2,670.95 with test period hours of 176.6 per month. Claimant's protected rate under the February 7, 1965 Agreement amounted to $2,225.22 a month. Since Claimant's General Clerk position carried a monthly rate of $2,425.18, Claimant chose New York Dock protection.

The Carrier paid Claimant a monthly displacement allowance of $245.77 for a short period subsequent to the transaction. In early November, 1986, a UP Labor Relations Manager advised Claimant that the Carrier had erroneously provided him with protective benefits under the New York Dock Conditions. The Manager asserted that Claimant had not been adversely affected by the transaction and thus he was not a displaced employee as defined by Section 1(b) of the New York Dock Conditions. The Carrier reverted Claimant's protective status back to the February 7, 1965 Agreement and recovered from his later pay checks the displacement allowance it had earlier disbursed to him.

The primary issue in this case is whether or not Claimant is a displaced employee. In addition, resolution of the main issue involves consideration of several ancillary issues especially since this claim represents a lead case and similar claims are being held in abeyance on the property awaiting the outcome of this dispute. Specifically, the parties have requested this Committee to provide it with general guidelines for handling similar cases, which involve not only the definition of a displaced employee but also test period overtime earnings, the

necessity for an immediate entitlement to protective benefits and the extent to which a New York Dock transaction could possibly affect employees of the merged Carriers.

The definition of a displaced employee is set forth in Section 1(b) of the New York Dock Conditions which reads:

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

The formula for calculating a displacement allowance and the conditions under which a displaced employee receives the allowance are set forth in Section 5(a) of the New York Dock Conditions as follows:

> "So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.
>
> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and <u>provided further</u>, that such allowance shall also be adjusted to reflect subsequent general wage increases.
>
> If a displaced employee's compensation in his retained position in any month is less in any month in which he

performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position." [Emphasis in text.]

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Claimant obviously fits the definition of a displaced employee since he was displaced by a senior Clerk who was directly affected by the transaction. The Carrier implicitly conceded that Claimant was entitled to a Section 5 displacement allowance inasmuch as it provided him with protective payments after Claimant was displaced.

Initially, the Organization argues that the words "adversely affected" do not appear in the New York Dock Conditions. Even without any difference between Claimant's test period average earnings and his current compensation, Claimant would satisfy the eligibility criteria for being a Section 1(b) displaced employee. Thus, Claimant need not show any adverse effect to be granted protective benefits.

Alternatively, Claimant was harmed by the transaction. Although Claimant attained a job with the same title, pay rate and general duties as his prior position, the transaction placed him in a worse position with respect to his aggregate compensation.

Claimant's test period average earnings were $245.77 higher per month than the monthly rate of his new assignment. Claimant was affected immediately upon being unable to attain a position producing compensation equal to or exceeding the compensation he had received in the position from which he was displaced. The Carrier improperly equates the term "position" to the word "assignment." Arbitration Board No. 284 (Robertson) ruled that the term "position" is "...not synonymous with job or assignment but rather connotes status, situation or posture." The Board went on to observe that the purpose of protective conditions is "...to assure an affected employe that his employment status insofar as compensation and working conditions were concerned would be preserved to him for the ...protective period..." Therefore, an employee may be placed in a worse position with respect to his compensation or rules governing working conditions even if he obtains a position with the same rate of pay as his former job. See also Public Law Board No. 1409 (Edgett).

The Organization further argues that even if there was a gap between the date of the transaction and the month Claimant incurred a diminution in compensation, the delayed repercussions would be attributable to the transaction. UP/MP v UTU, NYD §11 Arb., Case 3 (Fredenberger, Jr.; 6/24/86). Thus, Claimant need not suffer a decrease in compensation simultaneous with implementation of the transaction to become a displaced employee.

Section 5(a) of the New York Dock Conditions provides that the Carrier shall use Claimant's total compensation during the test period to obtain his test period average earnings. Acknowledging that the formula for calculating the displacement allowance is arbitrary, Arbitration Board No. 284 nonetheless decided that the Carrier must count all earnings derived from a protected employee's employment status. Thus, the Carrier cannot deduct what it calls extraordinary overtime from Claimant's test period average earnings. Even if abnormal overtime compensation were to be excluded from the displacement allowance formula, the Carrier has failed to demonstrate that Claimant received extraordinary overtime during his test period. Instead, subsequent to Claimant's displacement, the Carrier created a new position which was awarded to Claimant. The increase in office manpower eliminated overtime work.

B. The Carrier's Position

While the Carrier admits that Claimant was displaced because of a New York Dock transaction, it vigorously argues that Claimant was not placed in a worse position with regard to either his compensation or rules governing his working conditions. Claimant procured a position with exactly the same rate of pay as his prior job. In essence, nothing changed. He worked an identical job at the same location with the same duties. Claimant worked under the same collective bargaining agreement that he was subject to prior to his displacement. Thus, there was no change

in the rules governing Claimant's working conditions. An employee who is able to exercise his seniority to a position carrying the same or higher rate of pay as the position from which he was displaced is not entitled to a displacement allowance. BRAC v. CUT, Appendix C-1 Arb. (Rohman; 7/13/73); IBEW v. PC, Appendix C-1 Arb. (Rohman; 8/6/74); RED v. AT & SF, Appendix C-1 Arb. (Gilden; 2/25/74). Put simply, Claimant was not adversely affected. For a short time, the Carrier incorrectly provided Claimant with a displacement allowance but as soon as it detected its error, the Carrier promptly recovered the overpayments and accurately reverted Claimant's protection back to the February 7, 1965 Job Stablization Agreement.

Due to some extraordinary conditions necessitating overtime, Claimant received unusually high earnings during his test period. With its submission, the Carrier submitted a statement from Banking Manager Stogdall attesting that, between January, 1985 and January, 1986, the Banking Bureau was developing a new mechanized system for processing MP employee wage attachments. The installation of the new computer system was made in anticipation of several Accounting Department consolidations. The Manager emphasized that Claimant did not earn any overtime subsequent to his test period demonstrating that the prior overtime compensation was extraordinary and excessive. The ICC did not promulgate the New York Dock Conditions to confer a windfall upon employees. In Docket 137 of the Section 13 Disputes

Committee, Referee Bernstein adjudged that an unusual increase in overtime earnings, directly caused by the impending coordination, are excluded from the total compensation used to determine an employee's test period average earnings. When Claimant's excessive overtime compensation is factored out of the displacement allowance formula, he suffered no loss of earnings.

In a related issue, the Carrier is alarmed by the chain of displacements caused by employees who exercise their seniority. According to the Carrier, a single displacement causes a domino effect creating absurd situations where the Carrier inequitably pays eight (or more), instead of merely one, displacement allowances.

IV. DISCUSSION

To some extent, the parties, especially the Carriers, have combined what is really two separate issues into one issue. To minimize any confusion, the Committee will separately address the following issues. First, was Claimant a displaced employee within the meaning of Section 1(b) of the New York Dock Conditions? Second, if Claimant was a displaced employee, was he entitled to a displacement allowance during any month subsequent to September, 1985?

Section 1(b) lays down a two pronged, cause and effect test for determining if a worker is a displaced employee. The causation step of the test concerns whether Claimant was directly or indirectly affected by a New York Dock transaction. In this

case, the parties concur that Claimant was displaced from his General Clerk position as a result of a transaction. To satisfy the second prong of the test (the effect), an employee must have been placed in a worse position with respect to either his compensation or rules governing his working conditions. It should be noted that the employee need not suffer both a reduction in compensation and be placed in a disadvantageous position with respect to rules covering his working conditions. The employee must only show one or the other. As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented. UP/MP v. UTU, NYD § 11 Arb., Case No. 3 (Fredenberger, Jr.; 6/24/86). The Appendix C-1 arbitration decisions cited by the Carriers are distinguishable since the employees in those cases did not show a reduction in compensation at any time during their protective period. Nonetheless, the critical words "worse position" contemplate that an employee must suffer some detriment to his employment status. The parties' dispute herein centers on whether or not Claimant was placed in a worse position with respect to his compensation. More precisely, the parties disagree over whether or not Claimant's test period average earnings were improperly inflated because he performed overtime service during his test period.

Prior Arbitration decisions differ over what earnings should be included in a worker's test period average earnings calculation. Compare Arbitration Board No. 284 (Robertson) with Section 13 Disputes Committee, Docket No. 137 (Bernstein). Thus, the term "total compensation" appearing in Section 5(a) of the New York Dock Conditions is susceptible to more than one interpretation. However, the term cannot be wholly void of meaning. If the ICC had desire to restrict test period average earnings to an amount less than aggregate earnings, it would have used words such as "straight time wages" or "monthly rate of pay" or "hourly pay rate" or "normal earnings" in lieu of the broad terms "monthly compensation" and "total compensation" which are found in Section 5(a). While test period average earnings cannot be computed solely with straight time earnings, the term "total compensation" in protective arrangements like the New York Dock Conditions has evolved over the years into a meaning slightly at variance with the literal language. As the Section 13 Disputes Committee ruled, excessive overtime earnings directly attributable to the imminent coordination are outside the ambit of total compensation. The exception is narrow. The Carrier bears the heavy burden of proving that the overtime was extraordinary and linked directly to the impending implementation of the transaction. Regular overtime, recurring overtime or casual overtime attached to any assignment is properly included within the test period average earnings. The narrow exception, which

excludes only one type of overtime, is designed to prevent employees from profiting from the transaction. Excessive overtime earnings arising directly from the transaction would not have otherwise accrued to the employee if the Carrier did not implement the transaction. In such instances, the employee would obtain a windfall multiplied by the number of years in his protective period. Whether any overtime which an employee earns during this test period should be included or excluded from the Section 5(a) formula must be decided on a case by case basis using the guidelines discussed above.

In this particular case, the Carrier has not demonstrated that the overtime Claimant performed during his test period arose directly in anticipation of the imminent transaction. When the Carrier initially revoked Claimant's New York Dock protective status, it did not allege a miscalculation in Claimant's test period average earnings. Instead, the Carrier premised the revocation entirely on Claimant's capacity to procure an identical position with a pay rate equal to his prior position. The Carrier focused solely on Claimant's basic monthly pay and wanted to exclude all earnings above that rate. However, as we discussed above, the test period average earnings often will include earnings above and beyond straight time wages. As this case neared arbitration, the Carrier raised the abnormal overtime issue. To buttress its assertion, the Carrier submitted the statement from the Banking Manager. However, his statement

reveals that Claimant's overtime earnings, which were fairly constant during his test period, were neither abnormal nor related to the transaction covered by Implementing Agreement No. 28. The introduction of the computer program was completed by January, 1986, yet Claimant continued to perform overtime service through June, 1986. Indeed, his overtime earnings apparently peaked in March, 1986 when he received overtime pay of $704.27. As the Manager attested, the workload was greater than the clerical staff could handle during regular work hours. With the addition of another position following Claimant's displacement, the overtime disappeared. Therefore, the most plausible explanation for the test period overtime was a steady workload which employees could not handle without working overtime. Finally, this Claimant did not participate in the transaction covered by Implementing Agreement No. 28 (although he was clearly affected by the transaction). The Carrier has not explained to this Committee how Claimant's test period overtime was due to an impending coordination which did not result in the abolishment of his position. Therefore, an employee can incur a reduction in compensation even if he retains the same job title, same straight time rate of pay and general duties. Arbitration Board No. 289, Docket No. 2 (Bernstein).

Claimant fell squarely within the definition of a displaced employee.

Because we have found that Claimant is a displaced employee, we must address our second issue, that is, whether he is entitled to a displacement allowance. Even if an employee satisfies the definition of a displaced employee, he might not be entitled to a displacement allowance during each month of his protective period. UTU v. C&O/B&O, NYD § 11 Arb. (Prover; 5/18/87).

The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.

The Carrier is concerned about the chain of displacements which, in the long run, steadily expands the pool of employees receiving New York Dock protective benefits. Nothing in the New York Dock Conditions places a cap on the number of employees who might receive displacement allowances. The employee need only

trace his displacement to a Section 1(a) transaction. [See also Section 1(c) which defines a dismissed employee.] The Carriers nonetheless contend that the chain of displacements causes them to disburse an excessive and inequitable number of displacement allowances. We are unpersuaded by this argument. The Carriers are forgetting the source of their problem. It is the Carriers' transaction that disturbs work place tranquility. Absent the transaction, there would not be a chain of displacements. In addition, the bumping which occurs when a transaction is implemented simply reflects the natural operation of the well entrenched seniority principle. The parties recognized, in Article III, Section 3 of Implementing Agreement No. 28, that the effects of a transaction could flow to areas remote from the department where the transaction was actually implemented. Finally, while the chain of displacements may require the Carriers to pay many allowances, the Carriers' liability is not limitless. Should an employee fail to exercise his seniority to an available position producing compensation greater than the position he elects to retain, Section 5(b) of the New York Dock Conditions allows the Carriers to offset the employee's protective guarantee.

AWARD AND ORDER

The Answer to the First Question at Issue submitted by the Organization is Yes.

The Answer to the Second Question at Issue submitted by the Organization is Yes.

The Answer to the Question at Issue submitted by the Carrier is Yes.

Dated: March 1, 1988

F. T. Lynch
Employees' Member

L. A. Lambert
Carriers' Member

John B. LaRocco
Neutral Member

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 11

ARBITRATION PURSUANT TO ARTICLE I, SECTION 11 OF THE NEW YORK DOCK CONDITIONS

In the matter of ICC Finance Docket No. 32549 between

Burlington Northern Santa Fe Railway Company

-and-

Transportation-Communications International Union

DECISION

Before the Arbitration Committee

J. C. Campbell, Organization Member
Dan Kozak, Carrier Member
Joseph A. Sickles, Neutral Member

BACKGROUND INFORMATION

The Interstate Commerce Commission (ICC), the predecessor agency of the Surface Transportation Board (STB), approved a merger and consolidation of the Burlington Northern Railroad Co. (BN) and the Atchison, Topeka and Santa Fe Railway Co. (SF) on August 16, 1995 (ICC Finance Docket No. 32549). The ICC imposed the *New York Dock* labor protective conditions for affected employees. On December 19, 1995, the Burlington Northern Santa Fe Railway Company (BNSF or the Carrier) and the Transportation-Communications International Union (TCU or the Organization) reached an implementing agreement under the *New York Dock* requirements.

Subsequently, the Carrier notified the Organization on January 10, 1997, of its plans to relocate certain clerical work. The Carrier planned to move the field support work that was performed in SF Seniority District 709 in Topeka, Kansas, to a BN district in Fort Worth, Texas; 114

clerical positions were affected. At the same time, the customer service work that was being performed in Fort Worth would move to SF Seniority District 709 in Topeka. This swap was accomplished on March 22, 1997. All of the customer service positions in Topeka were rebulletined.

Meanwhile, the Carrier also notified the Organization in December 1996 and January 1997 of its plans to move most of the accounting work being done in SF Seniority District 101 in Topeka to the BN in St. Paul, Minnesota. A total of 87 clerical accounting positions in Topeka (out of 101) were abolished in February and March 1997. The affected employees were placed in other SF positions in Topeka.

Many of the employees in SF Seniority Districts 709 and 101 were displaced or dismissed as a result of the two transactions and are receiving *New York Dock* protective benefits. However, the Carrier denied benefits to 24 employees from Seniority District 709 and 2 employees from Seniority District 101. When the parties were unable to reach agreement on the eligibility of these 26 employees for *New York Dock* protective benefits, the Organization invoked arbitration under Section 11 of the *New York Dock* conditions by letter of July 10, 1998.

A hearing was held on January 28, 1999, at the offices of the National Mediation Board in Washington, DC. The parties exchanged prehearing submissions on January 14, 1999, including numerous prior arbitration awards. Both parties were afforded full opportunity to present their arguments before the three-person arbitration committee.

ORGANIZATION'S STATEMENT OF THE ISSUE

> "Are T.G. Bingham, et al., displaced employees pursuant to *New York Dock*? Shall Carrier now be required to determine the claimants' test period averages as of the date they were affected by a transaction and allow their claims for *New York Dock*?"

CARRIER'S STATEMENT OF THE ISSUE

"Are claimants entitled to a "displacement allowance" under the *New York Dock* conditions, Article 1, Section 5, even though each claimant displaced to a position with the same daily rate of pay as their former position, working conditions remained unchanged, and the quantum of work in the department, as measured by actual available overtime, increased subsequent to the transaction?"

STATEMENT OF FACTS

The relevant provisions of the *New York Dock* conditions state:

> 1. Definitions — (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed..
>
> (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction, is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> * * * *
>
> 5. Displacement allowances — (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protection period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.
>
> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further that such allowance shall also be adjusted to reflect subsequent general

wage increases.

> If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

The parties agree that the swap of field support work and customer service work in Seniority District 709 and the transfer of accounting work out of Seniority District 101 were transactions under *New York Dock*. All 26 claimants in this dispute were placed in jobs at the identical wage grades they held before the subject transactions. Prior to the transactions, the 26 claimants had worked various amounts of overtime; subsequent to the transactions, they also worked various amounts of overtime.

The Carrier states, without refute from the Organization, that the amount of overtime actually worked in the two seniority districts increased substantially in the year after the transactions. In Seniority District 709, overtime hours increased 24.9 percent from 1996 to 1997. In Seniority District 101, overtime increased 32.8 percent from 1996 to 1997.

The 26 claimants concluded that their incomes declined in at least some of the months following the transactions. The TCU requested that the Carrier compute the test period averages (TPAs)—average monthly compensation and average monthly time paid for—for the 26 claimants. The Carrier refused to compute the TPAs, insisting that the 26 employees were not adversely affected by the transactions.

POSITIONS OF THE PARTIES

Carrier's Position

The BNSF asserts that the claimants are not displaced employees under the *New York Dock* conditions because they were not placed in a "worse position" as a result of the transactions. Although the 26 claimants were affected by transactions, they were not adversely affected, the BNSF insists. All 26 claimants were placed in jobs at the same wage grade, and with the increase in overtime in their departments, they all maintained the same or greater potential for earnings:

> A reduction in earnings for a month or so cannot automatically be assumed to be the result of a transaction, especially since the quantum of work in the affected offices, as measured by available overtime hours, actually increased in each of the seniority districts after the transaction. . . . An occasional diminution in earnings in a particular month after the transaction does not make an individual a 'displaced' employee.

The Carrier continues that a comparison of the average monthly compensation during the test period:

> . . . to an isolated month of compensation following the transaction is not [the] proper criterion to determine whether an employee has been placed in a worse position regarding compensation as a result of a transaction.

The Carrier says that the claimants' reduced earnings were due to factors unrelated to the transactions. It notes that if the claimants did not work as much overtime after the transactions—despite the increased availability of overtime work— it was simply because many of them had not bothered to qualify for the overtime work on other positions that was available to them. According to the BNSF, qualifying would have been a simple matter, as it was the same type of work the claimants did on their regular jobs, but involved different commodities. Prior to the transactions, the claimants had taken the initiative to qualify for overtime work on other positions, and they are obligated to do so in their post-transaction positions in order to work the same number of hours they did before the transactions.[1]

The BNSF further contends that it has no obligation to compute TPAs for employees who are not adversely affected by a transaction. The BNSF claims that the

[1]The Carrier also briefly notes that some employees, on occasion, have refused overtime for which they were qualified.

Organization has requested TPAs as a back door approach to demonstrate that the claimants were in a "worse position." The Carrier cites several arbitration awards that have held that the TPA is a formula intended to calculate the **amount** of *New York Dock* protective benefits owed, not **if** such benefits are due. The Organization has the burden of first proving that the claimants were adversely affected by the transactions; and, the Carrier maintains, it has failed to do so in this case.

Organization's Position

According to the TCU, the Carrier initially denied *New York Dock* benefits to the claimants based solely on the grounds that they had been assigned to positions at the same wage grade and, therefore, were not placed in a "worse position" with respect to their compensation. The Carrier is mistakenly interpreting the term "compensation" as used in Section 5(a) of the *New York Dock* conditions to mean "rate of pay." The Organization submitted numerous arbitration decisions supporting its argument that "compensation" under *New York Dock* means total earnings, including overtime, allowances, bonuses, and other elements of pay.[2]

Using their pay stubs for the 12 months prior to the transactions and the months following the transactions, the claimants concluded that they had suffered a loss of earnings as a result of the transactions. The loss of earnings was due to post-transaction overtime, an element of "compensation" under *New York Dock*. Once there is a transaction and employees have identified facts which they believe demonstrate an adverse effect of the transaction, the burden shifts to the employer to prove that something **other than the transaction** was the cause, the Organization argues.

Moreover, it is not necessary that an employee's reduction in earnings occur **immediately** after a transaction in order to be related to that transaction, the Organization adds.

Late in the stages of handling on the property, according to the TCU, the Carrier seized upon the issue of overtime to bolster its argument that the claimants were not in a "worse position" as a result of the transaction, but rather as a result of their failure to work overtime. If the Carrier feels that individual employees are not fulfilling their obligations to make themselves available for sufficient overtime service to satisfy their average time paid for in the test period:

> . . . then the Carrier needs to decline their monthly claims on that basis, pay the displacement allowance which the Carrier calculates to

[2]The Carrier also submitted numerous arbitration decisions that equate "compensation" with "rate of pay." It is apparent that arbitral authority is split on this issue.

be correct, and let the displaced employee appeal the Carrier's declination if desired.

The TCU argues:

> It is not appropriate for the Carrier to paint all of the displaced employees with the same broad brush, as it has done in this dispute.

The relocation of the clerical functions involved in this case was anticipated by the Carrier in its merger application to the ICC, the TCU notes. The transfers of functions between the BN and SF seniority districts would have been prohibited by the collective bargaining agreements were it not for the ICC-approved merger, and labor protective conditions were imposed as a quid pro quo. There can be no dispute that there was a "transaction" as defined by *New York Dock*, and the employees have identified facts (reduced earnings, as determined from their pay stubs) that demonstrate that they are in a "worse position." Therefore, the Organization asserts, the Carrier is obligated to compute the TPAs for the 26 claimants.

DISCUSSION

The initial issue that must be addressed—because it is central to the other issues raised—is the interpretation of the word "compensation" as it is used in Sections 1 and 5 of the *New York Dock* conditions. Both parties have cited numerous arbitration awards on this issue, and the cited awards are contradictory. The decisions submitted by the Carrier hold that an employee moved, following a transaction, to a new position at the same rate of pay is in no worse position with regard to his compensation—essentially equating "rate of pay" or "hourly rate" with "compensation." The decisions submitted by the Organization give a more expansive definition to the term "compensation," specifically stating that it includes overtime pay.

We are inclined to adopt the more expansive definition. Clearly if the ICC had intended "hourly pay" or "rate of pay" to be the criterion for assessing an adverse impact on employees affected by a transaction, they would have used one of those phrases in drafting the *New York Dock*

conditions. By using "compensation," the ICC must have had in mind elements in addition to straight hourly wages. The word "compensation" is broad enough to include shift differentials, allowances, overtime, and other elements of pay, in addition to the contractually provided hourly rate. Exceptions to the inclusion of *all* elements of compensation are very narrow.[3]

It is interesting to note that the broader definition of "compensation" could conceivably mean that an employee moved to a lower-rated job with a lower hourly rate of pay following a transaction may not be entitled to protective benefits under *New York Dock*. Such an employee could receive allowances or a shift differential or sufficient overtime work to more than make up the deficit in hourly wages. Using the Carrier's definition, this employee would be in a "worse position" because his rate of pay would be lower. Using our definition, this employee would not be entitled to a displacement allowance.

With overtime payments included in their pre- and post-transaction "average monthly compensation," and with the evidence from their pay stubs that their earnings declined in close proximity to the transactions, the claimants have established at least a rebuttable presumption that they are displaced employees entitled to *New York Dock* protective benefits. At that point, the Carrier was obligated to compute the TPAs for compensation and hours paid, as requested by the Organization. It strikes us as common sense to apply the principle Referee Bernstein articulated years ago in Docket No. 62 under the *Washington Job Protection Agreement*: "In the normal and usual case, applying the formula of Section 6(c) [which corresponds to Section 5 of *New York Dock*] will

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[3]Neutral John B. LaRocco (*TCU and Missouri Pacific/Union Pacific*, March 1, 1998) has indicated that one of the very narrow exceptions to compensation to be included in the TPA is extraordinary overtime worked in anticipation of an imminent transaction. He added that the Carrier would have a "heavy burden" of proving that the overtime was linked directly to a transaction and was not part of regular, recurring, or casual overtime.

show whether an employee is 'in a worse position with respect to compensation.'" The critical language is unchanged from the *Washington Job Protection Agreement.*

The Carrier has argued that the claimants' reduction in monthly earnings is unrelated to the transaction. The BNSF says the claimants' failure to qualify for the available overtime work and alleged refusals of overtime are responsible for the earnings deficits. The Carrier places strong emphasis on the fact that the amount of overtime actually worked in the affected seniority districts increased substantially after the transaction, and the employees had ample opportunity to earn compensation equal to their TPAs.

The overtime figures cited by the Carrier (and unrefuted by the Organization) do suggest that overtime certainly did not diminish in the affected seniority districts. However, the figures alone do not show if this overtime was suitable for the 26 claimants' wage grades or if individual claimants had sufficient seniority to be awarded the overtime. As the Organization suggests, a case-by-case investigation for each claimant would be necessary to determine if they failed to meet their obligations to make themselves available for service.

Even if a closer inspection reveals that there was sufficient overtime suitable for the claimants' wage grades and seniority, there is the issue of the claimants' failure to qualify for the particular overtime work available. The BNSF points out that the claimants had, on their own initiative, qualified for overtime work on other positions prior to the transaction, and argues that they had an obligation to do so once again after the transaction. We do not agree. In the absence of the transaction, the employees would have already been qualified for enough overtime to maintain their customary earnings. It was the transaction that put them in the "worse position" of no longer being qualified for an equivalent amount of overtime.

We also reject the Carrier's argument that fluctuations in earnings are normal and, therefore, an occasional drop in earnings does not mean an employee is "displaced." We find that the *New York Dock* conditions require a **monthly** determination for the duration of the protective period as to whether an individual employee is in a "worse position" with respect to compensation, i.e., if his monthly earnings are less than his monthly average compensation in the test period.

Therefore, the Carrier must compute the TPAs for each claimant. This amount must include all overtime worked during the test period[4] and during the protective period. In any month that a claimant's compensation falls below his TPA, the Carrier must pay a displacement allowance. The only exception that would allow a denial of the displacement allowance is if a claimant refuses to work overtime for which he is qualified and consequently does not work enough hours in the month to match his TPA for hours paid.

As a means to minimize the amount of protective benefits it must pay, the Carrier is entitled to require employees to qualify for the available overtime work—on the Carrier's time. In the absence of such a requirement, however, the Carrier may not shift the burden onto the claimants if they do not work their TPA hours because there is insufficient overtime for which they are already qualified.

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[4]The Carrier objects specifically to including the overtime earned by Claimant Usnick when he worked during his vacation period, insisting that this was an extraordinary payment. In the absence of evidence that this overtime was due directly to an imminent transaction, we find that this payment must be included in his TPA.

AWARD

The Carrier shall compute the TPAs for each claimant. The claimants are presumed to be displaced employees in any month in which their compensation falls below their TPA for compensation, assuming the claimants have made themselves available for service for their TPA hours. The Carrier shall pay a displacement allowance in each such month, unless the Carrier can prove that the monthly decline in earnings was due to factors other than the transaction.

This award shall be complied with 30 days after its effective date.

Joseph A. Sickles
Neutral Member

J. C. Campbell
Organization Member

Dan Kozak
Carrier Member

Date: May 1, 1999

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 12

DECISION: The discontinuance of the position of switchtenders and the resumption of the performance of their duties by employees of Carriers using the Depot facilities was not a "coordination".

DOCKET NO. 62 -- Decision by Referee Bernstein

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees
vs.
The Chesapeake and Ohio Railway Company

PARTIES TO DISPUTE

QUESTION: (a) That the Carrier violated and continues to violate provisions of Agreement between The Chesapeake & Ohio Railway Company, Chesapeake District, The Chesapeake & Ohio Railway Company, Pere Marquette District (formerly The Pere Marquette Railway Company) and its Employees represented by The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes for each District signed July 22, 1954, effective August 1, 1954, and more specifically Section 27 with respect to Washington Agreement of May 21, 1936, and job stipulations of Interstate Commerce Commission Finance Docket No. 15228, when it failed to pay to Frank John Sana the difference between the monthly average of his total time paid for during period July 1, 1953 and June 30, 1954 ($523.77/232 hours) and compensation received in his subsequently held positions (Yard Clerk A-171/Yard Clerk A-230). Claim applicable to all employees involved in the coordination and continued in service under similar conditions and withour proper adjustment as required.

FINDINGS: On August 1, 1954 the parties entered into a coordination agreement involving facilities in Chicago, Illinois. This was one of a series of coordinations and agreements growing out of the 1947 merger of The Chesapeake and Ohio Railway Company and The Pere Marquette Railway Company. The parties adopted as the test period July 1953 through June 1954.

In this coordination no employee was deprived of employment. Indeed, two additional clerks were added to the force. No employee was continued in service at a rate of pay lower than that received at the time of the coordination.

However, the employee used as an example, Mr. Frank John Sana, while being paid a rate no lower than he received at the time of the coordination, received lower compensation in some months than the "average monthly compensation" of the "test period". The dispute here invokes Sections 6(a) and 6(c); for convenience the full texts follows:

> "Section 6(a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise

"of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline."

* *

"(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period."

In simplified form the Organization contends that <u>whenever</u> an employee's monthly compensation drops below the average monthly compensation of the test period, as prescribed by Section 6(c), he is entitled to a displacement allowance.

The Carrier contends that so long as an employee has a position - full time position - with a rate of pay equal to or greater than that he received at the time of the coordination, he cannot be eligible for a displacement allowance.

I believe that each position oversimplifies the actual provisions of the Agreement.

All parts of the Agreement should be read together and as harmoniously as possible. Usually all language in an Agreement serves some purpose, although this hornbook maxim is modified by the realistic proposition that some provisions of agreements are redundant. Which is the case depends upon the provisions and possibly their history; the ultimate conclusion is a matter of judgment.

In this case, the judgment is not difficult to make. Section 6(a) and Section 6(c) each serve a different function, although they are interdependent. As contended by the Carrier, Section (a) prescribes the protections to be given

employees "continued in service" and the conditions under which they will qualify for the displacement allowance whose formula is provided by Section 6(c).

That formula is to be applied to the twelve month period (the "test period") preceding the time when an employee is adversely affected by the coordination. The formula guarantees that he shall receive at least the average monthly compensation of the "test period". This is so even if after the coordination he works less than the "average monthly time paid for" during the test period. If the employee works more than the "average monthly time paid for" he is to receive the full benefit of that additional work at his then present rate in addition to the guarantee.

Clearly the function of the Section 6(c) test is to insure to the employee both the "compensation" guaranteed by Section 6(a) and whatever he earns in hours worked in excess of "average monthly time paid for". This "compensation" is the product of this rate of pay, any arbitraries and the amount of time that he worked. It is a commonplace of this industry that certain jobs normally involve overtime, e. g. for a sixth day's work when an unassigned employee is not available or for usual and recurrent, or at least frequent, overtime on given days. Such overtime at premium pay is desired and considered a prerequisite of the position. It seems quite clear that in determining whether an employee is in no "worse position with respect to compensation" after a coordination, the formula is to reflect elements of compensation in addition to the "rate of pay".

The device employed is an "average" of the "last twelve months in which (the employee) performed service" preceding the adverse effect upon him -- thereby reflecting the fluctuations in such compensation that normally occur in the course of a year, e. g. seasonal variations. Obviously, the average will serve only to approximate an equivalence in compensation "before" and "after" coordination. Generally the device is for the protection of the employee. In the normal and usual case, applying the formula of Section 6(c) will show whether an employee is "in a worse position with respect to compensation". In other words, if an employee drops below the "average compensation" (all earnings) for a period equal to or less than the "average monthly time paid for" he makes out a prima facie case that he is in a worse position than before the coordination. Because of the many variables -- new schedules, possible differences in size of work force, probable differences in volume of work, and a host of other factors -- the drop in average compensation is inferentially caused by the coordination.

The inference is rebuttable. Section 6(a) is quite explicit that the "worse(ned) position" must be "as a result of such coordination". If it can be shown that the difference in "compensation" is due to some cause unrelated to the coordination, the allowance would not be due. For this reason clearly demonstrable abnormalities in the test period which are absent after the coordination would negate the coordination as the causative factor.

From this discussion it may be seen that neither "rate of pay" nor the "test period" average earnings is dispositive. The Agreement makes "compensation" the test of "worse(ned) position" and the test period formula provides the normal and usual yardstick of compensation. But, the eligibility of an employee for an allowance depends upon whether any of the difference in compensation is a result of the coordination. Once the eligibility is shown all the difference between a month's compensation after the coordination and the "test period" average is due the employee. By adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur.

In Mr. Sana's case it is undisputed that he had abnormally high earnings in the test period due to the fact that he frequently worked more than one position.

Doubling up may be a normal incident of a position -- but the situation must be a rarity. Here it was due to the prospect of the coordination and the Carriers understandable desire not to hire new employees before the coordination. Where such a clear showing of abnormal earnings is made, the prima facie showing is overcome. There may be complicated situations in which the lower compensation is the result of both an abnormal situation before a coordination and the coordination itself. It is sufficient for Section 6(a) to show that any part of the decrease in compensation is caused by the coordination for an employee to qualify for the full difference between the test period average and actual compensation under the formula.

The tests for "worse(ned) position" are applicable only to the first adverse effect of a coordination. Once the employee is shown to be within the area of employment adversely affected by a coordination he is entitled to the benefits of the five year protective period provided by Section 6(a). This subject is more fully discussed in Docket No. 67, which is to be read in conjunction with this decision in order to ascertain the rights of employees under Section 6.

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

(b) Frank John Sana is not entitled to a displacement allowance because there is no proof that his post-coordination compensation was lower than the "average monthly compensation" (for the number of hours equal to "average time paid for") as a result of the coordination.

DOCKET NO. 63 -- Decision by Referee Bernstein

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees	)	
vs.	)	PARTIES TO DISPUTE
The Chesapeake and Ohio Railway Company	)	

QUESTION: (a) That the Chesapeake and Ohio Railway Company violated and continues to violate applicable terms of its Agreement of April 1, 1958, with its Clerical Employees, provisions of Washington Agreement of May 21, 1936, and stipulations set forth in Interstate Commerce Commission Docket No. 15228 when beginning April 1, 1958, it refused and continues to refuse to apply to its employees the beneficial provisions of documents above referred to as a result of displacement of its employees, or where employees are deprived of employment as a result of coordination of its facilities with those of the Pere Marquette Railway Company, and

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 13

In the Matter of Arbitration, between:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
System Council No. 6

and

CSX TRANSPORTATION, INC.

Decision of Arbitration Committee
pursuant to Article I, Section 11
of the
New York Conditions (350 I.C.C. 60 (1979))
Imposed by the Interstate Commerce Commission
in
Finance Docket No. 28905 (Sub No. 1)

John C. Fletcher, Chairman & Neutral Member

C. A. Meredith, Employee Member
IBEW, System Council No. 6

R. D. Hiel, Carrier Member
CSX Transportation, Inc.

October 3, 1990

INTRODUCTION:

On January 26, 1987, Carrier served notice on the Organization, pursuant to the provisions of the September 25, 1964, National Agreement of its intent to transfer certain mechanical work from its Louisville, Kentucky shops to Corbin, Kentucky. Five months later, to the day, an Implementing Agreement was reached, which provided that New York Dock Conditions, (New York Dock Railway Control - Brooklyn Eastern

TCU EXHIBIT 13
PAGE 1

District Terminal, 360 I.C.C. 60 (1979)), would be applicable the transaction.

Mr. C. T. McKeehan, the herein Claimant, retained seniority in the Electrician's Craft at Louisville, Kentucky. However, at the time of the transaction he was working as a non-agreement Supervisor at Carrier's Evansville, Indiana Locomotive Shop. In late 1987, Carrier downsized its non-agreement Supervisory work force. McKeehan, because of his relatively low ranking in this group, was released from his Supervisory position. On November 12, 1987, he exercised his Electrician's Craft seniority.

McKeehan was allowed to place himself at Corbin. He was advised that his Test Period Average, for protective pay purposes, would be computed in the following manner:

> In order to compute what your protected rate would have been if you had been an electrician at South Louisville at the time of the transfer of work to Corbin, we have requested the Test Period Averages computed at the time of the coordination for the contract employees immediately above and below you on the seniority roster. As soon as that information is available, we will take an average of those two Test Period Averages and that amount will be used as your guarantee rate. This will not be equivalent to your supervisory rate of pay.

The Organization filed a protest to this method of computation of McKeehan's Test Period. It asked that his Test Period be determined as provided in the second paragraph of Section 5(a) of the Conditions.

It is the parties disagreement on the method of establishing Mr. McKeehan's Test Period Average which is the dispute before this Arbitration.

QUESTION AT ISSUE:

The Organization fashions the Question at Issue in thi matter to be:

> (1) Is Electrician C. T. McKeehan entitled to a Test Period Average under New York Dock derived from his earnings received in the twelve (12) months in which he performed services immediately preceding the date of his displacement?
>
> (2) As an employee protected under New York Dock, what is the amount of the Test Period Average for Electrician C. T. McKeehan?

While Carrier fashions it slightly different:

> Was the Test Period Average of Corbin, Kentucky, Electrician C. T. McKeehan properly arrived at by the Carrier's method of computation?

There are no procedural or jurisdictional impediments to an award on these questions.

THE POSITION OF THE PARTIES:

The Position of the Organization:

The Organization contends that the only proper method of computing Mr. McKeehan's Test Period Average is to literally follow the method set forth in Section 5 (a) of the Conditions. In doing so, it argues, Carrier must consider Claimant's earnings received in the twelve months in which he performed Carrier service immediately preceding the Date of his displacement, which must include his earnings as a non-agreement supervisor.

The Organization argues that Carrier's suggested method of establishing Claimant's Test Period Average, averaging the earnings of the individuals above and below McKeehan and averaging these results to determine his TPA is arbitrary and without basis under the Implementing Agreement or the Conditions.

In support of its position the Organization relies up a number of Awards of various tribunals, but mainly it bottoms its case on New York Dock Arbitration, TCIU v. UP, Stallworth, Arbitrator, (February 28, 1989), which concluded that:

> The proper method for computing test period averages is to include both agreement and non-agreement compensation earned during the test period.

The Organization asks that this Arbitration establish Claimant's TPA at $3,475.00 per month, (his average monthly compensation as a supervisor), plus increases.

The Position of the Carrier:

Carrier contends that Claimant, (as a promoted employ returning to the Craft subsequent to the Coordination), derives entitlement to protective benefits from language within the Implementing Agreement which only conveys:

> ... whatever rights (he) may have had if (he) had been present at the time of the coordination.

The contemplates treating McKeehan as an Electrician and not as non-agreement Supervisor when developing his TPA.

It argues that the way it developed McKeehan's TPA wa consistent with prior arbitration Awards on the subject. Carri cites a number of decisions on the subject, with particular emphasis on Award 433, SBA 605, Eischen, Referee, (May 21, 1984 stating:

> It is unreasonable to the point of absurdity to conclude that the official position worked, irrespective of compensation, should establish the protected rate which is the quid pro quo for continued (resumed) employability under the BRAC Agreement.

Carrier disputes that the award of Arbitrator Stallworth, relied on by IBEW, is appropriate because if it is followed non-agreement Supervisory employees returning to their

Craft would receive more than:

> ... whatever rights they may have had if they had been present at the time of the coordination.

It contends that the averaging method used in determining Claimant's TPA was equitable and proper in the circumstances present in this case.

DISCUSSION:

This case involves the correct method to be used in establishing Test Period Averages of an Electrician who performed no service within his Craft in the twelve month period immediately preceding his return to his Craft and subsequent inclusion within coverage of New York Dock protection. The issue is whether his TPA should be based on compensation earned in a non-agreement Supervisory position or if it should be based on an average derived from the earnings of the two individuals immediately above and below him on the seniority roster. (Carrier indicates that it has been unable to develop any earning data on Mckeehan as an Electrician because of the length of time he has been away from Craft and the unavailability of payroll records back that far.)

It is our opinion that Mr. McKeehan's TPA must be developed in the manner prescribed in Section 5 (a) of the Conditions. Support for any other method of development, no matter how equitable it may appear to some, simply cannot be found in the language of the Implementing Agreement or in the provisions of the Conditions. Moreover, as will be discussed in more detail below, prior arbitration authority supports the contentions of the Organization on this point and not those advanced by Carrier.

The language contained in Section 5(a) has been in place since 1979. And even before that similar, if not identical, language appeared in Section 6 of the May 1936, Washington Job Protection Agreement, which, by all accounts, was the precedent establishing forerunner for the I.C.C.'s earlier, Oklahoma, New Orleans and Southern-Central of Georgia, Employee

Protective Conditions, required to be imposed in abandonment an merger transactions by Section 5 (2) (f) of the Interstate Commerce Act. From time to time negotiators in drafting employ protective and implementing agreements have altered the formula established by WJPA Section 6 and/or sections of I.C.C. employe protective conditions, to suit their situations, but this was n done in the transaction under review here.

The fact that the parties to the Implementing Agreemer did not, intentionally or unintentionally, see fit to alter, wha others have termed "the straightforward language of Section 5(a)", as it concerns the establishment of Test Period Averages must be given great weight and precludes subsequent alteration, on our part thru the Arbitration process, on the basis that one party now considers that a literal application of a TPA under th formula provided would be lacking in equity.

This Carrier and this Organization spent five months, from the date notice was given to the date the Implementing Agreement was signed, with the Louisville - Corbin transaction i an active negotiating status. While it is understood that in that period full time negotiations did not occur, it is clear that considerable thought, nevertheless, went into the process o drafting a suitable Implementing Agreement. The resulting product of these efforts is thoroughly detailed and contains no less than 23 side letters covering almost every imaginable subject and/or contingency. It is notable that while the negotiators saw fit to modify some provisions of New York Dock, the TPA development formula provided in Section 5 (a) was left unchanged.

IBEW Letter No. 13 to the Implementing Agreement clearly provides that non-agreement Supervisors who lose their jobs involuntarily may exercise seniority rights back into their Craft and be entitled to whatever rights they would have enjoyed if they had been present at the time the coordination occurred. When this provision was included within the Agreement it should have been apparent to all involved in the negotiations that such employees were receiving rates of pay greater than employees working exclusively within the Craft. The parties were, we are certain, also aware of the language of Section 5 (a) of NYD Conditions on development of TPA's.

However, they did not see fit to provide new and different language altering the TPA development formula in such circumstances. It would be an affront to the Arbitration proces to do so for them now. Especially since we are not being asked to interpret intent of the parties or obviously ambiguous language, but, instead, are being asked to sidestep "straight forward language" because it is perceived as lacking equity.

Carrier contends that its development of Mckeehan's TP is consistent with prior arbitration Awards on the subject. It stress adherence to the result of SBA 605, Award No. 433. We do not find Award No. 433 faulty or inappropriate in the circumstances present there. However, we have difficulty in accepting it as precedent in our case because of two critical factors.

First it should be observed that compensation guarantees in the February 7, 1965, Agreement are bifurcated. Regularly assigned employees are protected with regard to their normal rate of compensation as it existed on October 1, 1964, (plus increases). Other than regularly assigned employees are protected with a monthly displacement allowance, developed somewhat similarly to those under Section 5 (a) of NYD. However, the parties to the February 7, 1965, Agreement, the controlling instrument involved in Award No. 433, adopted several interpretative Questions and Answers which clearly expressed their intention to exclude certain non-Craft employment which ma have occurred earlier. One question, for example was:

> Question No. 9: Can employment in more than one craft be counted in determining protected status?
>
> Answer to Question No. 9: Ordinarily no: however, in cases such as promotion of a telegrapher to train dispatcher, promotion of a clerk to yardmaster, etc., where the seniority in the craft from which promoted is retained, employment in the higher classificaiton will be counted.

If service in another craft would not ordinarily be credited under the February 7, 1965, Agreement, it would also seem that the earnings received in that craft would not be used

in development of TPA's. But in those instances where such other craft service was to be counted, the parties to the February 7, 1965, Agreement developed a computation procedure which met this contingency. Their solution is found in the Answer to Question No 1, reading in part:

> To the extent that an employe whose guarantee is governed by Section 2 of Article IV has compensated service in such other craft, such service will also be included in determining the base period average earnings and hours paid for. However, his base period average monthly earnings shall be computed by taking his average hourly earnings in the base period in the craft in which he is protected (adjusted to include subsequent general wage increases), multiplying by the total number of hours paid for in the base period in both crafts and dividing by 12.

It is not our purpose here to interpret the February 7, 1965 Agreement, but, it seems that the Answer to Question No. 1 established a formula where the hours worked in the other Craft are added to the hours worked in the protected employees Craft and both are used with the average hourly earnings from the Craft in which protected to develop a TPA. No such similar agreed to interpretation exists with respect to Section 5 (a) of New York Dock or the June 26, 1987, Implementing Agreement, perhaps because the Conditions and the Implementing Agreement do not specifically exclude Carrier earnings from sources outside an employees Craft, which appears to be the case, for the most part, under the February 7, 1965 Agreement.

Each of the other awards from SBA 605, submitted by Carrier as support for its contentions, have been carefully reviewed. They are determined not to be controlling because of the special interpretations placed on the February 7, 1965, Agreement, and there are no similar understandings in place for NYD and the Implementing Agreement, with regard to Section 5 (a), which we are aware of.

Carrier also has supplied Award 1, SBA 860, Seidenber Referee, (November 20, 1976), dealing with a dispute over base period compensation and time paid for under the 1966 Penn-Centr Merger Protective Agreement. It is from the novel remedy generated in this Award that Carrier developed its peer averagi concept which it seeks to apply to Mckeehan's situation. Award 1, SBA 860 cannot stand as precedent here because language of t UTU Merger Protective Agreement, under review there, detailed which service would count and provided special considerations or periods while absent on leave for union business as well as tim working as an official, supervisory or in a fully excepted position.

For example the UTU Penn-Central Merger Agreement developed train service employees test periods from:

> ... the individual's average monthly compensation for the last twelve months in which he performed service in train service, ...

A similar provisions is not present in the language of the Conditions being reviewed here.

Carrier has stressed that by using language reading:

> "... shall be entitled to whatever rights they may have had if they had been present at the time of the coordination."

in the Agreement and Side Letter 13, it is manifest that it was the parties intention to treat returning non-agreement Supervisors as if they had worked in the Craft in the 12 months preceding the coordination that they would only be protected at the level of compensation they would have received it they had worked in the Craft during that time.

Even if this argument were accepted in total as presented, which it is not, TPA's would still have to be developed in accordance with the procedures provided in the Conditions, which the parties did not modify. This procedure requires examination of the earnings and hours in the preceding 12 months and taking the "total compensation" received and divi

this number by the "total time paid for." This formula does not provide an exclusion of earnings received in higher rated servic and it does not provide for an exclusion of earnings received in lower classes of service. The formula is arbitrary - providing for no exceptions of any type, and while some may argue that it is not equitable to protect a demoted Supervisor at his higher rate others may argue that a recently promoted Journeyman Mechanic is not treated equitably when lower rated helper or apprentice service would be counted. But, regardless of which perspective of equity and fairness is considered, the formula is there, and that is what must be followed, unless the parties saw fit to alter its language. A situation not present here.

However, if a general statement indicating that returning Supervisors are to be entitled to whatever rights they may have had if they had been present at the time of the transaction, was intended to provide a different formula for developing TPA's it would have been quite simple to include this formula within the text of the Agreement. This of course was no done. This omission forces a conclusion that returning Supervisors are entitled to have their TPA's computed as provide by the language of Section 5(a) as if they had been present at the time of the coordination. This computation includes "compensation earned" in the preceding 12 months.

Many of Carrier's arguments here are similar to those considered and rejected in New York Dock Arbitration TCIU v. UP, Stallworth, Arbitrator, (February 28, 1989). In that case the contentions of the parties were stated to be:

> The Carrier contends that for purposes of calculating a Claimant's test period earnings, the Claimants may not include compensation earned in non-agreement positions. The Organization argues, however, that the New Dock Conditions require the benefits to be based upon the total compensation during the preceding year including non-agreement earnings.
>
> The decision of the Arbitrator held:
>
> The Committee concludes that the literal language of these sections [Article 1, Sections 5(a) & 6(a)] should be applied, and that all of Claimant's

> earnings with the Carrier during the prior year, whether from agreement or non-agreement positions, are to be included in the test period earnings.
>
> As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon "total compensation" in the service of the Carrier "during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction." The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the Carrier for the year prior to the transaction.

It is our view that this is a correct interpretation of the New York Dock Conditions. As such it will be applied to the matter under review here.

One additional point. TCIU v. UP, (supra), also stated that:

> The Committee is bound to apply the literal language of the New York Conditions, unless the Carrier can show a compelling reason why this straightforward interpretation does not reflect the actual intent of the Parties.

Carrier argues that in our case a "compelling reason" to use a different method of computing Claimant's TPA is that by protecting his non-contract rate of pay he would be receiving far more than whatever rights he may have had if he had been present at the time of the coordination.

This contention is found to be unpersuasive because, among other things, it operates from an assumption that it is "rate of pay" which is the factor being protected. "Rate of Pay" is not the element of protection; "compensation" is the term that is used and that is the element on which protection must be based.

Additionally, notwithstanding Carrier's contentions when this matter was being reviewed on the property and notwithstanding its arguments before this Arbitration, we have no persuasive showing that at the time the Implementing Agreement was under consideration and in negotiations the parties ever intended that Section 5 (a) ever be applied other than literally as written. Accordingly, Carrier has not shown a compelling reason why the straightforward language of Section 5(a) should not be applied to the development of Mckeehan's TPA.

Finally, it should be observed that Carrier insists that the Award in TCIU v. UP is in error. However, it does not cite a single other authority in which unaltered NYD Conditions are scrutinized and a different result is reached. As discussed above, each authority submitted by Carrier involved language which could fairly be interpreted to support the conclusion reached. These decisions, though, cannot be viewed as controlling in this matter because of the existence of significant language differences between the Agreements studied in those case and the Conditions under review here.

On the totality of the entire record we are compelled to make an Award in favor of the Organization.

IBEW v. NYD Arbitration

CSX McKeehan TPA

A W A R D

The Question at Issue posed by Carrier is answered, No.

Question 1, posed by the Organization is answered:

Electrician C. T. McKeehan is entitled to have his Test Period Average under New York Dock Conditions include all earnings received in the twelve month period in which he performed service immediately preceding the date of his displacement, including earnings he received while working as a non-agreement Supervisor.

Question 2, posed by the Organization is answered:

Electrician C. T. McKeehan shall have his Test Period Average determined by dividing separately by 12 the total compensation received and the total time for which he was paid during the last 12 months in which he performed service immediately preceding the date of his displacement.

John C. FLETCHER, Arbitrator
Chairman and Neutral Member

C. A. Meredith, General Chairman
Employee Member

R. D. Hiel, Manager Labor Relations
Carrier Member
I dissent

Dated at Mt. Prospect, IL., this 3rd Day of October, 1990.

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 14

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 8-K

CURRENT REPORT PURSUANT
TO SECTION 13 OR 15(D) OF THE
SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of Earliest Event Reported): October 4, 2000

TRANSTAR HOLDINGS, L.P.
TRANSTAR CAPITAL CORPORATION

(Exact name of registrant as specified in its charter)

DELAWARE	033-73270	13-3486874
DELAWARE	033-73270-1	13-3745313
(State or other jurisdiction of incorporation)	Commission File Number)	(I.R.S. Employer Identification No.)

345 PARK AVENUE
NEW YORK, NY 10154

(Address and zip code of principal executive offices)

(212) 935-2626

(Registrant's telephone number, including area code)

(Former name or former address, if changed since last report.)

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Item 5. Other Events.

Transtar Holdings, L.P. ("Holdings") announced today that it has entered into a Reorganization and Exchange Agreement with USX Corporation ("USX") and Transtar, Inc. ("Transtar") regarding the organization of Transtar. In this reorganization, Holdings will exchange all of its shares in Transtar for 100% of the ownership of four direct Transtar subsidiaries -- Bessemer and Lake Erie Railroad Company; the Duluth, Missabe and Iron Range Railway Company; the Pittsburgh & Conneaut Dock Company; and USS Great Lakes Fleet, Inc. and their subsidiaries (collectively, the "Holdings Companies"). As a result of this transaction, USX will become the sole owner of Transtar and its remaining direct subsidiaries -- the Birmingham Southern Railroad Company; the Elgin, Joliet and Eastern Railway Company; the Lake Terminal Railroad Company; the McKeesport Connecting Railroad Company; the Mobile River Terminal Company, Inc.; the Union

Railroad Company; the Warrior and Gulf Navigation Company; and Tracks Traffic and Management Services, Inc., and their subsidiaries.

This reorganization will allow USX and Holdings to follow their independent strategies for the units they will control. No changes in service will occur as a result of this reorganization. Currently Holdings' only business activity is its investment in Transtar. Immediately after the consummation of the reorganization, Holdings' only business activity will be its investment in the Holdings Companies.

Consummation of the reorganization is conditioned upon (i) receipt of required approvals of the Surface Transportation Board, (ii) receipt of applicable antitrust clearances and (iii) receipt by Holdings of the proceeds of a financing in an amount sufficient to refinance Holdings' outstanding 13 3/8 % Senior Discount Notes and the Holdings Companies' allocable portion of certain indebtedness of Transtar and of financing commitments in an amount sufficient to fund the working capital needs of the Holdings Companies. In addition, the reorganization is subject to other conditions customary for similar transactions of its type.

Item 7. Financial Statements, Pro Forma Financial Information and Exhibits

(a) Financial Statements

None.

(b) Pro Forma Financial Information

None.

(c) Exhibits

99.1 Reorganization Agreement

<PAGE>

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated: October 4, 2000

TRANSTAR HOLDINGS, L.P.

By Blackstone Transportation Company, Inc.

By: _____

Name:
Title:

TRANSTAR CAPITAL CORPORATION

By: _____

Name:
Title:

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REORGANIZATION AND EXCHANGE AGREEMENT

AMONG

TRANSTAR, INC.,
TRANSTAR HOLDINGS, L.P.,
AND
USX CORPORATION

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REORGANIZATION AND EXCHANGE AGREEMENT

This Reorganization and Exchange Agreement (this "Agreement") is entered into as of this 4th day of October, 2000 by and among Transtar, Inc., a Delaware corporation ("Transtar"), Transtar Holdings, L.P., a Delaware limited partnership ("Holdings") and USX Corporation, a Delaware corporation ("USX").

WITNESSETH:

WHEREAS: The authorized capitalization of Transtar consists of 10,000 shares of Class A Voting Common Stock ("A Stock") and 10,000 shares of Class B Non-voting Common Stock ("B Stock");

WHEREAS: Holdings owns beneficially and of record 5,100 shares of A

Stock and 5,100 shares of B Stock (collectively, the "Holdings Stock");

WHEREAS: USX owns beneficially and of record 4,900 shares of A Stock and 3,900 shares of B Stock (collectively, the "USX Stock");

WHEREAS: PNC Bank, N.A. (formerly Pittsburgh National Bank), as trustee under the Management Stock Trust Agreement dated December 28, 1988 (the "Trustee"), holds of record 50 shares of B Stock (the "Management Stock") in connection with the Transtar, Inc. Equity Participation Plan, as amended (the "Management Stock Plan");

WHEREAS: As of the date hereof, of the 1,000 shares of management stock originally issued to the Trustee in connection with the Management Stock Plan, 50 shares remain outstanding as Management Stock and 950 shares are now held in treasury by Transtar, all 950 shares of which have been previously awarded to participants who elected to retire and receive benefits in accordance with the Management Stock Plan;

WHEREAS: Of all of the options granted to participants under the Transtar, Inc. Stock Option Plan, as amended (the "Management Option Plan"), options representing 400 shares of B Stock are outstanding (the "Management Options");

WHEREAS: Transtar is a holding company that directly or indirectly owns all of the issued and outstanding stock of Bessemer and Lake Erie Railroad Company ("B&LE"); the Duluth, Missabe and Iron Range Railway Company ("DM&IR"); the Pittsburgh & Conneaut Dock Company ("Dock"); USS Great Lakes Fleet, Inc. ("Fleet"); Birmingham Southern Railroad Company ("B Southern"); Elgin, Joliet and Eastern Railway Company ("EJ&E"); Fairfield Southern Company, Inc. ("F Southern"); The Lake Terminal Railroad Company ("Lake Terminal"); McKeesport Connecting Railroad Company ("MCC"); Mobile River Terminal Company ("MRT"); Union Railroad Company ("URR"); Warrior and Gulf Navigation Company ("W&G"), Mon Valley Railway Company ("Mon Valley"), Tracks Traffic and Management Services, Inc.; GLF Credit Corporation ("GLF Credit"), GLF Great Lakes Corporation ("GLF Lakes"), and Cuyahoga Dock, Inc. ("Cuyahoga") (collectively, the "Transtar Companies");

WHEREAS: A Stockholders Agreement, dated December 29, 1988, among USX; Blackstone Transportation Partners LP; a Delaware limited partnership and a predecessor in interest to Holdings; Blackstone Capital Partners LP, a Delaware limited partnership and a predecessor in interest to Holdings and Transtar (the "Stockholders Agreement") provides that the By-laws of Transtar (the "By-laws") can be amended by unanimous action of all holders of A Stock, requires that Holdings and USX will vote together to elect three individuals nominated by Holdings and two nominated by USX, and imposes significant restrictions on the ability of any shareholder to dispose of its shares of Transtar;

WHEREAS: The By-laws provide that most matters require unanimous approval of directors nominated by both USX and Holdings;

WHEREAS: Holdings and USX have significant differences concerning the future direction of Transtar and its subsidiaries: and

WHEREAS: In order to resolve these issues and to allow Transtar and its various subsidiaries to continue to operate profitably in their ongoing transportation businesses, the parties have concluded that it is in the best interest of the owners, employees, customers and suppliers of Transtar and its subsidiaries to reorganize to result in USX owning 100% of Transtar and certain of its subsidiaries and in Holdings owning 100% of the remaining Transtar subsidiaries.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and intending to be legally bound, the parties do hereby agree as

follows:

Article I

The Reorganization

Section 1.1 Recapitalization of Holdings Companies.

On or before the Closing Date, as hereinafter defined, Transtar will cause each of B&LE, DM&IR, Fleet and Dock to convert all of its issued and outstanding shares of common stock into 5,100 shares of voting common stock and 5,100 shares of non-voting common stock each (collectively, the "Exchanged Stock").

Section 1.2 Exchange of Holdings Stock.

On the Closing Date, Transtar will exchange all of the Holdings Stock for 5,100 shares of voting stock and 5,050 shares of non-voting stock in each of B&LE, DM&IR, Fleet and Dock. (B&LE, DM&IR, Fleet and Dock, together with Mon Valley, Cuyahoga, GLF Credit and GLF Lakes, to hereinafter be collectively called the "Holdings Companies", and individually each to be called a "Holdings Company", and Transtar and all of its other direct and indirect subsidiaries to be collectively called the "USX Companies", and individually each to be called a "USX Company").

Section 1.3 Exchange of Management Stock.

On the Closing Date, Transtar will exchange a number of shares of non-voting stock in each of the B&LE, DM&IR, Fleet and Dock ("New Management Stock") acceptable to Holdings for all of the Management Stock.

Section 1.4 Exchange of Management Options.

On the Closing Date, each of the B&LE, DM&IR, Fleet and Dock will have created new management option plans, will reserve stock for issuance pursuant thereto and will exchange stock options in each of the B&LE, DM&IR, Fleet and Dock or, at Holdings option, options on limited partnership interests in Holdings ("New Management Options") for the Management Options.

Article II

Asset & Liability Allocations

Section 2.1 General Rule.

Except as otherwise specifically provided in this Agreement and the Exhibits and Schedules attached hereto, each of the Holdings Companies and the USX Companies shall continue to remain liable for all of their liabilities as they exist on the Closing Date whether known or unknown: absolute or contingent; arising by contract, tort, statute, ordinance, regulation, judicial decree or administrative order; recorded or unrecorded in the accounting and financial record; or arising in the past, present or future. Except as otherwise specifically provided in this Agreement and the Exhibits and Schedules attached hereto, each of the Holdings Companies and the USX Companies shall continue to own or lease all of their existing assets. All parties acknowledge that all assets of the Holdings Companies, on the one hand, and the USX Companies, on the other hand, will be delivered in their "AS IS WHERE IS" condition on the Closing Date and that no party is making any representations express or implied concerning the assets of the USX Companies and the Holdings Companies.

Section 2.2 B&LE Dividend in Kind.

Immediately prior to the Closing Date, B&LE shall declare and transfer to Transtar as a dividend in kind (i) all of the computer equipment, software, license agreements, furniture, fixtures and other personal property used by B&LE exclusively in the provision of services to the Holdings Companies, USX and the USX Companies, (ii) all books, records and printouts held by the B&LE and related solely to USX and the USX Companies, and (iii) copies of all books, records and printouts held by the B&LE and related to USX and the USX Companies for which the originals are not part of the dividend in (ii) above (the "B&LE Dividend"); provided, however, the B&LE Dividend shall not include any software, license agreements or other personal property used solely by B&LE in connection with the provision of services to one or more of the Holdings Companies. For purposes of this agreement the value of all such assets shall be deemed to be the net book value of such assets.

Section 2.3 Intercompany Accounts.

(a) On the Closing Date, Transtar shall cause all intercompany accounts (other than those specified in Section 2.3(b) below) between it and any Holdings Company to be settled. Transtar will, as necessary, contribute existing intercompany indebtedness as a capital contribution to one or more of the Holdings Companies or cause one or more of the Holdings Companies to declare and pay dividends to Transtar in order to achieve this result. On the Closing Date, job protection liabilities related to the B&LE employees created as a result of the July 15, 1997 B&LE/TCIU Implementing Agreement shall be allocated to and shall thereafter remain with the company who, immediately following the Closing Date, employs the individual to whom the liability is attributable; provided, however, if such employee is a Union B&LE Transferee (as defined in Section 3.2(d) hereof), such liability shall remain with the B&LE until such time as the employee is actually transferred to a USX Company, whereupon such liability will be transferred to, and shall thereafter remain with, such USX Company.

(b) On the Closing Date, Transtar shall cause each of the USX Companies, on the one hand, and the Holdings Companies on the other hand to settle all outstanding payables and receivables between them except for (i) matters relating to ordinary course commercial transactions, including, but not limited to, the provision of transportation services by multiple carriers, which shall remain outstanding and be paid in the normal course of business (ii) tax matters which are specifically addressed in the Tax Matters Agreement referred to in Section 4.2 hereof and (iii) Cross Guarantees (as defined in Section 2.4(b) hereof) and allocations related to the Transtar Credit Agreement (as defined in Section 2.5 hereof).

Section 2.4 Release of Cross Guarantees.

(a) Prior to the Closing Date, the parties shall identify all guarantees, indemnities or other credit support provided between (i) any of the USX Companies (excluding Transtar), on the one hand, and (ii) any Holdings Company, on the other hand, (the "Internal Guaranteed Contracts") and shall enter into good faith negotiations to terminate or modify all Internal Guaranteed Contracts in a manner to release or otherwise relieve any obligation contingent or otherwise on a Holdings Company, in the case of USX or Transtar, or a USX Company (excluding Transtar), in the case of Holdings. To the extent that any such Internal Guaranteed Contract is not so terminated or modified, such Internal Guaranteed Contract shall remain in full force and effect and (i) to the extent any Holdings Company is the beneficiary of any Internal Guaranteed Contract, the relevant Holdings Company shall, in each case, severally and not jointly with any other Holdings Company; indemnify and hold the relevant USX Company harmless from and against any and all damages, losses, obligations, liabilities, claims, encumbrances, deficiencies, costs and expenses (including, without limitation, penalties, fines and reasonable attorneys' fees and other costs and expenses incident to any suit, action, investigation, claim or proceeding) (all hereinafter referred to collectively as "Losses") suffered,

sustained, incurred, or required to be paid by such USX Company by reason of such Internal Guaranteed Contract and (ii) to the extent that any USX Company is the beneficiary of any Internal Guaranteed Contract, the relevant USX Company shall, in each case severally and not jointly with any other USX Company, indemnify and hold the relevant Holdings Company harmless from and against any and all Losses suffered, sustained, incurred or required to be paid by such Holdings Company by reason of such Internal Guaranteed Contract.

(b) Prior to the Closing Date, the parties shall identify all guarantees, indemnities or other credit support provided by Transtar (including, without limitation, instances where Transtar and any Holdings Company are joint obligors) on behalf of any Holdings Company (the "Third Party Guaranteed Contracts" and, collectively with the Internal Guaranteed Contracts, the "Cross Guarantees") and Holdings shall enter into good faith negotiations to terminate or otherwise modify all Third Party Guaranteed Contracts in a manner to release all obligations, contingent or otherwise, upon Transtar. To the extent that any such Third Party Guaranteed Contract is not so terminated or modified, such Third Party Guaranteed Contract shall remain in full force and effect and, Holdings and the relevant Holdings Company shall jointly and severally indemnify and hold Transtar harmless from and against any and all Losses suffered, sustained, incurred or required to be paid by Transtar by reason of such Third Party Guaranteed Contract: provided, however, Holdings shall not be obligated with respect to any such Third Party Guaranteed Contract if one of the following has occurred:

(i) A third party, with an investment grade credit rating from Moody's or Standard and Poors and otherwise reasonably acceptable to USX and Transtar (it being understood that USX or Transtar, as the case may be, shall be considered reasonable in rejecting any third party that (x) competes with the U.S. Steel Group of USX in the markets in which the U.S. Steel Group is then active or (y) competes directly with Transtar in the provision of transportation services), unconditionally indemnifies Transtar with respect to all Losses suffered, sustained, incurred or required to be paid by Transtar by reason of such Third Party Guaranteed Contract; provided that the other terms of such indemnity must be acceptable to Transtar in its reasonable discretion; or

(ii) Some other provision has been made to (1) release Transtar from and against any and all liability, contingent or otherwise, under such Third Party Guaranteed Contract or (2) indemnify Transtar from and against any and all Losses suffered, sustained, incurred or required to be paid by Transtar by reason of such Third Party Guaranteed Contract; provided that any such provision must be acceptable to Transtar in its sole discretion.

Notwithstanding anything to the contrary set forth herein, for so long as Transtar remains obligated in any manner in connection with respect to a Third Party Guaranteed Contract, Holdings shall cause the relevant Holdings Company to carry insurance providing for policy limits, and deductibles substantially similar to those in effect on the date hereof and, subject to any limitations imposed by such Third Party Guaranteed Contract, naming Transtar as an additional insured under any such policy in connection with such Third Party Guaranteed Contract.

(c) For so long as the Motor Vessel Edgar B. Speer (Official Number 621104) shall be sub-chartered by Fleet from USX, Holdings agrees to cause Fleet to pay to USX an annual fee equal to 3/4 of 1% of the average balance due (as described in Schedule 2.4(c)) under the Charter dated September 1, 1980 between State Street Bank and Trust Company, successor trustee to Connecticut Bank and Trust Company, as owner trustee, and USX, as successor by merger to United

States Steel Corporation. USX and Fleet have entered into the written sub-charter attached as Exhibit A (the "Speer Agreement").

For so long as the Motor Vessel Edgar B. Speer (Official Number 621104) (the "Speer") shall be sub-chartered by Fleet from USX, Holdings shall cause the Fleet to (i) covenant to USX to carry insurance in connection with the Fleet's sub-charter of the Speer which (A) for so long as USX is permitted to self-insure under the Charter, provides for policy limits and deductibles substantially similar to those in effect on the date hereof and (B) for so long as USX is not permitted to self-insure under the Charter, satisfies the insurance requirements of the Charter and, in each case, subject to any limitations imposed by the Charter, names USX as an additional insured and (ii) to covenant to USX to satisfy the financial requirements of the Oil Pollution Act of 1990, as amended from time to time.

Section 2.5 Bank Debt Repayment and Allocation.

(a) On the Closing Date and immediately after the exchange contemplated by Section 1.2 hereof shall have occurred, all debt outstanding under the Credit Agreement dated as of December 7, 1993, as amended and restated as of August 26, 1999, among Transtar, the lenders named therein and Chase Manhattan Bank (successor to Chemical Bank), as Agent, as amended (the "Transtar Credit Agreement") shall be repaid. The debt repayment shall be allocated between the Holdings Companies on the one hand and the USX Companies on the other hand in accordance with the following formula:

Holdings Companies	USX Companies
56 % of Transtar Credit Balance	44% of Transtar Credit Agreement Balance
Plus $4,080,416	Minus $4,080,416
Final Holding Companies Repayment Amount	Final USX Companies Repayment Amount

For purposes of this Section 2.5, "Transtar Credit Agreement Balance" means the outstanding amount under the Transtar Credit Agreement plus all accrued interest as of the Closing Date.

Prior to the Closing Date, but in no event more than two business days prior to the Closing Date, Transtar shall, in good faith, prepare and deliver to USX and Holdings an estimate of the actual consolidated cash of Transtar and the Transtar Companies as of the Closing Date (the "Estimated Cash Statements") and, on the Closing Date, shall allocate the aggregate cash to provide the Holdings Companies with 56% of such aggregate cash and the USX Companies with 44% of such aggregate cash. To the extent possible, such allocation shall be made in a manner that does not create or increase any excess loss account, as defined in Treasury Regulation Section 1.1502-19, that Transtar may have in the stock of any Transtar Company. As soon as practicable after the Closing Date, but in any event not later than thirty (30) days after the Closing Date, (i) Holdings and USX agree to cooperate to close the books of each of the Holdings Companies and the USX Companies and (ii) Transtar, Holdings and USX shall, in good faith, jointly determine and prepare statements of the amount of cash held by each of the USX Companies and the Holdings Companies as of the time of closing on the Closing Date (the "Actual Cash Statements"). To the extent that the amount of cash reflected on the Actual Cash Statements of the USX Companies exceeds in the aggregate 44% of the amount of total cash reflected on the Actual Cash Statements of both the USX Companies and the Holdings Companies in the aggregate, then USX shall cause to be paid to Holdings or a Holdings Company, at the sole discretion of Holdings, within one business day after the determination of the Actual Cash Statements by wire transfer of immediately available funds to an account or accounts designated in writing by Holdings an amount of cash sufficient to ensure that the Holdings Companies in the aggregate have received

56% of the total cash on the books of Transtar and its consolidated subsidiaries as of the Closing Date. To the extent that the amount of cash reflected on the Actual Cash Statements of the Holdings Companies exceeds in the aggregate 56% of the amount of total cash reflected on the Actual Cash Statements of both the Holdings Companies and the USX Companies in the aggregate, then Holdings shall cause to be paid to USX or a USX Company, at the sole discretion of USX, within one business day after the determination of the Actual Cash Statements by wire transfer of immediately available funds to an account or accounts designated in writing by USX an amount of cash sufficient to ensure that the USX Companies in the aggregate have received 44% of the total cash on the books of Transtar and its consolidated subsidiaries as of the Closing Date. Such adjusting payments shall be deemed to be made immediately prior to the Closing and shall be treated as distributions from the paying company or companies to Transtar, and as capital contributions from Transtar to the recipient company or companies. To the extent possible, such payments shall be made in a manner that does not create or increase any excess loss account, as defined in Treasury Regulation Section 1.1502-19.

(b) Holdings shall cause the Holdings Companies to pay the Final Holdings Companies Repayment Amount specified in (a) above and USX shall cause the USX Companies to pay the Final USX Companies Repayment Amount specified in (a) above. Notwithstanding anything to the contrary set forth herein, Holdings may, at its option, elect to assume, or to cause the Holdings Companies to assume, its portion of the Transtar Credit Agreement Balance as specified in Section 2.5(a) and not to pay such amount; provided that if Holdings elects to assume or cause the assumption of such obligation, Holdings shall obtain a novation, release or other assurances from the lenders under the Credit Agreement, all to the effect (and to the reasonable satisfaction of USX and any USX Company) that none of USX, Transtar or any USX Company shall have any further obligation whatsoever for any such obligation so assumed.

(c) Prior to the Closing Date, Transtar shall make capital contributions as necessary to eliminate or to reduce to the extent possible any excess loss account, as defined in Treasury Regulation Section 1.1502-19, that it would otherwise have in the stock of any Transtar Company as of the Closing Date. The capital contribution to any Holdings Company will come solely from funds dividended by one or more other Holdings Companies after the execution of this Agreement. The capital contribution to any USX Company will come solely from funds dividended by one or more other USX Companies after the execution of this Agreement. Transtar will cause one or more Holdings Companies or one or more USX Companies to declare and pay dividends to Transtar in order to make such contributions.

Section 2.6 Post-Closing Payments for Pre-Closing Items.

(a) Holdings and the Holdings Companies shall indemnify the USX Companies for 56% of all amounts paid by any such USX Company after the Closing Date with respect to transaction related costs pertaining to the transactions contemplated by this Agreement and not otherwise addressed herein.

(b) Transtar and the other USX Companies shall indemnify the Holdings Companies for 44% of all amounts paid by any such Holdings Company after the Closing Date with respect to transaction related costs pertaining to the transactions contemplated by this Agreement and not otherwise addressed herein.

(c) All costs incurred by Transtar or Tracks Traffic and Management Services, Inc. ("Tracks") relating to Closing Date or pre-Closing Date activity which are not solely for the expense of Transtar or Tracks and which are paid after the Closing Date shall be allocated to the Transtar Company to which such costs relate. If such costs cannot be specifically identified with one or more Transtar Companies, or if such costs were incurred by Transtar in its role as holding company for the Transtar Companies, or were incurred by Tracks in its cash management role for the Transtar Companies, then such costs shall be

allocated 56% to the Holdings Companies and 44% to the USX Companies. The Transtar Company or Companies allocated costs under this Section 2.6(c) shall indemnify Holdings, USX or any other Transtar Company for any such allocated costs paid after the Closing Date by Holdings, USX or any other Transtar Company.

Article III

Employee Matters

Section 3.1 Continuation of Employment.

(a) Except as otherwise set forth in this Article III, all non-union employees employed by Transtar or any Transtar Company immediately prior to the Closing Date (the "Non-Union Employees") shall continue to be employed by such Company as employed them immediately prior to the Closing Date and shall receive the same salary or wage as they received and be subject to the same terms and conditions of employment as they were immediately prior to the Closing Date.

(b) Each USX Company and each Holdings Company shall continue in place each collective bargaining and other agreements in effect between it and any labor union and shall continue to provide all employment and other entitlements provided to employees represented by such labor unions in accordance with the terms of such collective bargaining agreements (the "Union Employees"), except as modified by agreement of the parties or by an arbitrator in order to permit the transfer of employees contemplated by Section 3.6(b) herein.

(c) For purposes of this Agreement Non-Union Employees and Union Employees shall include all individuals on disability, leave of absence, vacation, holiday, layoff or other status that would entitle such individual to employment by any USX Company or Holdings Company.

Section 3.2 Pension Plans.

(a) Current Plans. Transtar will remain the sponsor of the Transtar, Inc. Non-Contributory Pension Plan and the Transtar, Inc. Salaried Retirement Plan (the "Transtar Pension Plans").

(b) Holdings Plans. As soon as possible after the Closing Date and effective as of the Closing Date, Holdings shall establish, or shall cause one of the Holdings Companies to establish, one or more defined benefit pension plan or plans (the "Spinoff Plans") providing pension benefits to the employees of the Holdings Companies (i) that, in the case of represented employees, meet the obligations of all collective bargaining agreements applicable to such employees and (ii) that are generally comparable to those currently provided to such employees.

(c) Plan Asset Transfers. As soon as practicable, Transtar shall cause to be transferred: (i) from the respective Transtar Pension Plans to the Spinoff Plans, the Accrued Liability (as defined below) for all participants identified as transferring to the respective Holdings Companies and (ii) from the trusts relating to the Transtar Pension Plans to the trust or trusts created under the Spinoff Plans (the "Holdings Trusts"), an amount of allocated assets determined in the manner below (the "Asset Transfer Amount"). Participants transferring to the Holdings Companies (the "Holdings Participants") include active employees transferring to the employment of the Holdings Companies as identified in Section 3.6 and retired employees transferring to the Holdings Companies as identified in Section 3.5, including associated dependents for both. As soon as practicable following the Closing Date, Transtar will cause Retirement Benefits Services, Inc. (the "Current Actuary") to calculate the Accrued Liability as of the Closing Date (the "Valuation Date") of all participants in the Transtar Pension Plans and then to compare, on a plan-by-plan basis, the Accrued

Liability of all the participants in each Transtar Pension Plan to the fair market value of the assets in the respective Transtar Pension Plans as of the Valuation Date. If the Accrued Liability as of the Valuation Date of all participants in a Transtar Pension Plan is less than the fair market value of the assets as of the Valuation Date in such Transtar Pension Plan, then Transtar will cause assets (determined as of the Valuation Date) to be transferred from such Transtar Pension Plan to the Holdings Trusts to the corresponding Spinoff Plan equal to the product of (x) such fair market value of the assets in such Pension Plan multiplied by (y) a fraction, the numerator of which is the projected benefit obligation ("PBO") of the Holdings Participants for such Transtar Pension Plan as of the Valuation Date, and the denominator of which is the PBO of all participants in such Transtar Pension Plan as of the Valuation Date. For purposes of the preceding sentence, the PBO shall be determined on the basis of each employee's age, service and compensation, and the terms of the respective Transtar Pension Plans in effect on the Valuation Date, using: (i) the 30-year Treasury rate in effect on the Valuation Date plus 100 basis points rounded to the nearest one-half (1/2) percent for the discount rate; (ii) a lump sum rate that is 200 basis points less than the discount rate used; (iii) salary scales for determining the accrued benefits liability at an average annual rate of 4% for salaried employees and 3.5% for wage employees; and (iv) all other actuarial assumptions and methods identical to those used by Transtar for SFAS No. 87 disclosures for the year ended December 31, 1999. If the Accrued Liability as of the Valuation Date of all participants in a Transtar Pension Plan is equal to or greater than the fair market value as of the Valuation Date of the assets in such Transtar Pension Plan, then the Current Actuary will determine the amount of assets allocable to the Accrued Liabilities attributable to Holdings Participants based on Section 4044 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (the "Section 4044 Amount"), and Transtar will cause assets equal in value to the Section 4044 Amount applicable to Holdings Participants under such Transtar Pension Plan to be transferred from such Transtar Pension Plan to the Holdings Trust for the corresponding Spinoff Plan. The Asset Transfer Amount for the respective Plans shall be the dollar amount of allocated assets determined in accordance with the above, increased or decreased by the actual return on the market value of assets, and decreased by the amount of actual benefit payments for the Holdings Participants subsequent to the Valuation Date and prior to the date of transfer; provided, however, that in no event shall the Asset Transfer Amount be less than the amount necessary to satisfy Section 414 (l) of the Code (as defined in Section 4.1.1 hereof). Upon the transfer of the Asset Transfer Amount the Spinoff Plan will assume all benefit liabilities and obligations of the corresponding Transtar Pension Plan, solely with respect to Holdings Participants under such Transtar Pension Plan from which that transfer was made and will become with respect to such Holdings Participants responsible for all acts, omissions and transactions under or in connection with such Transtar Pension Plan, whether arising before or after the Closing, other than to the extent resulting from acts or omissions of Transtar or its affiliates after the Closing. With respect to each Spinoff Plan, Transtar will continue to administer benefit claims for Holdings Participants until the first of the month following the transfer date of the Asset Transfer Amounts to the Holdings Trusts. As used in this Agreement, "Accrued Liability" shall mean the termination liabilities of the applicable participants under the respective Transtar Plans calculated in accordance with Sections 401(a)(12) and 414(l) of the Code, including the use of the Pension Benefit Guarantee Corporation ("PBGC") interest rate applicable to immediate and deferred annuities for the termination of single employer plans in effect on the first day of the month containing the Valuation Date. These are the same liabilities used in the allocation of assets for the Section 4044 Amount, if required.

(d) If the authorized representatives of the Union B&LE Transferees (defined below) have not signed a TCIU Implementation Agreement indicating TCIU approval of transfer of the employment of the Union B&LE Transferees to a USX Company (the "TCIU Approval") as of the Closing Date, all pension liabilities and any assets held in trust for the satisfaction of liabilities associated with such Union B&LE Transferees at the Closing Date will be transferred from the

Transtar, Inc. Non-Contributory Pension Plan to the Spinoff Plan and the Holdings Trust covering union employees as part of the transfers contemplated in Sections 3.2(b) and 3.2(c). "Union B&LE Transferees" shall mean the union administrative employees to be transferred from the B&LE to a USX Company (the number of such employees to be up to 60 non-shared union administrative employees and up to 25 shared union administrative employees) and so identified in Schedules 3.2(x) and 3.2(y). For purposes of this Section 3.2, it is agreed that the employees of the USX Companies and the Holdings Companies listed in Schedule 3.2(x) are non-shared employees and that the employees of the USX Companies listed in Schedule 3.2(y) are shared employees. At the end of the month in which the actual payroll responsibility for the Union B&LE Transferees is transferred to a USX Company (the "Holdings Transfer Return Date), a spin-off of pension liabilities and corresponding assets ("Holdings Transfer Return Amount') will be made from the Spinoff Plan to the Transtar, Inc. Non-Contributory Pension Plan, or a successor USX pension plan, (the "Holdings Transfer Return") consistent with the allocation methodology identified in Sections 3.2(c) and 3.2(h) as it pertains to the Union B&LE Transferees, without regard to the de minimis test of Section 414(l) of the Code. If the assets allocated respecting the Union B&LE Transferees' liabilities consistent with the methodology identified in Section 3.2(c) had been reduced by an amendment or early termination program adopted by the Spinoff Plan in which Union B&LE Transferees participate after the Closing Date but prior to the Holdings Transfer Return Date and a comparable amendment or early termination program is not adopted by the Transtar, Inc. Non-Contributory Pension Plan, or a successor USX pension plan, the excess, if any, of (a) the Holdings Transfer Return Amount computed as if such amendment or program were not adopted over (b) the Holdings Transfer Return Amount shall be paid, together with interest up to the date of transfer using the rate paid on 30-day U.S. Treasury Bills and an additional gross-up amount to reflect USX's effective federal and state income tax rates, to Transtar in cash by Holdings at the same time the Holdings Transfer Return Amount is transferred to the trust associated with the Transtar, Inc. Non-Contributory Pension Plan, or a successor USX pension plan.

(e) Multi-Employer Plans. After the Closing Date, Holdings shall or shall cause Fleet to contribute to multi-employer pension plans in respect of Union Employees employed by Fleet pursuant to any collective bargaining agreements to which Fleet may be a party. Holdings Companies shall be responsible for all contributions with respect to their own employees for all multi-employer plans.

(f) As soon as practical Holdings shall take or shall cause the Holdings Companies to take all steps reasonably necessary to qualify the Spinoff Plans under the Code.

(g) Non-qualified Plans. The USX Companies shall continue to maintain the Transtar non-qualified plans and the Holdings Companies shall establish non-qualified plans designed to provide benefits in excess of the limits imposed by Sections 415 and 401(a)(17) of the Code for defined benefit plans as appropriate for the participants respectively assigned to each party (as defined under Section 3.6 and Section 3.5, including dependents of such participants); and to the extent that any plan is funded the USX Companies shall transfer or assign to Holdings or a Holdings Company any assets held for the satisfaction of benefit obligations to participants assigned to Holdings or a Holdings Company under Section 3.5 or Section 3.6 of this Agreement. Further, liabilities recorded on Transtar's books with respect to participants of such plans prior to the Closing Date shall be transferred on the Closing Date to the company which will employ such participant immediately following the Closing Date.

(h) In the event that either USX or Holdings disagrees with any calculations made by the Current Actuary they may, at their sole expense, have the calculations reviewed by another actuary of their choice. If USX and Holdings mutually determine that they are unable to resolve such disagreement then each shall select an actuary (who may be the actuary chosen pursuant to the

preceding sentence) and these two such actuaries shall select a third actuary whose determination shall be final and binding upon all parties. Each party shall pay the cost of the actuary it selects and each shall pay one half of the cost of the third actuary. The Current Actuary, Holdings and Transtar will each cause to be provided to any actuary designated by Holdings, Transtar or USX all information in its possession or under its control that is reasonably necessary to review the determination and the calculation of the Accrued Liability, Section 4044 Amount and other determinations or calculations related to pensions, in all respects, and to verify that such determinations and calculations have been performed in a manner consistent with the terms of this Agreement.

Section 3.3 Thrift Plans.

(a) Transtar shall remain the sponsor of the Transtar, Inc. Savings Plan for Salaried Employees and the Transtar, Inc. Savings Plan for Represented Employees ("Transtar Thrift Plans").

(b) As soon as practical after the Closing Date, Holdings shall establish a thrift plan, or plans, (the "Holdings Thrift Plan") substantially similar to the Transtar Thrift Plans.) As of the Closing Date, Holdings Companies' employees will cease to be eligible to actively participate in the Transtar Thrift Plans. Upon the establishment of the Holdings Thrift Plan Transtar shall cause the Transtar Thrift Plans to transfer to the Holdings Thrift Plan the accounts of all participants in the Transtar Thrift Plans who are employed by the Holdings Companies, including those transferred to the Holdings Companies pursuant to Section 3.6 hereof, or who retired from a Holdings Company (the "Holdings Thrift Plan Participants"). Transtar shall cause the trust maintained under the Transtar Thrift Plans to transfer to the trust established under the Holdings Thrift Plan the assets attributable to the Holdings Thrift Plan Participants under the Transtar Thrift Plans; provided that amounts invested in loans to such participants shall be transferred in kind. Contingent upon the transfer of assets attributed to the Holdings Thrift Plan Participants, Holdings will assume all benefit obligations of the Transtar Thrift Plans relating to the Holdings Thrift Plan Participants. The amount of assets transferred will be equal to the sum of (x) the excess of (A) the Holdings Thrift Plan Participants accounts under the Transtar Thrift Plans determined as of the last date of the month preceding the transfer date over (B) any benefit payments made to Holdings Thrift Plan Participants under the Transtar Thrift Plans during the period from the preceding month end to the transfer date and (y) interest on such excess amount from the preceding month end to the transfer date using the rate paid on 30 day Treasury Bills on the transfer date.

(c) The USX Companies shall continue to maintain the Transtar non-qualified plans and the Holdings Companies shall establish non-qualified plans designed to provide benefits in excess of the limits imposed by Sections 415 and 401(a)(17) of the Code for thrift plans as appropriate for the participants respectively assigned to each party pursuant to Section 3.5 and Section 3.6; and, to the extent that any plan is funded, the USX Companies shall transfer or assign to Holdings or a Holdings Company any assets held for the satisfaction of benefit obligations to participants assigned under Section 3.5 or Section 3.6 of this Agreement. Further, liabilities recorded on Transtar's books with respect to participants of such plans prior to the Closing Date shall be transferred on the Closing Date to the company which will employ such participant immediately following the Closing Date.

(d) If the TCIU Approval has not been obtained as of the Closing Date, all Transtar Thrift Plan assets attributable to the accounts of the Union B&LE Transferees at the Closing Date will be transferred to the trust associated with the Holdings Thrift Plan as part of the transfers contemplated in Section 3.3(b). At the end of the month in which actual payroll responsibility for the Union B&LE Transferees is transferred to a USX Company, all Holdings Thrift Plan

assets attributable to the Union B&LE Transferees will be transferred back to the Transtar Thrift Plan consistent with the methodology described in Section 3.3(b).

Section 3.4 Insurance and Other Welfare Benefit Plans.

(a) Continuation of Current Plans. Transtar shall or shall cause each of the other USX Companies to maintain the medical, life and other insurance programs currently provided to employees and retirees of the USX Companies.

(b) Establishment of Holdings Plans. Holdings shall or shall cause each of the Holdings Companies to establish medical, life and other insurance programs providing benefits comparable to those currently provided to employees and retirees of the Holdings Companies.

(c) Interim Provisions of Benefits. Transtar shall continue to administer claims and shall cause payments to be made to employees of the Holdings Companies who were participants in Transtar medical, life, vision, dental, supplemental sickness and other insurance programs for up to 180 days following the Closing Date to allow Holdings to establish its own plans. Transtar shall continue to administer runout claims until they are completed. Holdings shall reimburse Transtar weekly for all amounts paid and costs incurred in connection with such services upon receipt of appropriate documentation thereof.

(d) Other Programs. Transtar shall cause the USX Companies and Holdings shall cause the Holdings Companies to continue to provide vacation, leave and other employee policies substantially similar to those currently provided.

(e) Service Recognition. All benefit programs referred to in this Section 3.4 of USX, Holdings, the USX Companies or the Holdings Companies shall recognize service of any employees of the Transtar Companies employed by USX, Holdings, any such USX Company or any such Holdings Company, respectively, after the Closing Date with any of USX, the USX Companies or the Transtar Companies for all purposes and shall recognize all co-payments and deductibles incurred in the calendar year of the Closing Date under corresponding programs of the Transtar Companies prior to the Closing Date.

(f) If TCIU Approval has been obtained as of the Closing Date, all medical, life, other insurance liabilities and other employee benefit liabilities currently provided to such employees and any assets held in trust for the satisfaction of such liabilities associated with such employees at the Closing Date will not be transferred from the Transtar plans or trusts covering union employees to the Holdings Companies' newly created medical, life, and other welfare plans and associated trusts as part of the transfers contemplated under other subsections of this Section 3.4. If TCIU Approval has not been obtained as of the Closing Date, all medical, life, other insurance liabilities and other employee benefit liabilities currently provided to such employees and any assets held in trust for the satisfaction of such liabilities associated with such employees at the Closing Date will be transferred from the Transtar plans or trusts covering union employees to the Holdings Companies' newly created medical, life, and other welfare plans and associated trusts as part of the transfers contemplated under other subsections of this Section 3.4. Again, if TCIU Approval has not been obtained as of the Closing Date, at the end of the month in which actual payroll responsibility for the Union B&LE Transferees is transferred to a USX Company, all medical, life and other insurance liabilities attributable to the Union B&LE Transferees will be transferred back to Transtar along with all assets held for the satisfaction of such liabilities.

(g) General. Unless specifically provided otherwise in this Agreement, responsibility for employee benefit liabilities, including without limitation compensation, workers' compensation, incentive, employment, split dollar life insurance policies, VEBA, supplemental unemployment benefits or other payroll or

benefit liabilities, for employees of the Transtar Companies shall be the sole responsibility of the USX Company or Holdings Company which employed such employee as of the Closing Date. Any assets held for the satisfaction of benefit obligations to such employees so employed by a Holdings Company on the Closing Date, whether held in trust or otherwise, shall be transferred to such Holdings Company or a trust designated by it and, in the case of split dollar life deposits, such transfer shall occur on the Closing Date.

Section 3.5 , Retirees.

For all purposes under this Article III, responsibility for benefits payable to persons who retired from any of the Transtar Companies in the past and are receiving or entitled to receive any retirement benefits now or in the future shall be the sole responsibility of the last Transtar Company to have employed such person. This liability allocation shall include legal liability, accounting treatment such as OPEB and administrative responsibility.

Section 3.6 Employee Transfers.

(a) Non-Union Employees. Effective immediately prior to the Closing Date, certain non-union employees of the Transtar Companies shall be transferred as set forth in the Schedule attached hereto as Schedule 3.6(a) or as shall otherwise be agreed upon by USX and Holdings.

(b) Union Employees. Effective immediately prior to the Closing Date, or as soon thereafter as possible under amendments to applicable collective bargaining agreements or arbitration decisions, certain union employees of the Transtar Companies shall be transferred as set forth in the Schedule attached hereto as Schedule 3.6(b).

Section 3.7 Management Plans.

On the Closing Date and effective as of the Closing Date, Holdings shall assume all of the obligations of Transtar under the Management Stock Plan and the Management Stock Option Plan (the "Management Plans") and shall enter into amendments to the Management Plans reasonably acceptable to Holdings and the Trustee which shall preserve for the participants under the Management Plans the economic benefits of such plans immediately prior to the Closing Date.

Article IV

Tax Matters

Section 4.1 Tax Indemnity.

Section 4.1.1 Definitions.

For purposes of this Section 4.1 the following definitions shall apply:

"Applicable Credit Amount" means the sum of (i) the B&LE Credit Amount, if B&LE is a Holdings Company described in Section 4.1.3(a) below; and (ii) the DMIR Credit Amount, if DM&IR is a Holdings Company described in Section 4.1.3(a) below; and (iii) the Fleet Credit Amount, if Fleet is a Holdings Company described in Section 4.1.3(a) below; and (iv) the Dock Credit Amount, if Dock is a Holdings Company described in Section 4.1.3 (a) below. For purposes of the definition of Applicable Credit Amount and Applicable Taxes, a Holdings Company is described in Section 4.1.3(a) below if (a) in a transaction other than a Permitted Transfer, (i) Holdings sells, transfers, assigns or otherwise disposes of such Holdings Company's stock (or if such Holdings Company disposes of substantially all of its assets) during the Credit Period, or (ii) one or more persons are treated as acquiring directly or indirectly the stock of such Holdings Company and each condition set forth in Section 4.1.4(a) is met or (b)

Holdings elects to provide credit enhancement pursuant to Section 4.1.3(a)3, Section 4.1.3(a)4 or Section 4.1.3(a)5 with respect to Taxes arising from or based on the Split-off of such Holdings Company; provided, however, a Holdings Company is not described in Section 4.1.3(a) to the extent that it previously has been described in Section 4.1.3(a) and one of the forms of credit enhancement set forth in 4.1.3(b)1 has been obtained with respect thereto.

"Applicable Taxes" means the sum of (i) B&LE Taxes, if B&LE is a Holdings Company described in Section 4.1.3(a) below; and (ii) DMIR Taxes, if DM&IR is a Holdings Company described in Section 4.1.3(a) below; and (iii) Dock Taxes, if Dock is a Holdings Company described in Section 4.1.3(a) below; and (iv) Fleet Taxes, if Fleet is a Holdings Company described in Section 4.1.3(a) below.

"B&LE Credit Amount" means $15,810,000.

"B&LE Taxes" means all Taxes resulting from the Split-off of B&LE that (i) are caused by a Holdings Triggering Event, or (ii) result from any breach by Holdings of either the representation in Section 9.2.4 or covenant in Section 10.3(a).

"Code" means the Internal Revenue Code of 1986, as amended.

"Credit Period" means the period from the date of the Split-off through the earlier of: (i) the expiration of the statute of limitations for Taxes imposed on Transtar that are triggered by the Split-off and (ii) the fourth anniversary of the Split-Off.

"DMIR Credit Amount" means $48,200,000.

"DMIR Taxes" means all Taxes resulting from the Split-off of DM&IR that are caused by (i) a Holdings Triggering Event, or (ii) result from any breach by Holdings of either the representation in Section 9.2.4 or covenant in Section 10.3 (a).

"Dock Credit Amount" means $3,860,000.

"Dock Taxes" means all Taxes resulting from the Split-off of Dock that are caused by (i) a Holdings Triggering Event, or (ii) result from any breach by Holdings of either the representation in Section 9.2.4 or covenant in Section 10.3 (a).

"Finally Determined" means that one of the following has occurred: (1) a decision, judgment, decree or other order by any court of competent jurisdiction, which decision, judgment, decree or other order has become final (e.g., when all allowable appeals thereof have been exhausted by either party to the action or the time for filing such appeal has expired) or the acceptance of the terms of an administrative determination if Transtar consents in writing to such acceptance, (2) the exhaustion of all administrative remedies if a contest cannot be currently brought in a court of competent jurisdiction, (3) a closing agreement entered into under Section 7121 of the Code or any other settlement agreement entered into in connection with an administrative or judicial proceeding, or (4) the expiration of the time for instituting a claim for refund, or if such a claim was filed, the expiration of the time for instituting suit with respect thereto.

"Fleet Credit Amount" means $32,130,000.

"Fleet Taxes" means all Taxes resulting from the Split-off of Fleet that are caused by (i) a Holdings Triggering Event, or (ii) result from any breach by Holdings of either the representation in Section 9.2.4 or covenant in Section 10.3 (a).

"Holdings Taxes" means all Taxes resulting from the Split-off that are caused by (i) a Transtar Triggering Event, or (ii) result from any breach by USX of either the representation in Section 9.1.4 or covenant in Section 10.3 (b).

"Holdings Triggering Event" means, (A) any acquisition (including a redemption), directly or indirectly (excluding all indirect acquisitions which in the aggregate do not exceed 10% of the outstanding stock of such Holdings Company), of the stock (or substantially all of the assets) of a Holdings Company during the Triggering Period; (B) any acquisition (including a redemption), directly or indirectly, of the stock of a Holdings Company after the Triggering Period that, together with the Split-off, is determined to be part of a plan (or series of related transactions), within the meaning of Section 355(e) of the Code, pursuant to which 1 or more persons acquire directly or indirectly stock representing a 50% or greater interest in a Holdings Company and that causes Section 355(e) of the Code to apply to the Split-off (whereby stock of one or more of the Holdings Companies is not treated as qualified property for purposes of Section 355(c) of the Code); or (C) the sale, termination or substantial change of a business of a Holdings Company within the Triggering Period if, due to such sale, termination or substantial change, a Holdings Company is not engaged in the active conduct of a trade or business immediately after the Split-off (within the meaning of Section 355(b) of the Code).

"No-Fault Taxes" means all Taxes described in Section 4.1.2 (c).

"Permitted Transfer" means (1) an issuance of employee stock options or (2) a sale or other transfer of primary or secondary equity securities or (3) any other direct or indirect transfer of the stock of one or more Holdings Companies or one or more USX Companies; provided that (a) after all such issuance of options or such sale or other transfers described in (1), (2) or (3), the percentage of stock owned directly or indirectly in the Holdings Company or USX Company whose stock is involved, by all persons owning stock in such corporation immediately after the Split-off, has not decreased in the aggregate by 50% or more (by vote or value) (after applying the aggregation and attribution rules set forth in Code Section 355(e)(4)(C)) or (b) such issuance, sale or transfer involves the acquisition by a person of stock or securities in any successor corporation of a Holdings Company or USX Company by reason of holding stock or securities in such Holdings Company or USX Company (for purposes of this Section 4.1, such stock or securities in such successor corporation shall be treated as stock or securities in such Holdings Company or such USX Company, as the case may be). In addition, a Permitted Transfer shall include any transfer proposed by (i) Holdings and consented to by Transtar or (ii) proposed by Transtar and consented to by Holdings, such consent not to be unreasonably withheld or delayed. Whether such consent is unreasonably withheld or delayed shall be determined based solely on whether such issuance, sale or transfer might reasonably result in Taxes subject to indemnity under this Section 4.1. If a party requests the consent of the other to make a transfer, such other party shall be deemed to have consented in writing to such transfer unless such other party otherwise sends a written response within 45 days after a written request to make such a transfer is sent.

"Split-off" means the distribution of the stock of the Holdings Companies in exchange for all of the Holdings Stock and the Management Stock.

"Taxes" means (1) all taxes, assessments or other governmental charges, including, without limitation, all federal, state, local or foreign taxes, charges, fees, duties, levies or other assessments including, without limitation, net or gross income, gross receipts, net or gross proceeds, ad valorem, real and personal property (tangible and intangible), sales, use, franchise, user, transfer, value-added, fuel, excess profits, occupational, employees' income withholding, unemployment, Social Security, Railroad Retirement, Railroad Unemployment Insurance, alternative or add-on minimum, estimated, environmental and franchise taxes, including interest, penalties or

additions to tax attributable to or imposed on or with respect to such taxes, which are imposed by any governmental body whether disputed or not, and shall include any liability for such amounts as a result of either being a member of a combined, consolidated, unitary or affiliated group or of a contractual obligation to indemnify any person or other entity and (2) related costs and attorneys fees.

"Transtar Triggering Event" means, (A) any acquisition (including a redemption), directly or indirectly (excluding all indirect acquisitions which in the aggregate do not exceed 10% of the outstanding stock of Transtar), of the stock (or substantially all of the assets) of Transtar during the Triggering Period; (B) any acquisition (including a redemption), directly or indirectly, of the stock of Transtar after the Triggering Period that, together with the Split-off, is determined to be part of a plan (or series of related transactions), within the meaning of Section 355(e) of the Code, pursuant to which 1 or more persons acquire directly or indirectly stock representing a 50% or greater interest in Transtar and that causes Section 355(e) of the Code to apply to the Split-off (whereby stock of one or more of the Holdings Companies is not treated as qualified property for purposes of Section 355(c) of the Code); or (C) the sale or termination of, or substantial change in, an active business of Transtar within the Triggering Period if, due to such sale, termination or substantial change, Transtar is not engaged in the active conduct of a trade or business immediately after the Split-off (within the meaning of Section 355(b) of the Code).

"Triggering Period" means the period from the date of the Split-off through the date of the second anniversary of the Split-off.

Section 4.1.2 Indemnification.

(a) Holdings Companies' Indemnification

1. B&LE shall indemnify and hold harmless Transtar and each USX Company against any B&LE Taxes.

2. DM&IR shall indemnify and hold harmless Transtar and each USX Company against any DMIR Taxes.

3. Fleet shall indemnify and hold harmless Transtar and each USX Company against any Fleet Taxes.

4. Dock shall indemnify and hold harmless Transtar and each USX Company against any Dock Taxes.

(b) USX's and Transtar's Indemnification. USX and Transtar shall jointly and severally indemnify and hold harmless Holdings, any direct or indirect owner of an interest in Holdings, and each Holdings Company against any Holdings Taxes.

(c) Sharing of No-Fault Taxes.

1. Notwithstanding Section 4.1.2(a) and Section 4.1.2(b), the sole remedy for No-Fault Taxes are pursuant to this Section 4.1.2(c). In the event Transtar or Holdings (or any direct or indirect owner of an interest in Holdings) incurs any Taxes resulting from the Split-off that result solely from the Split-off failing to meet the requirements of Section 355 of the Code and that are not caused by a Holdings Triggering Event or a Transtar Triggering Event or a breach of a representation or covenant by USX or Holdings in Sections 9.1.4, 9.2.4, 10.1(n), 10.3(a) or 10.3(b) (referred to herein as "No-Fault

Taxes"), such No-Fault Taxes shall be shared between the Holdings Companies and Transtar in the ratio of 56%/44%.

2. The Holdings Companies' share of No-Fault Taxes shall be allocated to each Holdings Company based upon the Ratio of the Credit Amount for such Holdings Company to the total Credit Amounts for all Holdings Companies.

3. Transtar's share of No-Fault Taxes shall be allocated among the USX Companies as follows: B Southern - 17.50%; EJ&E - 51.65%; F Southern - .59%; Lake Terminal - 3.14%; MCC - 1.19%; MRT - 7.56%; and URR - 18.37%. Transtar and each of the USX Companies shall jointly and severally indemnify Holdings (or any direct or indirect owner of an interest in Holdings) against Transtar's share of No-Fault Taxes allocated to such USX Company.

(d) Taxes Saved.

1. In the case of Holdings Taxes indemnified under Section 4.1.2(b) or No-Fault Taxes incurred by Holdings (or any direct or indirect owner of an interest in Holdings) and indemnified by Transtar or another USX Company under Section 4.1.2(c), "Taxes Saved" in the future shall be repaid to USX, Transtar or such other USX Company, as the case may be, when such Taxes Saved are "Realized."

2. "Taxes Saved" shall equal: (i) the actual reduction in Taxes for a particular taxable period that otherwise would have been due and payable for such taxable period, which reduction is solely due to (x) Holding's tax basis in the Holdings Companies or (y) the tax basis of a direct or indirect owner in Holdings in the entity through which such direct or indirect owner of Holdings owns its direct or indirect interest in Holdings (such ownership interest referred to as a "Holdings Interest"), being higher than it would have been if the Split-off were tax-free pursuant to Section 355 of the Code, multiplied by (ii) the Allocation Rate. The "Allocation Rate" shall be (A) 100% if the indemnified party recovered Holdings Taxes pursuant to 4.1.2(b) and (B) 44% if the indemnified party recovered No-Fault Taxes pursuant to Section 4.1.2(c).

3. Taxes Saved are "Realized" at the time the Taxes Saved for such taxable period otherwise would have been due and payable to a taxing authority.

4. For the avoidance of doubt, the following examples clarify when Taxes Saved have been Realized (in the amount of the actual reduction in Taxes for a particular taxable period as determined under Section 4.1.2(d)2 above) and when Taxes Saved have not been Realized:

(i) If, in a taxable transaction, a direct or indirect owner of Holdings transfers or

exchanges its Holdings Interest, or Holdings transfers its interest in a Holdings Company, such transfers might cause Taxes Saved to be Realized (as determined pursuant to Section 4.1.2(d)2 above). If, however, such transfer is pursuant to a tax-free transaction, there would be no Taxes Saved Realized at the time of the transfer. Such property received in a tax-free transaction ("Substituted Property") by a direct or indirect owner of Holdings or by Holdings, as the case may be, shall be (for purposes of this Section 4.1.2(d)) treated as the Holdings Interest transferred (in the case of a transfer by a direct or indirect owner of Holdings) or the stock of the Holdings Company transferred (in the case of a transfer by Holdings of a Holdings Company). If such Substituted Property is subsequently transferred in a taxable transaction, such transfer might cause Taxes Saved to be Realized (as determined pursuant to Section 4.1.2(d)2 above). If, however, such Substituted Property is exchanged for different property in a tax-free exchange, there would be no Taxes Saved Realized and such different property received would be the new Substituted Property (that would be treated like the original Holdings Interest transferred (in the case of a transfer of the Substituted Property by a direct or indirect owner of Holdings) or the stock of the Holdings Company transferred (in the case of a transfer of the Substituted Property by Holdings)).

(ii) To the extent that (x) Holdings' increased tax basis in a Holdings Company or (y) a direct or indirect owner's increased tax basis in its Holdings Interest, causes (or increases) a loss that is not used by a person to offset Taxes in a taxable period or an earlier taxable period, Taxes Saved have not been Realized. Such person generally would have Taxes Saved Realized in a subsequent taxable period to the extent such loss were used to offset Taxes otherwise due and payable in such subsequent taxable period.

(iii) If a partner that is required to pay any remaining Taxes Saved when Realized dies and the tax basis in such partner's Holdings Interest is stepped up to fair market value pursuant to Code Section 1014, any Taxes Saved that have not been Realized prior to such partner's death will never be Realized (and thus will never have to be repaid).

(iv) If a partner disposes of its Holdings Interest or Substituted Property in a taxable transaction, or in a tax-free transaction not described in Section

4.1.2(d)4(v) or (vi), and all Taxes Saved are not Realized by such Partner at the time of the disposition, a subsequent disposition by Holdings of the stock of a Holdings Company will not cause any Taxes Saved to be Realized by such partner.

(v) If a direct or indirect owner of Holdings transfers its Holdings Interest in a tax-free transaction, other than a transfer at death, to either (i) a Conduit Entity (as defined below) owned more than 50% by such owner (at the time Holdings sells or disposes of a Holdings Company) or (ii) to an entity that is not a Conduit Entity and that is owned more than 80% by such owner (at the time Holdings sells or disposes of a Holdings Company), and such transfer does not result in Taxes Saved at the time of the transfer, then at the time Holdings sells or otherwise disposes of a Holdings Company, such direct or indirect owner of Holdings shall be treated as having Taxes Saved Realized equal to (x) the amount of Taxes Saved such owner would have Realized as a result of the sale or other disposition by Holdings of such Holdings Company if such owner had not transferred its Holdings Interest to such entity multiplied by (y) the percentage of beneficial ownership such owner has in the Holdings Interest at the time Holdings sells or otherwise disposes of such Holdings Company. A Conduit Entity means an entity which is not treated for federal income tax purposes as a corporation or an association taxable as a corporation. For purposes of this Section 4.1.2(d)4(v), an interest in an entity (whether or not it is a Conduit Entity) owned by a member of the family (as defined in Code Section 267(c)(4)) of a direct or indirect owner of Holdings shall be treated as owned by such direct or indirect owner.

(vi) If a direct or indirect owner of Holdings transfers its Holdings Interest to a member of such owner's family (as defined in Code Section 267(c)(4)), Taxes Saved Realized by such family member shall be treated as Taxes Saved Realized by such direct or indirect owner of Holdings.

5. Notwithstanding anything to the contrary, the total Taxes Saved for the current taxable period and all prior taxable periods with respect to a particular party shall not exceed the total amounts paid to such party by USX, Transtar or another USX Company pursuant to Section 4.1.2(b) and 4.1.2(c).

6. USX's and Transtar's indemnity obligation with respect to a particular person under Section 4.1.2(b) and Transtar's (and the other USX Companies') indemnity obligation under Section 4.1.2(c) with

respect to a particular person shall be reduced by any Taxes Saved that are Realized by that person at or prior to the time the claim for indemnification is made. Such person shall have no obligation to pay back to USX, Transtar or any other USX Company any such Taxes Saved that are Realized that reduce USX's, Transtar's or such other USX Company's indemnity obligation under Section 4.1.2(b) or 4.1.2(c).

7. Only the party that received payment from USX, Transtar or a USX Company shall be liable to pay Taxes Saved when Realized and nothing in this Agreement shall require any transferee of a direct or indirect interest in Holdings to pay any Taxes Saved with respect to such direct or indirect interest in Holdings (whether or not such transferor owes Taxes saved at the time of the transfer to such transferee).

(e) Procedure for Direct and Indirect Owners of Holdings. This Section 4.1.2(e) provides (1) the procedure pursuant to which direct and/or indirect owners of Holdings must make a claim against (i) Transtar and/or USX for indemnification for Holdings Taxes (as provided in Section 4.1.2(b)) and (ii) Transtar and the other USX Companies for indemnification for No-Fault Taxes (as provided in Section 4.1.2(c)) (USX, Transtar and any other USX Company referred to in this Section 4.1.2(e) as an "Indemnitor") and (2) the procedure pursuant to which such direct and/or indirect owners of Holdings are required to return any Taxes Saved to an Indemnitor.

1. Claims against Transtar and/or USX.

(i) The parties to this Agreement intend to make all direct and/or indirect owners of Holdings third-party beneficiaries to Section 4.1 of this Agreement. Accordingly, each direct and/or indirect owner of Holdings has a direct claim against (A) Transtar and/or USX for indemnification for Holdings Taxes (as provided in Section 4.1.2(b)) and (B) Transtar and the other USX Companies for indemnification of Transtar's 44% share of No-Fault Taxes (as provided in Section 4.1.2(c)).

(ii) Holdings agrees to use commercially reasonable efforts to (a) act as agent for the direct and/or indirect owners of Holdings that have a direct claim against an Indemnitor and (b) cause such direct and /or indirect owners of Holdings to use Holdings as such an agent. Holdings' sole responsibilities as agent will be to collect indemnity claims (and other information set forth in Section 4.1.2(e)1(iii) below) from such direct and/or indirect owners of Holdings, forward such claims (and any other information set forth in Section 4.1.2(e)1(iii) below) to the Indemnitor and to forward payments made by the Indemnitor pursuant to such claims to such owner. If Holdings fails to act as agent, or a direct

and/or indirect owner of Holdings chooses not to use Holdings as an agent for its claims against an Indemnitor, claims by such direct or indirect owner of Holdings shall not be prejudiced in any way. In addition, except as set forth in Section 4.1.2(e)1(v) below, no act or omission of Holdings (while acting as or not acting as agent of an owner) shall prejudice, in any way, such owner's ability to make a direct claim against such Indemnitor or the amount to which the owner is entitle to collect directly from the Indemnitor.

(iii) To make a claim against an Indemnitor, each direct or indirect owner of Holdings may either present to Holdings or directly to the Indemnitor its claim for indemnity against an Indemnitor, together with the signed agreement described in Section 4.1.2(e)2(ii) and such documentation as the Indemnitor may reasonably request to support such owner's indemnity claim. If a direct or indirect owner submits a certificate from a nationally recognized firm of certified public accountants, such as a so-called "Big Five" public accounting firm, that sets forth the amount of Taxes incurred by such owner as a result of Holdings Taxes or No-Fault Taxes (and, for purposes of the tax gross-up, the amount of Taxes that would be owed as a result of payments by an Indemnitor to such owner) (an "Accountant's Certificate"), it will be deemed unreasonable for the Indemnitor to request any further documentation to support such owner's indemnity claim. If an owner provides (x) an Accountant's Certificate or (y) a certificate from an independent certified public accountant that sets forth such owner's marginal federal and state income tax rates for the taxable year at issue, then under no circumstances shall the owner be required to disclose any other Tax return information to the Indemnitor in order to receive payment for an indemnity claim. Holdings, if the direct or indirect owner uses Holdings as its agent, shall forward such claim, agreement and supporting documentation to the Indemnitor for payment.

(iv) Within 30 days after the Indemnitor has received the claim for indemnification, the signed agreement described in Section 4.1.2(e)2(ii), and the supporting documentation referenced in Section 4.1.2(e)1(iii) for the claim from Holdings (if the direct or indirect owner uses Holdings as its agent) or from the direct or indirect owner of Holdings, it shall pay such claim to Holdings (if the direct or indirect owner uses Holdings as its agent) or directly to such direct or indirect owner

of Holdings, unless it reasonably disputes such claim, in which case it will attempt to resolve the dispute with Holdings or with such direct or indirect owner as soon as practicable.

(v) An Indemnitor's liability for an indemnity claim made by a direct or indirect owner of Holdings through Holdings is relieved to the extent the Indemnitor makes payment to Holdings under this Section 4.1.2(e) with respect to such claim.

(vi) It is the parties' intention that Holdings will act solely as an agent of its direct and indirect owners that submit claims through Holdings with respect to the indemnity obligations of the Indemnitors under this Section 4.1.2, and Holdings has no direct obligation to such owners or to the Indemnitors with respect to the indemnity obligations of the Indemnitors. Holdings shall have no liability to the direct and indirect owners of Holdings or to USX, Transtar or a USX Company for any acts or omissions with respect to its role as agent under this Agreement.

2. Return of Taxes Saved.

(i) If a direct and/or indirect owner of Holdings makes a claim pursuant to section 4.1.2(e)1, such direct and/or indirect owner (or a successor to such direct and/or indirect owner's interest) will agree to become directly liable to the Indemnitor for any Taxes Saved when such Taxes Saved are Realized.

(ii) Prior to indemnifying a direct or indirect owner of Holdings pursuant to Section 4.1.2(b) or Section 4.1.2(c), the Indemnitor may reasonably require such direct or indirect owner of Holdings to enter into a written agreement to be directly liable for Taxes Saved when Taxes Saved are Realized.

(iii) Holdings does not agree to act as agent with respect to Taxes Saved.

(f) Delay of Indemnity Payments if the Other Party is Delinquent.

1. USX, Transtar or another USX Company may delay all or a portion (as described further below) of a payment of an indemnity claim made by a direct or indirect owner of Holdings if each of the following conditions are met at the time payment would otherwise be due to Holdings or a direct or indirect owner of Holdings under Section 4.1.2(e)1(iv).

(i) Transtar has incurred No-Fault Taxes that are Finally Determined.

(ii) Transtar has made an indemnity claim against a Holdings Company for reimbursement of such Holdings Company's allocable portion of the Holdings Companies' 56% share of such No-Fault Taxes.

(iii) At the time Transtar presents its claim described in (ii) above, such Holdings Company is owned at least 50%, directly or indirectly, by Holdings.

(iv) Within 90 days after Transtar presents its claim described in (ii) above, such Holdings Company has not paid such claim in its entirety or has not provided a reasonable basis for failure to pay such claim in its entirety.

If each of conditions (i) through (iv) above are met, then USX, Transtar or such USX Company, as the case may be, may delay payment of an indemnity claim made by a direct or indirect owner of Holdings, up to a pro-rated portion (as described below) of the amount such Holdings Company has not paid (and for which a reasonable basis for the failure to pay such amount has not been provided) within 90 days after Transtar presents its claim described in (ii) above, until 30 days after (x) the delinquent Holdings Company has paid such amount due on Transtar's indemnity claim or (y) Transtar and such Holdings Company have resolved any dispute over the unpaid portion of Transtar's indemnity claim (Transtar to use such reasonable efforts so as to obtain a resolution as quickly as practicable). The pro-rated portion shall be based on such direct or indirect owner's indemnity claim over the total of all such claims for which USX, Transtar or a USX Company is seeking to delay payment under this Section 4.1.2(f)1. In no event shall the total payments delayed under this Section 4.1.2(f)1 exceed the unpaid portion of Transtar's indemnity claim. No interest shall accrue on an indemnity claim of a direct or indirect owner of Holdings during the period USX, Transtar, or such USX Company is allowed to defer payment of such claim under this Section 4.1.2(f)1.

2. A Holdings Company may delay payment of all or a portion (as described further below) of an indemnity claim made by Transtar for No-Fault Taxes if each of the following conditions are met at the time the indemnify claim is presented by Transtar.

(i) A direct or indirect owner of Holdings has incurred No-Fault Taxes that are Finally Determined.

(ii) Holdings, on behalf of such direct or

indirect owner, or a direct or indirect owner of Holdings, has made an indemnity claim against Transtar or another USX Company for reimbursement of such USX Company's allocable portion of Transtar's 44% share of such No-Fault Taxes.

(iii) Within 90 days after Holdings or such direct or indirect owner presents the claim described in (ii) above, Transtar or such USX Company has not paid such claim in its entirety or has not provided a reasonable basis for failure to pay such claim in its entirety.

If each of conditions (i) through (iii) above are met, then a Holdings Company may delay making an indemnity payment to Transtar, up to an amount that Transtar or such USX Company has not paid (and for which a reasonable basis for the failure to pay such amount has not been provided) within 90 days after Holdings or such direct or indirect owner of Holdings presents its claim described in (ii) above, until 30 days after (x) Transtar or such USX Company has paid such amounts due on the indemnity claim described in (ii) above or (y) Holdings and Transtar or such USX Company have resolved any dispute over the unpaid portion of such indemnity claim (Holdings to use such reasonable efforts so as to obtain a resolution as quickly as practicable). No interest shall accrue on Transtar's indemnity claim during the period that the Holdings Company is allowed to defer payment of such claim under this Section 4.1.2(f)2.

(g) Gross-up for Taxes. All payments required by Section 4.1.2 shall be made on an after-tax basis, so that the net amount retained by the payee (after payment by the payor and payee of all Taxes imposed on such payment and all payments made pursuant to this gross-up provision) equals the amount owed pursuant to Section 4.1.2. For example, if the partners of Holdings incur $100 of No-Fault Taxes and thus Transtar is obligated to pay 44% of this amount to such partners pursuant to Section 4.1.2(c), if such partners would be subject to income tax (and all other Taxes) equal to 40% on payments by Transtar (or a USX Company) to such partners, Transtar (or a USX Company) must gross-up such payment pursuant to this paragraph by $29.33 for a total payment to the partners of $73.33 ($44 + 29.33).

Section 4.1.3 Credit Enhancement Provided by Holdings.

(a) Holdings shall provide credit enhancement in an amount not to exceed $100,000,000 to protect against Applicable Taxes for the Applicable Credit Amount in each of the following cases.

1. Except with respect to a Permitted Transfer or a transaction that does not occur during the Credit Period, at or prior to the time Holdings sells, transfers, assigns or otherwise disposes of the stock

of a Holdings Company (or if a Holdings Company disposes of substantially all of its assets).

2. Within 30 days after USX notifies Holdings that the conditions in Section 4.1.4(a) have been met.

3. At the option of Holdings, within 30 days after USX notifies Holdings that USX or Transtar has received from the Internal Revenue Service or any other taxing authority any written notice of deficiency, claim or adjustment of Taxes that arises from or is based in whole or in part on the breach of a representation in Section 9.2.4 or a covenant in Section 10.3(a).

4. At the option of Holdings, within 30 days after USX notifies Holdings that USX or Transtar has received from the Internal Revenue Service or any other taxing authority any written notice of deficiency, claim or adjustment of Taxes that includes in whole or in part No-Fault Taxes.

5. At the option of Holdings, within 30 days after USX notifies Holdings that the conditions in Section 4.1.4(b) have been met.

(b) Operating Principles of Credit Enhancement

1. Holdings shall determine the form of credit enhancement, which shall, at the option of Holdings, consist of one or more of the following:

(i) One or more of the following provided by an entity with an investment grade rating from Moody's or Standard & Poors.

a. Insurance for the Applicable Credit Amount

b. Letter of credit for the Applicable Credit Amount

c. Surety bond for the Applicable Credit Amount

d. Cash for the Applicable Credit Amount

e. Any other form of credit enhancement for the Applicable Credit Amount reasonably acceptable to USX and Transtar.

(ii) An undertaking by each partner of Holdings to severally (but not jointly) indemnify USX and Transtar against Applicable Taxes in the aggregate not in excess of the Applicable Credit Amount. If, at the time the credit enhancement is provided, more than 25% of the partnership interests in Holdings are held by persons or entities that were not partners at the time of the Split-off, USX has the right to review the new partners for credit quality. If any new partner is below

investment-grade credit quality or, in the case of an individual, is not of credit quality reasonably acceptable to USX, then USX may object to having such partner's indemnity qualify as credit enhancement, in which case Holdings shall either substitute another of the permissible credit enhancements or require that such partner's indemnity obligation be transferred to the person or entity that held such partnership interest at the time of the Split-off.

(iii) Holdings may choose a combination of credit enhancements set forth herein as long as the total dollar value of the credit enhancement is equal to the Applicable Credit Amount.

2. In the case of (a) a Holdings Triggering Event that is not a Permitted Transfer that occurs during the Triggering Period, (b) a situation described in Section 4.1.4(a) and (c) any breach of either the representation in Section 9.2.4 or covenant in Section 10.3 (a), the credit enhancement procured shall be the primary recourse of Transtar, USX and the USX Companies in seeking to enforce an indemnity under this Section 4.1 (in which case the relevant Holdings Company shall be secondarily liable for any indemnity payments owed pursuant to this Section 4.1). For purposes of this subsection, an acquisition of the stock (or substantially all of the assets) of a Holdings Company, either directly or indirectly (including the acquisition of a partnership or other interest in Holdings), shall be deemed to occur no later than such time as a binding agreement of sale or a letter of intent is entered into, or a regulatory filing with respect to such acquisition is made.

3. If Credit Enhancement is provided with respect to a Holdings Company pursuant to this Section 4.1.3 and such Credit Enhancement remains in full force and effect, but the situation giving rise to such credit enhancement is not covered by Section 4.1.3(b)2 above (which situations include, but are not limited to (i) a Permitted Transfer that occurs at any time, (ii) the election by Holdings to procure credit enhancement for No-Fault Taxes pursuant to Section 4.1.3(a)4 and (iii) the election by Holdings to procure credit enhancement pursuant to Section 4.1.3(a)5), the credit enhancement procured shall be the sole recourse of Transtar, USX and the USX Companies in seeking to enforce an indemnity (in which case the relevant Holdings Company shall not be liable for any indemnity payments owed pursuant to this Section 4.1).

4. If Holdings does not procure credit enhancement to protect against No-Fault Taxes, then each Holdings Company shall be primarily liable, on a several but not joint basis, for any indemnity payments with respect to such No-Fault Taxes owed pursuant to this Agreement.

5. If the amount of credit enhancement procured with respect to a Holdings Company exceeds the amount of Applicable Taxes Finally Determined with respect to such Holdings Company, the amount of credit enhancement procured or to be procured with respect to any other Holdings Company chosen by USX for which Taxes have not been Finally Determined, shall be increased by a pro-rata share of such excess, with such share based on a ratio of the Credit Amount of such Holdings Company to the sum of the Credit Amounts for all such Holdings Companies. If the credit enhancement amount for a Holdings Company is increased pursuant to this subsection, such increased amount shall be taken into account in applying this subsection when the Taxes of such Holdings Company are Finally Determined.

6. The credit enhancement provided pursuant to Section 4.1.3(a)1 and Section 4.1.3(a)2 shall remain in full force and effect for as long as the indemnifications secured by such enhancement survive pursuant to this Agreement.

Section 4.1.4 Acquisition of 50% or More of Ownership Interests in Holdings.

(a) Holdings shall provide credit enhancement pursuant to Section 4.1.3(a)2 if each of the following conditions has been met.

1. During the Triggering Period there is an acquisition of a partnership interest (or other interest) in Holdings, provided that after such acquisition, with respect to each Holdings Company owned by Holdings at the time, the percentage of stock owned directly or indirectly in such Holdings Company, by all persons owning stock in such corporation immediately after the Split-off, has decreased in the aggregate by 50% or more (by vote or value) (after applying the aggregation and attribution rules in Section 355(e)(4)(C)), and

2. Within 5 years from the date of the Split-off, USX or Transtar has received from the Internal Revenue Service or any other taxing authority any written notice of deficiency, claim or adjustment (including Internal Revenue Service Form 5701, "Notice of Proposed Adjustment") involving Taxes that arise from or are in significant part due to an acquisition of a partnership or other interest in Holdings described in Section 4.1.4(a)1 above. Neither USX or Transtar shall voluntarily notify or otherwise advise the Internal Revenue Service as to any acquisition of a partnership or other interest in Holdings; provided, however, that USX or Transtar may provide any information requested by the Internal Revenue Service in the course of an audit concerning Transtar, including information concerning acquisitions of partnership or other interests in Holdings.

(b) If the condition in Section 4.1.4(a)1 above is met and the written notice of deficiency, claim or adjustment described in Section 4.1.4(a)2 is received more than 5 years from the date of the Split-off, then each Holdings Company (i) owned 50% or

more by Holdings at the time an indemnity payment is owed pursuant to Section 4.1.2(a) and (ii) for which Holdings has not made the election under Section 4.1.3(a)5 to provide credit enhancement, shall have joint and several liability with every other such Holdings Company satisfying (i) and (ii) of this Section 4.1.4(b) for the Taxes described in Section 4.1.4(a)2 with respect to all such Holdings Companies satisfying (i) and (ii) of this Section 4.1.4(b).

Section 4.1.5 Circumstances for USX Credit Enhancements.

(a) In the event that all or substantially all of the assets or the stock of the U.S. Steel Group of USX are sold, transferred, assigned or otherwise disposed of, including (without limitation) a spin off to all or a portion of the shareholders of USX, in one or a series of related transactions during the Credit Period, then USX shall either (1) provide credit enhancement as provided in Section 4.1.5(b), or (2) require any purchaser, transferee, assignee or other recipient of the U.S. Steel Group assets to assume joint and several liability for the obligations of USX and Transtar under this Section 4.1.

(b) USX shall determine the form of credit enhancement, which shall be in an amount specified in Section 4.1.5(c) and which shall, at the option of USX, consist of one or more of the following.

1. One or more of the following provided by an entity with investment grade rating from Moody's or Standard & Poors.

   (i) Insurance

   (ii) Letter of credit

   (iii) Surety bond

2. Cash

3. Any other form of credit enhancement reasonably acceptable to Holdings.

(c) The amount of the credit enhancement shall be $80,000,000 in the case of a sale, transfer, assignment or other disposition of all or substantially all of the assets or the stock of the U.S. Steel Group during the Triggering Period; in all other instances the amount of the credit enhancement shall be $40,000,000.

(d) USX may choose a combination of credit enhancements as set forth in Section 4.1.5(b) as long the total dollar amount of the credit enhancement is equal to the amount specified in Section 4.1.5(c).

Section 4.1.6 Duration of Indemnity Provisions / Survival of Indemnification/Successors and Assigns.

This Section 4.1 shall become effective as of the date of the Split-off and, except as otherwise provided herein, shall continue in full force and effect indefinitely.

(a) The indemnifications provided herein shall survive until 30 days after the expiration of the applicable statute of limitations (including any applicable extensions thereto).

(b) Any reference in this Section 4.1 to a person, party or entity shall include any successor or assign to such person, party or entity whether by merger, consolidation, asset transfer or otherwise.

Section 4.2 Tax Matters Agreement.

Effective as of the Closing Date, USX, Holdings, the USX Companies and the Holdings Companies shall enter into a Tax Matters Agreement in substantially the form of Exhibit C attached hereto.

Article V

Transportation Matters

Section 5.1 Transportation Services Agreements.

(a) Effective as of the Closing Date, USX and Fleet shall agree to an extension of the termination date from March 15, 2005 until March 15, 2009 of the Transportation Services Agreement dated December 21, 1998, but effective July 1, 1998 by and among USX; USS/Kobe Steel Company, an Ohio general partnership, and Fleet, such agreement to be substantially in the form of Exhibit D (the "Substitute Fleet TSA"). Holdings shall use all commercially reasonable efforts to negotiate the same extension with Republic Technologies International, LLC ("RTI").

(b) Effective as of the Closing Date, USX, DM&IR and B&LE shall enter into a Transportation Services Agreement identical in substance to the Transportation Services Agreement dated December 21, 1998 but effective July 1, 1998 by and between USX and Transtar except that the "Initial Term" as defined in Section 2 thereof shall be through June 30, 2008 instead of December 31, 2004, such agreement to be in substantially the form of Exhibit E (the "Substitute TSA").

Section 5.2 Non-Interference.

Each party hereby agrees that unless required to do so by law or compelled to act by subpoena or other judicial or regulatory process, for a period of five (5) years after the Closing Date, it will not, and shall not permit any of its directors and agents (but only in such individual's capacity as a director or agent), officers, representatives, counsel, subsidiaries or affiliates to (and shall not encourage or assist its employees to) (i) comment in an adverse manner or in any manner express an adverse opinion on behalf of any person including, without limitation, by submitting any adverse written, oral or other comments or testimony before any federal, state or local legislative body, court or other tribunal, governmental agency, commission or other instrumentality (each a "Governmental Entity") in respect of any proposed sale or other transaction involving the disposition by the other party of any of Holdings Companies or the USX Companies (a "Unit Sale"); (ii) in any way on behalf of such party or any other person to assist, encourage or provide information to any other person, entity or group seeking to comment in an adverse manner and/or in any manner express an opinion which in any way opposes any proposed Unit Sale; (iii) respond on behalf of such party or any other person in an adverse manner to any investigation, inquiry, or request for comment or information by or from any Governmental Entity or any other person, group or entity in respect of any proposed Unit Sale; or (iv) take any action on behalf of such party to oppose a proposed Unit Sale. Nothing in this Section 5.2 shall be construed or interpreted to prevent or preclude either party from

providing exclusively factual information and/or data in response to any request from a Governmental Entity. The restrictions set forth in this paragraph shall not apply to (i) a sale of the DM&IR to the Burlington Northern Santa Fe Railway ("BNSF") or to any successor to the BNSF rail assets utilized for the transportation and/or transloading of taconite pellets in Minnesota; or (ii) a sale of Fleet, to a competitor, if the effect of such sale is to leave less than two major competitors providing transportation of bulk commodities on the Great Lakes. The parties agree that there currently are four major competitors providing such service on the Great Lakes: Fleet; American Steamship Company; The Interlake Steamship Company; and Oglebay Norton.

Article VI

Amendments to 1988 Agreements

Section 6.1 Stockholders Agreement.

(a) Effective as of the Closing Date, USX and Holdings shall terminate the Stockholders Agreement in substantially the form set forth as Exhibit F (the "Stockholders Agreement Termination").

(b) Transtar shall pay each of USX and Holdings a pro rata portion of the monitoring fee pursuant to Section 8.3 of the Stockholders Agreement payable for the one month period in which the Closing Date occurs, such pro rata portion to be based on the number of days elapsed in such period.

(c) On the Closing Date, Holdings shall cause James J. Mossman, Peter G. Peterson and Stephen A. Schwarzman or any replacements (collectively, the "Blackstone Directors") to resign as directors of Transtar.

Section 6.2 Asbestos Assumption and Indemnification Agreement.

Effective as of the Closing Date, the Assumption and Indemnification Agreement dated as of December 28, 1988 by and among USX, Transtar and Fleet (the "Assumption Agreement") shall be amended and restated to provide that (i) USX shall continue its indemnification obligation set forth in Section 1 thereof; (ii) Section 2 thereof shall be modified such that (a) for claims filed pursuant to Section 2 thereof and filed prior to the Closing Date, (x) Fleet shall indemnify USX for 56% of all liability incurred by USX and arising with respect to such claims and (y) Transtar shall indemnify Fleet for 44% of all liability incurred by Fleet and arising with respect to such claims, and (b) for claims filed pursuant to Section 2 thereof and filed on or after the Closing Date, Fleet shall indemnify USX for 100% of all liability arising with respect to such claims; (iii) other than as set forth in clause (ii)(a)(y) above, Transtar shall be released from its indemnification obligation set forth in Section 2 thereof; and (iv) claims subject to the Assumption Agreement which have been filed prior to the Closing Date and which have been "administratively dismissed" by a court of competent jurisdiction and which are subsequently re-filed or otherwise revived by the plaintiff shall, for purposes of the Assumption Agreement and the amendments contemplated hereby, be deemed to have been filed on the date on which the original claim to which such re-filed or revived claim relates was filed, all such amendments to be memorialized in an agreement to be entered into by and among USX, Transtar and Fleet, to be called the Amended and Restated Assumption and Indemnification Agreement, and to be substantially in the form of Exhibit G (the "Asbestos Agreement").

Section 6.3 Environmental Indemnification Agreement.

(a) Effective as of the Closing Date, USX, Holdings and the Holdings Companies shall enter into a new Environmental Indemnification Agreement identical in substance to the Environmental Indemnification Agreement dated as of December 28, 1988 (the "1988 Environmental Agreement") except that (i) the

only beneficiaries of such new agreement shall be Holdings and (ii) the Holdings Companies and the USX Deductible Amount (as defined in such agreement) shall be $1,158,826, such agreement to be in substantially the form of Exhibit H (the "Environmental Indemnification Agreement").

(b) Effective as of the Closing Date, USX and Holdings shall cause Transtar and the Transtar Companies to terminate the 1988 Environmental Agreement, such termination to be substantially in the form of Exhibit I (the "Environmental Agreement Termination").

Section 6.4 USS Name License Agreement.

Effective as of the Closing Date, USX shall and Holdings shall cause Fleet to enter into an amendment of the License Agreement dated as of December 28, 1988 among USX and Fleet in substantially the form of Exhibit J (the "USS Name License Agreement") to provide that the term specified in Section 9 thereof shall terminate on the second anniversary of the Closing Date and that Fleet shall take the steps specified upon termination within one year thereafter.

Section 6.5 Agreement Concerning Leases, Licenses and Easement.

The Agreement Concerning Leases, Licenses and Easements dated as of December 28, 1988 by and among USX, Transtar and the Transtar Companies shall remain in full force and effect so far as they apply to any of the Holdings Companies.

Section 6.6 Asset Purchase Agreement.

USX, Holdings, Transtar and each Transtar Company shall enter into an amendment of the Asset Purchase Agreement dated as of December 15, 1988 (the "1988 Asset Purchase Agreement") to amend Section 10.11 thereof, such amendment to be substantially in the form of Exhibit K (the "Asset Purchase Agreement Amendment").

Section 6.7 Services and Technical Assistance Agreement.

Effective as of the Closing Date, USX and Transtar shall enter into an amendment of the Services and Technical Assistance Agreement dated as of December 28, 1988 (the "1988 Services Agreement") to delete all references to, and any obligations implied with respect thereto, the Corresponding Companies (Direct and Indirect), their respective agents, successors and assigns, such amendment to be substantially in the form of Exhibit L (the "1988 Services Agreement Amendment").

Article VII

Inter-Company Services

Section 7.1 Services Agreement.

Effective as of the Closing Date, Transtar will, or will cause a subsidiary of Transtar reasonably acceptable to Holdings, to, enter into a services agreement (the "Services Agreement") with Holdings and the Holdings Companies to provide services to the Holdings Companies (the "Services") on terms and conditions consistent with Section 7.3 hereof and otherwise reasonably acceptable to each of Transtar, USX and Holdings, such services agreement to become effective on the Closing Date. Upon execution of this Agreement, Transtar, Holdings and the Holdings Companies shall negotiate in good faith to enter into a mutually acceptable agreement.

Section 7.2 B&LE Services Agreement.

Unless the TCIU Approval has occurred and the Union B&LE Transferees have been transferred as of the Closing Date, Holdings will cause B&LE to enter into a services agreement (the "B&LE Services Agreement") with USX and the USX Companies to provide services (the "B&LE Services") on terms and conditions consistent with Section 7.4 hereof and otherwise reasonably acceptable to each of Transtar, USX and Holdings, such services agreement to become effective on the Closing Date. Upon execution of this Agreement, Holdings, B&LE, USX and the USX Companies shall negotiate in good faith to enter into a mutually acceptable agreement.

Section 7.3 Completion of Services Agreement.

USX and Holdings shall complete negotiation of the final terms of the Services Agreement and the B&LE Services Agreement adhering to the following principles:

(a) General Terms of Services.

(i) Services should be provided to both the USX Companies and the Holdings Companies on a non-discriminatory basis and, unless otherwise mutually agreed, based on the same priorities as those on which Services were provided immediately prior to the date of this Agreement; provided, that nothing set forth herein shall prohibit Transtar from making changes to such service priorities which are, individually and in the aggregate, immaterial.

(ii) Services should be charged based upon costs, without any mark-up reflecting profits or a return on investment. Costs of services purchased from USX by Transtar for the account of the Holdings Companies shall be based upon the prices paid for such services under the 1988 Services Agreement, as in effect on the date hereof, with no material adjustments to the costs of such services.

(iii) Costs for services will be charged based on the principles set forth in Exhibit O attached hereto. Holdings may once every six months, in conjunction with the review specified in clause (iv) reduce its service requirements by written notice delivered to Transtar; provided that no more than one such notice may be delivered in any six month period. If Holdings makes such a reduction, the parties will, in conjunction with the next succeeding scheduled Service review, provide for an appropriate reduction in rates to reflect the effects of reduced utilization resulting from such reduced Service requirements.

(iv) The parties to the Services Agreement shall meet every six months, or more frequently if they so agree, to perform the reviews specified in Exhibit O attached hereto and to discuss and attempt to resolve any requested adjustments to, or disputes or disagreements regarding, the Services as may exist at the time of such meeting and will attempt to resolve any errors or misunderstandings with respect thereto.

(v) To the extent that Transtar finds it necessary or reasonably desirable to use any software, books, records or printouts currently used by the B&LE in

providing services to USX, the USX Companies or the Holdings Companies, which are retained by B&LE and not transferred to Transtar as a part of the B&LE Dividend (the "Non-Transferred B&LE Assets") in connection with the provision of Services, B&LE shall, and Holdings shall cause B&LE to, upon the written request of Transtar, license or otherwise make available to Transtar such Non-Transferred B&LE Assets in order to allow Transtar to fulfill its obligations under the Services Agreement. To the extent that Transtar requests access to any Non-Transferred B&LE Assets in accordance with the immediately preceding sentence and B&LE fails to make available such assets in violation of the requirements of such sentence, then Transtar shall not be obligated to provide any Services with respect to which the use of such unavailable Non-Transferred B&LE Assets is necessary or reasonably desirable until such time as such Non-Transferred B&LE Assets are licensed or otherwise made available to Transtar, to Transtar's reasonable satisfaction, by B&LE.

(b) Intellectual Property Rights. The Services Agreement should make clear that each of the USX Companies and the Holdings Companies will have, other than with respect to third-party licenses, trade marks, trade names or service marks, either title to or a perpetual, freely transferable, non-exclusive, royalty-free license to use all of the intellectual property currently used in their respective businesses, including without limitation, all computer software (including all customizations thereof through closing, all source code and all object code related thereto). In the event of the discontinuance of any MIS Services elected by Transtar, the USX Companies shall assist the Holdings Companies in migrating from the discontinued MIS Services to the replacement stand-alone MIS system, including assistance with related interfaces.

(c) Legal Services. The parties shall discuss and mutually agree upon allocation of the Transtar legal department services, including the assignment of at least one Transtar lawyer to the Holdings Companies, and a mutually acceptable contingency plan in the event that conflicts of interest arise.

(d) Quality Standards.

(i) The Services provider shall be responsible for maintaining consistent quality levels for all Services. Services will be provided on the basis of (including, without limitation, frequency, schedule, level of detail and other matters), and at least at, the quality at which they are currently provided; provided, that nothing set forth herein shall prohibit the Service provider from making changes to the basis on which Services are provided (including, without limitation, frequency, schedules, level of detail and other matters) which are, individually and in the aggregate, immaterial. The quality and level of services which are currently purchased from USX pursuant to the 1988 Services Agreement shall be provided by Transtar to Holdings and the Holdings Companies based upon the quality and level of such services currently received under the 1988 Services

Agreement, as in effect on the date hereof, with no material adjustments to the quality or level of such services.

(ii) Additional Services or changes to Services may be requested by the Services recipient and, if provided, will be provided based upon terms to be negotiated at the time.

(iii) The Services provider will ensure that the management information systems relevant to the Services provided under the Services Agreement are maintained consistent with customary Transtar service levels. Upgrades may be requested and, if provided, will be provided based upon terms to be negotiated at the time.

(iv) In order to assure Services quality, the parties will establish mutually agreeable quality benchmarks, based on current Transtar performance standards. All costs to develop such benchmarks, and any systems relating thereto, shall be shared equally by Holdings and Transtar.

(v) Following notice and reasonable opportunity to cure, the material and recurring failure on the part of the Services provider to maintain Services consistent with the quality of service currently being provided will provide the Services recipient with the right to give notice that a "Service Alarm" has occurred. Upon the declaration of a Service Alarm, the parties shall immediately consult regarding the best way to resolve such Service Alarm in a mutually satisfactory manner. If within 7 calendar days of the declaration of a Service Alarm there remains a good faith dispute as to whether or not the conditions necessary to cause a Service Alarm have occurred, either party may request mediation or arbitration of the dispute in accordance with the provisions of Exhibit P, attached hereto. If either party requests arbitration, the parties shall proceed directly to arbitrate the dispute in accordance with Exhibit P, unless the parties mutually agree to mediation, in which case the arbitration shall be stayed pending the outcome of such mediation. Once the parties have entered such arbitration, the Service recipient shall pay into escrow all sums due in respect of any Services being so disputed; provided, however, upon final determination of such arbitration process, all such escrowed payments, including any interest in respect of such escrowed funds, shall be delivered as promptly as practicable to the party whom the arbitrators determined is entitled to such sums.

(e) Termination; Renewal Option.

(i) Subject to the following renewal and discontinuance options, the Services Agreement shall have a term of four years; provided that, subject in all cases to the applicable renewal option, the Services Agreement shall terminate as to any Holdings Company on the date which is six months after the date of the sale of all or substantially all of the outstanding

capital stock of such Holdings Company by Holdings (or, if all or substantially all of the general partnership interest owned by Blackstone Transportation Company, Inc., or any of its affiliates, is sold), the Services Agreement will terminate in its entirety six months after such sale. Such six month period will be extended up to an additional six months in the event that a Holdings Company (or Holdings) is purchased by a buyer who elects to so extend the six month period. Upon termination of the Services Agreement, in whole or in part, the Services provider will cooperate in good faith with the Services recipient to assist in a reasonable transition of the relevant Services and, if not otherwise being used by the Services provider, the related infrastructure to the Services recipient, Holdings or the purchaser of the applicable Holdings Company, as the case may be. Other than to assist and cooperate with the migration to a new service provider, the Services provided pursuant to this agreement do not include transition and installation services.

(ii) Any Services with respect to any Holdings Company (including any portion of the Services) under the Services Agreement may be discontinued by the recipient in accordance with Section 7.3(a)(iii) of this Agreement.

(iii) The Services Agreement will provide that, upon the sale of any Holdings Company (or the sale of all or substantially all of the general partnership interest owned by Blackstone Transportation Company, Inc., or any of its affiliates), USX will negotiate in good faith with the purchaser of such Holdings Company regarding the renewal of the Services Agreement for period of up to two years from the termination date (including any extension period available to such purchaser) set forth in clause (i) above. Any party wishing to renew the Services Agreement will agree to negotiate in good faith regarding the fees to be paid for such services which shall be charged on an arm's-length basis.

(iv) Upon termination of the Services Agreement, USX, at Holdings' request, will provide Holdings or the relevant Holdings Company with the opportunity to hire any redundant or excess Transtar personnel involved in providing Services to the Holdings Companies and shall take reasonable steps to cooperate with Holdings in making known to such employees the option to be employed by Holdings. To the extent that Transtar personnel elect to become employed by Holdings or any Holdings Company (or such personnel decline employment with Holdings or any Holdings Company and are thereafter terminated by Transtar or any other USX Company), Transtar shall make available to the Holdings Companies the computer workstations and related physical assets of such personnel at no additional cost to the Holdings Companies or Holdings; provided, however, such workstations and assets will not be so provided unless such workstations and assets are owned by the

USX Companies and are not otherwise being used by the USX Companies.

(f) Miscellaneous.

(i) If a USX Company, other than Transtar, is sold, Transtar will retain all personnel necessary to perform all functions required under the Services Agreement or, alternately, transfer such function to USX or another USX Company without diminution or disruption in service levels or quality.

(ii) If Transtar is sold, USX will assume or cause the purchaser to assume the obligations under the Services Agreement without diminution or disruption in service levels or quality.

(iii) All Services provided pursuant to the Services Agreement will be subject to a force majeure provision substantially in the form of Section 3 of Exhibit P.

(iv) No warranty, implied or otherwise, is provided with any Service or transition assistance. USX and the USX Companies disclaim all liability, including that arising from the negligence of USX and the USX Companies or any of their directors, officers, employees, agents, contractors or suppliers for any Service provided or any failure to perform under the Services Agreement, except for that which arises out of the bad faith, gross negligence or intentional misconduct of USX or the USX Companies. Holdings and the Holdings Companies' sole remedy for breaches of the Services Agreement shall lie under the arbitration provisions of Exhibit P. No officer, director, employee or consultant of USX or any USX Company shall have any personal liability for a breach of this Agreement other than liability based on such person's gross negligence or intentional misconduct.

(v) Holdings and the Holdings Companies ("Indemnitors") shall defend, indemnify and save harmless USX and the USX Companies and their directors, officers, employees, agents, contractors or suppliers (collectively, "Indemnitees") from and against any and all obligations, liabilities, claims suits, demands, losses and expenses, including reasonable attorneys' fees, (collectively "Damages") arising out of the work to be performed under the Services Agreement, and asserted against the Indemnitees by any persons or entity (including employees of the Indemnitors) provided that any such Damages are attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including loss of use resulting therefrom. The Indemnitors agree to defend, indemnify and save harmless the Indemnitees hereunder regardless of whether or not said Damages are caused or are alleged to be caused in part by the negligent acts or omissions of the Indemnitees. The parties specifically understand and agree that this indemnity and hold harmless shall not apply to

Damages caused by the sole negligence of the Indemnitees.

(vi) Transtar may decline to provide any Service herein if such Service would conflict with any applicable law, regulation or ordinance, would, with respect to legal Services, result in a conflict of interest (such conflict of interest to be determined according to the applicable professional disciplinary code) or would be inconsistent with any provision of the Services Agreement. In any such event, Transtar shall provide prompt written notice to Holdings and/or the relevant Holdings Company, specifying the basis therefor, and Transtar agrees to assist such company in obtaining substitute services. Notwithstanding the foregoing, Transtar agrees to use reasonable efforts to resolve any such conflict of law, regulation or ordinance or conflict of interest.

(vii) The Services Agreement is to be governed by the laws of the Commonwealth of Pennsylvania, except for the conflicts provisions thereof.

(viii) The Services Agreement is to provide that there shall be no assignment of rights and obligations by any party (except that Transtar may (i) assign to or subcontract with USX or (ii) assign to any wholly owned, direct or indirect, subsidiary of USX or subcontract with a third-party as long as Transtar remains obligated) and there shall be no third-party beneficiary rights; provided that nothing in this clause (viii) shall be construed to deny any purchaser of Holdings or any Holdings Company the benefits of Section 7.3(e)(i) of this Agreement.

(ix) Holdings and the Holdings Companies agree to indemnify and save harmless USX and the USX Companies for any sales or use taxes of similar-type taxes imposed on services performed under the Services Agreement.

(x) Once executed and delivered, the Services Agreement shall supersede this Section 7.3.

Section 7.4 Completion of B&LE Services Agreement.

Simultaneously with the negotiation of the Services Agreement, the parties shall negotiate the terms of the B&LE Services Agreement based upon the applicable principles set forth in Section 7.3 of this Agreement, applied mutatis mutandis, in light of the changes in the parties, roles and the services to be delivered.

Section 7.5 Building Lease.

B&LE and Transtar shall enter into a lease (the "Monroeville Building Lease") on the terms set forth in Exhibit Q hereto, and otherwise on terms mutually acceptable to the parties in their reasonable discretion.

Article VIII

Mutual Assumptions Concerning
Transtar and the Transtar Companies

Section 8.1 Mutual Assumptions.

In deciding to enter into the transactions contemplated herein, USX and Holdings have made the following assumptions about Transtar and each of the Transtar Companies:

8.1.1 Existence and Organization.

(a) Each of Transtar and the Transtar Companies is a corporation duly incorporated, validly existing and in good standing under the law of the state of its incorporation and is duly qualified and in good standing as a foreign corporation in each jurisdiction where such qualification is required to carry out its obligations hereunder or where the failure to be so qualified would result in a material adverse effect on the business, properties, financial condition or results of operations (a "Material Adverse Effect") of the Transtar Companies, taken as a whole. For purposes of this Agreement, "Material Adverse Effect" shall not include effects resulting from (i) changes in laws and regulations impacting the transportation industry generally, or (ii) except with respect to Section 11.1.4(b) and 11.2.4(b), the impact on Transtar or any of the Transtar Companies business of the loss or reduction of any customer or supplier relationship, other than USX or an affiliate (as such term is defined pursuant to Rule 13d-3 under the Securities Exchange Act of 1934, as amended) or the resignation of any employee resulting from the transactions contemplated by this Agreement.

(b) No amendments or modifications thereto have been adopted or are contemplated to the Certificate of Incorporation, By-laws or other constituent document (the "Constituent Documents") of each of Transtar and the Transtar Companies and each remains in full force and effect on the date hereof.

(c) None of Transtar or the Transtar Companies is the subject of any voluntary or involuntary bankruptcy, liquidation, reorganization, or dissolution and none is contemplated.

(d) The authorized capital stock of Transtar and each of the Transtar Companies is as set forth in its Constituent Documents; the number of shares outstanding for Transtar as of the date hereof is set forth in the recitals of this Agreement and the number of shares outstanding for each of the Transtar Companies is as set forth in Schedule 8.1.1. There are no options, warrants, or other rights outstanding obligating any of Transtar or the Transtar Companies to issue any shares of its capital stock.

(e) Each share of Transtar Company stock (a) has been duly and validly authorized and issued, is fully paid and non assessable and is not the subject of any preemptive or other right; and (b) is legally and beneficially owned by Transtar on the date hereof free and clear of any lien, encumbrance or other claim.

8.1.2 Corporate Authority.

(a) Each of Transtar and the Transtar Companies has full power and authority to own its properties and to conduct its business and operations as currently conducted.

(b) The execution and delivery of this Agreement and the consummation of the transactions contemplated herein have been approved by the Board of Directors of Transtar and by USX and Holdings as the sole holders of A Stock and no other shareholder or other corporate approval or action is required on the part of Transtar or any of the Transtar Companies. This Agreement constitutes a legal, valid and binding obligation of Transtar enforceable against it in accordance with its terms, except to the extent that its enforceability may be subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting the enforcement of creditors' rights generally and by general equitable principles.

8.1.3 Conflicts and Consents. The execution and delivery by Transtar of this Agreement and the consummation of the transactions contemplated herein does not conflict with, violate, constitute an event of default, require the consent of any government entity or other third party or result in the creation of a lien or encumbrance under (a) the Constituent Documents of Transtar or any of the Transtar Companies; (b) any law, regulation, ordinance, judicial decree or administrative order binding upon Transtar, the Transtar Companies or their respective properties except for approvals required from (i) the Surface Transportation Board ("STB") under the Interstate Commerce Commission Termination Act of 1995 and (ii) the Department of Justice or the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR"), and (c) any mortgage, indenture, lease, contract or other agreement binding upon Transtar, any Transtar Company or their respective properties, except with respect to clause (c) for such violations or defaults which would not have a material adverse effect on the business, properties, financial condition or results of operation of Transtar and the Transtar Companies, taken as a whole.

8.1.4 Transtar Disclosure Documents. USX and Holdings have true and complete copies of the Annual Report on Form 10-K for the year ended December 31, 1999; Quarterly Reports on Form 10-Q for the Quarters ended March 31 and June 30, 2000 and the Current Report on Form 8-K dated July 17, 2000 of Holdings (the "Transtar Disclosure Documents").

8.1.5 Financial Statements.

(a) The consolidated financial statements of Transtar and the Transtar Companies contained in the Transtar Disclosure Documents were prepared in accordance with generally accepted accounting principles consistently applied (except for changes noted therein, if applicable) and fairly present in all material respects the financial position of Transtar and the Transtar Companies on a consolidated basis as of the dates thereof and the results of operations and statement of cash flows of Transtar and the Transtar Companies on a consolidated basis. The periods ended on such dates are subject in the case of unaudited interim financial statements to normal year-end adjustments. PricewaterhouseCoopers, LLP, whose report on the annual financial statements contained therein, are independent

public accountants as defined by regulations of the Securities and Exchange Commission.

(b) In contemplation of this transaction, Transtar has previously delivered to USX and Holdings monthly income statements for each month of 1999 and 2000 (through June in the case of 2000) and balance sheets as of the end of each month of 1999 and 2000 (through June in the case of 2000) for each Transtar Company (the "Unit Financial Statements"). The Unit Financial Statements fairly present in all material respects the financial position of each Transtar Company as of the dates thereof and the results of operations, subject in each case to normal year-end and consolidating adjustments.

8.1.6 Legal Proceedings and Violations. Except as disclosed in the Transtar Disclosure Documents and a letter from Transtar dated the date hereof (the "Transtar Disclosure Letter"), (a) there are no legal proceedings pending or threatened against Transtar or any of the Transtar Companies which, individually or in the aggregate, if adversely decided, would have a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole, (b) none of the Transtar Companies is in violation of any law, regulation, ordinance, judicial decree or administrative order (including, but not limited to, any environmental or employee benefit law) which violation, individually or in the aggregate, would have a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole, and (c) each of the Transtar Companies has all licenses, permits and other governmental grants of authority ("Permits") necessary to own its respective assets and conduct its business as currently conducted except for the absence of Permits which, individually or in the aggregate, would not have a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole.

8.1.7 Changes Since December 31, 1999. Since December 31, 1999, a) the business of Transtar and the Transtar Companies has been conducted in the ordinary course, consistent with past practice; (b) none of Transtar or the Transtar Companies or their respective properties has suffered any fire, loss or other casualty that has resulted in or is likely to result in the future in a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole, and (c) there has not occurred any condition that has had, or with the passage of time, the giving of notice or both, will have a Material Adverse Effect on the USX Companies taken as a whole; or the Holdings Companies, taken as a whole.

8.1.8 Taxes.

(a) As used herein "Taxes and Code" shall have the meanings given in Section 4.1.

(b) Each of Transtar and each Transtar Company has filed or caused to be filed on a timely basis all material tax returns, statements, schedules or other written notice required to be filed with the Internal Revenue Service ("IRS") or any state or local taxing authority relating to Taxes ("Tax Returns"). Each such Tax Return was complete and accurate in all respects except for deficiencies which will not have a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole.

(c) All Taxes to be paid pursuant to any Tax Return have been paid, or fully reserved in the Interim Financial Statements, and no other Taxes are due and payable by

Transtar or any Transtar Company except for deficiencies which will not have a Material Adverse Effect on the USX Companies taken as a whole, or the Holdings Companies, taken as a whole.

(d) All Taxes under the Code have been resolved except for all fiscal years following 1995.

(e) No legal proceeding, audit or review is pending or threatened against Transtar or any Transtar Company regarding any Taxes except for matters that, individually and in the aggregate, will not have a Material Adverse Effect on the USX Companies, taken as a whole, or the Holdings Companies, taken as a whole.

(f) Except as contemplated by Section 4.2 hereof, neither Transtar or any Transtar Company is party to or bound by any material tax sharing, indemnity, allocation or similar agreement.

8.1.9 Benefit Plans.

(a) All pension, retirement, profit sharing, Section 401(k), thrift-savings, individual retirement account, excess benefit plan, deferred compensation, incentive compensation, stock bonus, stock option, restricted stock, cash bonus, employee stock ownership (including, without limitation, payroll related employee stock ownership), severance pay, cafeteria, flexible compensation, life insurance, medical, dental, disability, or vacation plans or arrangements of any kind and any other Employee Pension Benefit Plan or Employee Welfare Benefit Plan (as defined in Section 3 of ERISA), incentive compensation plan or fringe benefit or any combination of the foregoing established, maintained, sponsored, contributed to or otherwise participated in by any of Transtar or the Transtar Companies for any of its current or past employees have been filed by Transtar as exhibits to the Transtar Disclosure Documents or are set forth in Schedule 8.1.9 (the "Transtar Plans").

(b) Each Transtar Plan has been administered in compliance with the terms of such plan and all applicable laws, regulations and rules except for such failures that individually or in the aggregate would not have a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole.

(c) No "Reportable Event" as such term is defined in Section 4043 of ERISA has occurred with respect to any Transtar Plan (other than as a result of or with respect to the transactions contemplated by this Agreement) and no accumulated funding deficiency as such term is defined in Section 412 of the Code has occurred in relation to any Transtar Plan.

(d) Each Employee Pension Benefit Plan (as defined in Section 3 of ERISA) is the subject of a favorable determination letter issued by the IRS under Section

401(a) of the Code, no challenge to such determination is pending or threatened and no facts or circumstances exist that would be grounds for revocation of such determination letter.

(e) An Annual Report on Form 5500 for each Transtar Plan as of December 31, 1999 has been filed and the financial statements and other information contained therein are complete and accurate in all material respects.

8.1.10 Material Contracts.

(a) "Material Contracts" shall mean any contract, indenture, purchase order or other agreement to which Transtar or any Transtar Company is a party and which (i) is outside of the ordinary course of business; (ii) one of the ten largest in terms of year 2000 transaction dollars for each of the purchase, sale or lease of any goods and services, other than those with USX, USS/Kobe Steel Company, U.S. Steel Mining LLC, or Republic Technologies International LLC as successor by merger to USS/Kobe Steel Company; (iii) one of the ten largest in terms of 2000 transaction dollars for transportation services other than those with USX, USS/Kobe Steel Company, U.S. Steel Mining LLC, or Republic Technologies International LLC as successor by merger to USS/Kobe Steel Company; (iv) involves expenditures or receipts by Transtar or the Transtar Companies of more than $1,000,000 other than those detailed in (ii) and (iii); and (v) any agreement with any governmental body.

(b) Except as disclosed in the Transtar Disclosure Letter, all Material Contracts are in full force and effect and neither Transtar nor the Transtar Companies has given or received written notice of any event of force majeure, breach, default or condition which, with the passage of time, the giving of notice or both would constitute a breach or default.

8.1.11 Insurance. All insurance in effect covering Transtar and the Transtar Companies at any time since January 1, 2000 remains in full force and effect and there have been no claims made, or facts and circumstances existing, that would be grounds for a claim except for matters that, individually and in the aggregate, will not have a Material Adverse Effect on the USX Companies taken as a whole, or the Holdings Companies, taken as a whole.

8.1.12 Title to Properties. The Transtar Companies own or lease all of their assets, including rights of way, free and clear of any and all security interests, mortgages or other monetary lien, except for (a) precautionary security interest filings in connection with leases, (b) liens granted under the Transtar Credit Agreement, or (c) other matters which, individually or in the aggregate, would not have a Material Adverse Effect on the USX Companies, taken as a whole, or the Holdings Companies, taken as a whole.

8.1.13 Condition and Sufficiency of Assets. The physical condition of the assets owned or leased by the Transtar Companies (a) are adequate for the uses to which they are being put; (b) are in good operating condition consistent with their age and ordinary wear and tear; and (c) have been maintained consistent with standard practice in the transportation industry except in each case for such defects which, individually or in the aggregate, would not have a Material Adverse Effect on the USX Companies, taken as a whole, or the Holdings

Companies, taken as a whole. Except as set forth on Schedule 8.1.13 (x), the assets owned, leased or licensed by the Holdings Companies after the Closing Date are all of the material assets currently used in the conduct of the business of the Holdings Companies and are sufficient to allow Holdings and the Holdings Companies to conduct the business of the Holdings Companies as currently conducted. Except as set forth on Schedule 8.1.13 (y), the assets owned, leased or licensed by the USX Companies after the Closing Date are all of the material assets currently used in the conduct of the business of the USX Companies and are sufficient to allow USX and the USX Companies to conduct the business of the USX Companies as currently conducted. Immediately following the Closing Date, the Holdings Companies and the USX Companies, as the case may be, shall own the assets reflected on the balance sheet of each such company provided in the June 30, 2000, Unit Financial Statements, together with any assets thereafter acquired by such company, less (i) all assets disposed of in transactions expressly permitted or required hereunder and (ii) all assets sold, transferred or otherwise disposed of to persons who are not affiliates of Transtar in the ordinary course of business consistent with past practice.

8.1.14 Environmental Matters.

(a) As used herein, "Environmental Law" shall mean federal, state and local laws, implementing regulations and applicable regulatory permits relating to pollution or protection of the environment, including laws concerning hazardous and toxic substances, emissions, releases and discharges of pollutants, wastes and other substances into ambient air, surface water, ground water or land including, but not limited to, the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, the Resource Conservation and Recovery Act, the Hazardous Material Transportation Act, and the Emergency Planning and Community Right to Know Act.

(b) As used herein, "Hazardous Materials" means petroleum or any byproducts or fractions thereof; asbestos in any form; polychlorinated biphenyl; urea formaldehyde and any other chemical, material or substance (whether in solid, liquid or gaseous form) defined in, or included in, the definition of "hazardous substances," "hazardous waste," "hazardous materials," "extremely hazardous substances," "restricted hazardous waste," "toxic substances" or "toxic pollutants" or words of similar import under any applicable Environmental Law and any other chemical, material or substance (whether in solid, liquid or gaseous form), exposure to which is prohibited, limited or regulated by any governmental authority under, or which may otherwise form the basis of liability (whether for cleanup or otherwise), under any Environmental Law.

(c) Except as set forth in the Transtar Disclosure Documents and the Transtar Disclosure Letter, Transtar and the Transtar Companies are in full and complete compliance with Environmental Laws except for violations that, individually or in the aggregate, would not have a Material Adverse Effect on the USX Companies, taken as a whole, or the Holdings Companies, taken as a whole.

(d) No Hazardous Materials have been disposed of on the properties of any of the Transtar Companies except for amounts that the cleanup of which in accordance with Environmental Laws individually or in the aggregate would not have a Material Adverse Effect on the USX Companies, taken as a whole, or the Holdings Companies, taken as a whole.

(e) Except for the environmental reports commissioned by USX and Holdings in connection with the 1988 Asset Purchase Agreement there are no reports, studies, audits or other analysis of compliance, non-compliance or possible liability of Transtar or any of the Transtar Companies under any Environmental Laws.

(f) There are no proceedings or investigations pending or threatened by any governmental entity against Transtar or any Transtar Company concerning compliance, non-compliance or possible liability under any Environmental Laws.

(g) There are no consent or other judicial decrees, administrative orders or findings or agreements with any governmental authority relating to Environmental Laws binding upon Transtar, any Transtar Company or any of their properties.

8.1.15 Labor Matters.

(a) There is no labor strike, lockout or other work stoppage in effect or threatened against Transtar or any of the Transtar Companies.

(b) There are no labor arbitration, grievance or complaint pending against Transtar or any of the Transtar Companies except for those where an adverse determination, individually or in the aggregate, would not result in a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole.

(c) There is no union organizing campaign or vote pending involving Transtar or any of the Transtar Companies.

(d) Transtar and the Transtar Companies have complied in all material respects with the provisions of all collective bargaining agreements except for matters that, individually or in the aggregate, would not result in a Material Adverse Effect on the USX Companies, taken as a whole; or the Holdings Companies, taken as a whole.

8.1.16 No Prior Discussions. As of the date this Agreement is executed, neither Transtar or any Transtar Company is party to any agreement, understanding, arrangement or substantial negotiations concerning the sale, transfer or other disposition, either directly or indirectly, of the stock of Transtar or any Transtar Company or substantially all of the assets of Transtar or a Transtar Company and there have been no substantial negotiations concerning such a sale, transfer or other disposition by any officer, employee or advisor or agent (if such advisor or agent is acting pursuant to the direction of such officer or employee) of Transtar.

Article IX

Representations and Warranties

9.1 Representations and Warranties of USX.

USX represents and warrants to Holdings the following:

9.1.1 Existence and Organization. USX is a corporation duly incorporated, validly existing and in good standing under the law of the State of Delaware and is duly qualified and in good standing as a foreign corporation in each jurisdiction where such qualification is required to carry out its obligations hereunder.

9.1.2 Corporate Authority.

(a) USX has full power and authority to own its properties and to conduct its business and operations as currently conducted.

(b) The execution and delivery of this Agreement and the consummation of the transactions contemplated herein have been approved by the Board of Directors of USX and no shareholder or other corporate approval or action is required on the part of USX. This Agreement constitutes a legal, valid and binding obligation of USX enforceable against it in accordance with its terms, except to the extent that its enforceability may be subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting the enforcement of creditors' rights generally and by general equitable principles.

9.1.3 Conflicts and Consents. The execution and delivery by USX of this Agreement and the consummation of the transactions contemplated herein does not conflict with, violate, constitute an event of default, require the consent of any government entity or other third party or result in the creation of a lien or encumbrance under (a) the Constituent Documents of USX; (b) any law, regulation, ordinance, judicial decree or administrative order binding upon USX or its properties except for approvals required from the STB and under HSR and (c) any material mortgage, indenture, lease, contract or other agreement binding upon USX or its properties except with respect to clause (c) for violations or defaults which will not have a Material Adverse Effect on the Holdings Companies taken as a whole, and will not affect the ability of USX, Transtar and The Transtar Companies to consummate the transactions contemplated hereby.

9.1.4 No Prior Discussions. As of the date this Agreement is executed, neither USX or any affiliate of USX is party to any agreement, understanding, arrangement or substantial negotiations concerning the sale, transfer or other disposition (other than a Permitted Transfer), either directly or indirectly, of the stock of Transtar or any USX Company or substantially all of the assets of Transtar or a USX Company and there have been no substantial negotiations concerning such a sale, transfer or other disposition by any director, officer, employee or advisor or agent (if such advisor or agent is acting pursuant to the direction of such director, officer or employee) of USX or any affiliate of USX.

9.1.5 Ownership of USX Stock. USX owns beneficially and of record all of the USX Stock free and clear of any lien claim or encumbrance.

9.2 Representations and Warranties of Holdings.

Holdings represents and warrants to USX the following:

9.2.1 Existence and Organization. Holdings is a limited partnership duly formed, validly existing under the law of the State of Delaware and is duly qualified and in good standing as a foreign limited partnership in each jurisdiction where such qualification is required to carry out its obligations hereunder.

9.2.2 Authority.

(a) Holdings has full power and authority to own its properties and to conduct its businesses and operations as currently conducted.

(b) The execution and delivery of this Agreement and the consummation of the transactions contemplated herein have been approved by the appropriate governing body of Holdings and no

partner or other similar approval or action is required on the part of Holdings. This Agreement constitutes a legal, valid and binding obligation of Holdings enforceable against it in accordance with its terms, except to the extent that its enforceability may be subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting the enforcement of creditors' rights generally and by general equitable principles.

9.2.3 Conflicts and Consents. The execution and delivery by Holdings of this Agreement and the consummation of the transactions contemplated herein do not conflict with, violate, constitute an event of default, require the consent of any government entity or other third party or result in the creation of a lien or encumbrance under (a) the Constituent Documents of Holdings; (b) any law, regulation, ordinance, judicial decree or administrative order binding upon Holdings or its properties except for approvals required from the STB and under HSR, and (c) any material mortgage, indenture, lease, contract or other agreement binding upon Holdings or its properties other than the 13 3/8% Series B Senior Discount Notes due December 15, 2003 issued by Holdings and Transtar Capital Corporation (the "Holdings Notes") except with respect to clause (c) for violations or defaults which will not have a Material Adverse Effect on the financial position or results of operation of the USX Companies, taken as a whole and will not affect the ability of Holdings, Transtar and the Transtar Companies to consummate the transactions contemplated hereby.

9.2.4 No Prior Discussions. As of the date this Agreement is executed, neither Holdings or any affiliate of Holdings is party to any agreement, understanding, arrangement or substantial negotiations concerning the sale, transfer or other disposition (other than a Permitted Transfer), either directly or indirectly, of the stock of Transtar or any Holdings Company or substantially all of the assets of a Holdings Company and there have been no substantial negotiations concerning such a sale, transfer or other disposition by any partner, officer, employee or advisor or agent (if such advisor or agent is acting pursuant to the direction of such partner, officer or employee) of Holdings or any affiliate of Holdings.

9.2.5 Ownership of Holdings Stock. Holdings owns beneficially and of record all of the Holdings Stock free and clear of any lien, claim or encumbrance, and on the Closing Date, upon the consummation of the closing of the redemption contemplated herein, will deliver to Transtar good and marketable title to the Holdings Stock free and clear of any lien, claim or encumbrance.

9.3 Representations Exclusive.

The parties acknowledge that the representations set forth in this Article IX are the sole and exclusive representations of the parties. Without limiting the foregoing the parties acknowledge that none of the matters set forth in Article VIII constitutes a representation by any of the parties hereto or any of the Transtar companies.

Article X

Certain Covenants

Section 10.1 Interim Operations.

From the date hereof and until the Closing Date, (i) USX and Holdings agree that they will cause Transtar and each of the Transtar Companies to and (ii) Transtar will and will cause each of the Transtar Companies to:

(a) Except as expressly contemplated by, or as required to implement this Agreement, conduct their business and maintain

their assets only in the ordinary course and consistent with past practice;

(b) Duly and punctually pay and perform all of its contractual obligations in accordance with the terms thereof;

(c) Not sell, pledge or assign any capital stock of any Transtar Company nor issue or agree to issue any share of its capital stock;

(d) Except as expressly contemplated by, or as required to implement this Agreement, not amend any of the Constituent Documents of Transtar or any of the Transtar Companies;

(e) Not acquire any assets or the securities of any person other than in the ordinary course of business consistent with past practice;

(f) Not dispose of any assets other than (i) the sale of obsolete equipment and supplies in the ordinary course of business consistent with past practice or (ii) the sale or lease of real property in the ordinary course of business consistent with past practice;

(g) Not make any capital authorizations or expenditures, or enter into any agreements in connection therewith, other than for amounts and items in the form of and contemplated in the 2000 Capital Plan (including the amendment in respect of the Bessemer Car Fleet specified in the Letter dated May 30, 2000 from Robert Rosati to James Mossman and Robert Hernandez) and which do not exceed $31,434,000 in the aggregate with respect to USX Companies and $16,526,000 in the aggregate with respect to Holdings Companies;

(h) Except as contemplated in the 2000 Business Plan, not enter into any contract or agreement that would (i) constitute a Material Contract or (ii) any contract for a term longer than six months (assuming that all cancellation rights are promptly exercised on the Closing Date or as soon thereafter as possible);

(i) Not establish nor amend any employee benefit plan except as contemplated in Article III hereof;

(j) Not grant any salary or wage increase or pay any bonus except for increases granted to employees other than elected officers in accordance with the existing program or except as explicitly agreed to in writing by USX and Holdings;

(k) Not incur, guarantee or become liable for any indebtedness for money borrowed, except for guarantees (i) made by one of the Holdings Companies for the benefit of another Holdings Company; or (ii) made by one of the USX Companies for the benefit of another USX Company.

(l) Not declare, set aside, pay or make any distribution in respect of any of its capital stock or purchase, redeem, otherwise acquire any of its capital stock or make any capital contributions (except as authorized by Sections 2.2, 2.3 and 2.5 hereof);

(m) Not grant any stock or options under the Management Plans;

(n) Not allow any substantial negotiations by the officers, employees, or agents (if such agents are acting pursuant to the direction of such officers or employees) of Transtar or the Transtar Companies concerning any agreement, understanding, or arrangement concerning the sale, transfer or other disposition, either directly or indirectly, of the stock of Transtar or any Transtar Company or substantially all of the assets of Transtar or a Transtar Company.

(o) Not enter into, modify, amend, supplement or terminate any binding agreement or contract with any affiliate of Holdings or USX (other than the Transtar Companies), except in the ordinary course of business, consistent with past practice.

(p) Not agree to any material change in any insurance policy, including, but not limited to, any change which would impair Transtar's, or any of the Transtar Companies', rights to extend the discovery period for claims made against any claims made insurance policies.

(q) Not authorize or agree with any person nor make any commitment to do any of (c) through (p) above.

Section 10.2 Regulatory Approvals

(a) Promptly upon the execution of this Agreement Transtar, Holdings and USX shall apply to the STB for approval under and for an exemption from the requirements of the ICC Termination Act of 1995 (49 USC 11323).

(b) Promptly upon the execution of this Agreement, Transtar, Holdings and USX shall make all filings necessary with the Federal Trade Commission and the Department of Justice under HSR.

Section 10.3 Future Disposition of Units.

(a) Holdings agrees that until the six-month anniversary of the Closing Date, it will not (i) sell, transfer, or assign (or enter into a definitive agreement to sell) the stock of any Holdings Company (except for a Permitted Transfer); (ii) actively solicit its partners to sell, transfer or assign a partnership or other interest in Holdings to another person (other than a Permitted Transfer) or actively initiate or promote such a sale, transfer or assignment (but Holdings shall not be prevented from taking any action required to be taken by it under the Holdings Limited Partnership Agreement in respect to the sale or transfer of a limited partnership interest in Holdings), (iii) allow the sale, transfer or assignment of all or substantially all of the assets of any Holdings Company; (iv) enter into substantial negotiations to do (i), (ii) or (iii) above; or (v) allow any Holdings Company to fail to continue to conduct its current business such that such Holdings Company is not engaged in the active conduct of a trade or business within the meaning of Section 355(b) of the Code.

(b) USX agrees that until the six month anniversary of the Closing Date, it will not (i) sell, transfer, or assign (or enter into a definitive agreement to sell) the stock of any USX Company (except for a Permitted Transfer); (ii) allow the sale, transfer or assignment of all or substantially all of the assets of any USX Company; (iii) enter into substantial negotiations to do (i) or (ii) above; or (iv) allow any USX Company to fail to continue to conduct its current business such that such USX Company is not engaged in the active conduct of a trade or business within the meaning of Section 355(b) of the Code.

(c) USX agrees that if at any time prior to the fourth anniversary of the Closing Date, it directly or indirectly sells, transfers, assigns or

otherwise disposes of all of the capital stock of EJ&E or allows EJ&E to sell all or substantially all of its assets in a transaction or series of related transactions for a purchase price in excess of the Base EJ&E Price (defined below), it will pay to Holdings 56% of the proceeds (including without limitation, (i) the proceeds of any dividend to USX, or its affiliates, by EJ&E financed through the issuance of any indebtedness to the extent EJ&E, or the purchaser, remains liable for any such indebtedness at the time of such sale, transfer, assignment or other disposition and (ii) the amount of any indebtedness of USX or its subsidiaries (other than EJ&E) which is assumed by the acquirer in such transaction) received above the Base EJ&E Price. The "Base EJ&E Price" shall mean $205 million, increased by the fair market value of any indebtedness for borrowed money retained by USX or an affiliate of USX (or, in the case of the last proviso of this section, such purchaser) in a transaction or series of related transactions contemplated by this Section 10.3(c). In the event that the capital stock or assets of EJ&E are sold, transferred, assigned or otherwise disposed of as part of a transaction or series of related transactions including additional stock or assets, then (x) the provisions of this Section 10.3(c) shall have no effect upon such sale, transfer, assignment or other disposition (whether by merger, consolidation, sale, contribution or otherwise) in one or a series of related transactions if (i) all or substantially all of the properties of the U. S. Steel Group of USX are sold, transferred, assigned or otherwise disposed of in such transaction; or (ii) the revenues of EJ&E during the last calendar year prior to such transaction were 25% or less of the total revenue of all the legal entities or businesses sold, transferred, assigned or otherwise disposed of in such transaction; provided however, that, notwithstanding anything to the contrary in this Section 10.3(c), that in the case of a transaction contemplated by clause (i) or (ii) above, USX and Transtar shall require any such purchaser to assume the remaining obligations of USX and Transtar under the provisions of this Section 10.3(c) and (y) if the revenues of EJ&E during the last calendar year prior to such transaction were in excess of 25%, but less than 100% of the total revenues of all legal entities or businesses sold, transferred, assigned or otherwise disposed of, then the proceeds received in such sale which are attributable to EJ&E and to which this Section 10.3(c) shall apply, shall be determined by taking the total proceeds realized from such sale, transfer, assignment or other disposition, and multiplying them by a fraction, the numerator of which shall be the revenues of EJ&E during the last calendar year and the denominator of which shall be the revenues during the last calendar year of all of the legal entities or businesses sold, transferred, assigned or otherwise disposed of to generate such proceeds. In the event that all or a portion of the proceeds are in a form other than cash, the fair market value of such non-cash proceeds as of the closing of the transaction shall be used for purposes of this Section 10.3(c).

Section 10.4 Consents.

Schedule 10.4 sets forth a list of all Material Contracts that require the consent of the other parties thereto for the consummation of the transactions contemplated herein ("Required Consents") or where the other parties thereto have indicated that they intend to change the nature or level of their business relationship with Transtar or a Transtar Company as a consequence of the consummation of the transactions contemplated herein. Holdings shall use all commercially reasonable efforts to assist in obtaining Required Consents that relate to the Holdings Companies and USX shall use all commercially reasonable efforts to assist in obtaining Required Consents that relate to the USX Companies.

Section 10.5 Due Diligence and Access.

Promptly after the execution and delivery of this Agreement, USX and Holdings will cause Transtar and the Transtar Companies to grant to USX, Holdings, institutions or other persons potentially providing financing to Holdings and their respective partners, directors, officers, employees and agents full and complete access to the property and records of Transtar and the

Transtar Companies and to provide any information reasonably requested of them.

Section 10.6 Relation to Holdings Notes.

Holdings acknowledges that none of USX, Transtar or any USX Company has any responsibility or any obligation under the Holdings Notes.

Section 10.7 Post Closing Access.

From and after the Closing Date, USX shall cause the USX Companies to supply or make available to Holdings, and Holdings shall cause the Holdings Companies to supply or make available to USX, all information, records and other matters as such party may reasonably request in connection with all matters occurring prior to the Closing Date or as may be reasonably necessary to defend any litigation or investigate any related claim, prepare financial statements, public disclosure documents, Tax Returns or other governmental filings.

Section 10.8 Further Assurances.

From and after the Closing Date, USX shall take and shall cause the USX Companies to take any and all actions that are reasonably requested by Holdings to vest in Holdings directly or indirectly good and marketable title and ownership to the capital stock of the Holdings Companies. From and after the Closing Date, Holdings shall take and shall cause the Holdings Companies to take any and all actions that are reasonably requested by USX to vest in USX directly or indirectly good and marketable title and ownership to the capital stock of the USX Companies. In the event that there is any title defect or lien upon the stock of the Holdings Companies resulting from actions by USX, USX shall be solely responsible for the cost of removing such lien or curing such defect. In the event that there is any title defect or lien upon the stock of the USX Companies resulting from actions by Holdings, Holdings shall be solely responsible for the cost of removing such lien or curing such defect. In the event that there is any title defect or lien upon the stock of either a USX Company or a Holding Company that arose after December 28, 1988 and prior to the Closing Date other than through an action by USX or Holdings, then Holdings shall be responsible for 56% of the cost of removing such lien or curing such defect and USX shall be responsible for 44% of such cost.

Section 10.9 Holdings Officer.

If Holdings designates, after the date hereof and prior to the Closing Date, a person to serve as chief executive officer of Holdings after the Closing Date (the "Holdings Designee"), Transtar agrees to provide the Holdings Designee with the necessary access to information, and to take all such other action as may be reasonably necessary, to allow the Holdings Designee to familiarize himself with the business of the Holdings Companies in a manner sufficient to allow the Holdings Designee to manage the business of the Holdings Companies after the Closing Date.

10.10 Commercially Reasonable Efforts.

Each of USX and Holdings agrees to use all commercially reasonable efforts to take, or cause to be taken, and to cooperate with all other parties in taking or causing to be taken, all actions which are necessary and proper to cause the satisfaction of the conditions to closing set forth herein, including, without limitation, in the case of Holdings, using its commercially reasonable efforts and acting in good faith to obtain the financing contemplated by Section 11.2.6; it being understood that no party hereto shall be required to pay or increase any fees (except for customary commitment fees, agency fees and other similar fees to be paid by Holdings in connection with the financing contemplated by Section 11.2.6) or assume or create any additional liability or offer or grant any material accommodation to any third party or agree to do any of the foregoing; provided that no person shall be obligated to commence any

litigation in order to comply with this covenant. This covenant shall not limit any rights of any party set forth herein and, in particular and without limitation, shall not limit the right of Holdings to approve, in its sole discretion, the terms of the financing contemplated by Section 11.2.6 of this Agreement.

Article XI

Conditions to Closing

11.1 Conditions Precedent to Obligations of USX.

All obligations of USX arising pursuant to this Agreement are subject to the satisfaction of each of the following conditions, unless expressly waived in writing by USX.

11.1.1 Opinion of Counsel. USX shall be furnished with the opinion of White & Case LLP in substantially the form of Exhibit M attached hereto.

11.1.2 Representations and Warranties. The representations and warranties made by Holdings in Section 9.2 herein and Trustee in the agreement signed by Trustee and the parties hereto in substantially the form of Exhibit B attached herewith (the "Accession Agreement") shall be true and correct in all material respects (except to the extent such representations and warranties contain a materiality qualification in which case they shall be true and correct in all respects) on and as of the Closing Date with the same force and effect as though all representations and warranties had been made on and as of such date, and the General Partner shall have so certified on behalf of Holdings.

11.1.3 Covenants and Agreements. Holdings, Transtar and the Transtar Companies shall have performed or complied in all material respects with all obligations, covenants and agreements required by this Agreement to be performed or complied with by them by the time of Closing Date, and the General Partner of Holdings shall have certified on behalf of Holdings and the President and Chief Executive Officer, Vice President Finance and Chief Financial Officer, Vice President Marketing, Vice President Law, Vice President Operations, Vice President Administration, Treasurer, and Comptroller (collectively the "Transtar Officers") shall have so certified on behalf of Transtar.

11.1.4 Material Adverse Change.

(a) The assumptions set forth in Article VIII shall be true and correct as of the Closing Date except for such matters as individually or in the aggregate would not constitute a Material Adverse Effect on the USX Companies, taken as a whole, and the Transtar Officers shall have so certified.

(b) All Required Consents relating to the USX Companies shall have been received except for those that, individually or in the aggregate, would not constitute a Material Adverse Effect on the USX Companies, taken as a whole, and the Transtar Officers shall have so certified.

(c) There shall have occurred no event nor shall there exist any condition which has had or would reasonably be expected to have a Material Adverse Effect on the USX Companies.

11.1.5 PBGC. No action shall have been taken or threatened by the PBGC to terminate any of the Transtar Pension Plans, to impose any additional liability on USX or the USX Companies or to require any accelerated contributions to the Transtar Pension Plans.

11.1.6 Good-Standing Certificates. Transtar shall have delivered to USX a Certificate of Good Standing for each of the USX Companies from the Secretary of State of such state in which such USX Company is duly qualified evidencing such USX Company's good standing therein.

11.1.7 Execution of Documents. Each of Holdings, Transtar, the Holdings Companies and the Trustee shall have executed and delivered the following documents (the "Ancillary Agreements") to which it is a party: the Speer Agreement, the Tax Matters Agreement, the Substitute Fleet TSA, the Substitute TSA, the Stockholders Agreement Termination, the Asbestos Agreement, the Environmental Indemnification Agreement, the Environmental Agreement Termination, the USS Name License Agreement, the Asset Purchase Agreement Amendment, the 1988 Services Agreement Amendment, the Services Agreement, the B&LE Services Agreement (if required, pursuant to Section 7.2), and the Monroeville Building Lease.

11.2 Conditions Precedent to Obligations of Holdings.

All obligations of Holdings arising under this Agreement are subject to the satisfaction of each of the following conditions, unless expressly waived in writing by Holdings.

11.2.1 Opinions of Counsel.

(a) Holdings shall be furnished with the opinion of Richard J. Munsch, Assistant General Counsel or Robert M. Stanton, Senior General Attorney-Corporate in substantially the form attached hereto as Exhibit N.

(b) Holdings shall be furnished with the opinion of Reed, Smith, Shaw & McClay LLP that the shares of Exchanged Stock delivered to Holdings on the Closing Date have been duly authorized and issued and are fully paid and non-assessable, which opinion to be reasonably satisfactory to counsel for Holdings.

11.2.2 Representations and Warranties. The representations and warranties made by USX in Section 9.1 herein and Trustee in the Accession Agreement shall be true and correct in all material respects (except to the extent such representations and warranties contain a materiality qualification, in which case they shall be true and correct in all respects) on and as of the Closing Date with the same force and effect as though all such representations and warranties have been made on and as of such date and USX's Chairman of the Board of Directors, Vice Chairman & Chief Financial Officer, or Vice President & Treasurer shall have so certified on behalf of USX.

11.2.3 Covenants and Agreements. USX, Transtar and the Transtar Companies shall have performed or complied in all material respects with all obligations, covenants and agreements required by this Agreement to be performed or complied with by them by the Closing Date and USX's Chairman of the Board of Directors, Vice Chairman & Chief Financial Officer or Vice President & Treasurer shall have so certified on behalf of USX and the Transtar Officers shall have certified on behalf of Transtar.

11.2.4 Material Adverse Change.

(a) The assumptions set forth in Article VIII shall be true and correct as of the Closing Date except for such matters as individually or in the aggregate would not constitute a Material Adverse Effect on the Holdings Companies, taken as a whole, and the Transtar Officers shall have so certified.

(b) All Required Consents relating to the Holdings Companies shall have been received except for those that individually or in

the aggregate would not constitute a Material Adverse Effect on the Holdings Companies, taken as a whole, and the Transtar Officers shall have so certified.

(c) There shall have occurred no event nor shall there exist any condition which has had or would reasonably be expected to have a Material Adverse Effect on the Holdings Companies.

11.2.5 Exchanged Stock. The Exchanged Stock shall have been duly authorized, validly issued to Holdings, non-accessible and free of any preemptory or other rights.

11.2.6 Financing. Holdings (i) shall have received, on terms satisfactory to Holdings in its sole discretion, at least $255.0 million (reduced by the amount of any indebtedness of Transtar which is assumed and not refinanced) of proceeds from one or more bank financings or offering of debt securities, and (ii) shall have entered into a revolving credit facility with available commitments of not less than $20.0 million, which such amount and commitment (together with any assumption of indebtedness) shall in the aggregate be sufficient to (a) refinance the outstanding obligations under the Holdings Notes (including, without limitation, any principal, interest or premium owed with respect thereto), (b) refinance, to the extent it is refinanced and not assumed, the outstanding share of the Holdings Companies debt under the Transtar Credit Agreement (including any make-whole premium incurred), (c) sufficiently finance working capital of the Holdings Companies and (d) pay the fees and expenses of Holdings, the Holdings Companies, Blackstone Capital Partners LP and Blackstone Transportation Partners LP related to (a), (b) and (c)).

11.2.7 PBGC. No action shall have been taken or threatened by the PBGC to terminate any of the Transtar Pension Plans, to impose any additional liability on Holdings or the Holdings Companies or to require any accelerated contributions to the Transtar Pension Plans.

11.2.8 Good-Standing Certificates. Transtar shall have delivered to Holdings a Certificate of Good Standing for each of the Holdings Companies from the Secretary of State of such state in which such Holdings Company is duly qualified evidencing such Holdings Company's good standing therein.

11.2.9 Execution of Documents. Each of USX, Transtar and the USX Companies shall have executed and delivered each of the Ancillary Agreements to which it is a party and RTI will have executed the Substitute Fleet TSA.

11.3 Mutual Conditions Precedent.

The obligations of both USX and Holdings shall be subject to the satisfaction on or prior to the Closing Date of each of the following, unless expressly waived in writing by both parties.

11.3.1 No Injunctions. No temporary or permanent restraining order, preliminary or permanent injunction or other legal restraint or prohibition against the consummation of the transactions contemplated herein shall be in effect; no action seeking such an order, injunction or prohibition is pending and no governmental authority, including without limitation, the STB, the Federal Trade Commission, the Department of Justice or any state attorney general is threatening such an action (collectively an "Injunctive Action").

11.3.2 STB Approval. The STB has granted an approval or exemption for the transactions contemplated herein; such approval or exemption remains in full force and effect ("STB Approval") and no action or proceeding is pending or threatened challenging such approval or exemption (an "STB Challenge").

11.3.3 HSR Filing. All waiting periods under HSR have expired or the Federal Trade Commission and the Department of Justice have granted early

termination to such waiting periods.

11.3.4 Tax Free Reorganization. Each of USX and Holdings shall have received assurances reasonably satisfactory to it that the transaction contemplated herein qualifies as a tax free under Section 355 of the Code.

11.3.5 Execution of Accession Agreement by Trustee. The Trustee shall have agreed to become a party to this Agreement through the execution and delivery of the Accession Agreement.

Article XII

Closing

12.1 Closing Date.

The closing of this transaction shall occur on the second Business Day following the satisfaction of the conditions set forth in Article XI hereof. "Business Day" shall mean any day other than a Saturday, Sunday or day on which commercial banks are permitted to be closed in New York, NY, or Pittsburgh, PA (the "Closing Date").

12.2 The Closing.

(a) The Closing shall be held at the offices of USX at 600 Grant Street, Pittsburgh, PA, or such other place as the parties shall agree, at 11:00 A.M. on the Closing Date.

(b) A pre-closing shall be held on the Business Day immediately prior to the Closing Date and, to the extent possible, all documents delivered by either party shall be examined at the pre-closing.

(c) At the Closing, USX shall deliver:

(i) The opinion of counsel specified in Section 11.2.1(a);

(ii) The certificates on behalf of USX specified in Sections 11.2.2 and 11.2.3;

(iii) Evidence of due authorization of this Agreement; and

(iv) Such other documents and certificates as Holdings or its counsel may reasonably request.

(d) At the Closing, Holdings shall deliver:

(i) To Transtar, certificates representing the Holdings Stock;

(ii) The resignations of the Blackstone Directors;

(iii) The opinion of counsel specified in Section 11.1.1;

(iv) The officer's certificate specified in Section 11.1.2 and 11.1.3;

(v) Evidence satisfactory to USX of the cancellation of all Management Options;

(vi) Evidence of due authorization of this Agreement; and

(vii) Such other documents and certificates as USX or its counsel may reasonably request.

(e) At the Closing, Trustee shall deliver (pursuant to the Accession Agreement):

(i) To Transtar, certificates representing the Management Stock.

(f) At the Closing, Transtar shall deliver:

(i) To Holdings, certificates representing the Exchanged Stock;

(ii) To Trustee, certificates representing the New Management Stock;

(iii) The officers certificates on behalf of Transtar specified in Sections 11.1.3, 11.1.4, 11.2.3 and 11.2.4;

(iv) The opinion specified in Section 11.2.1(b);

(v) Evidence of repayment of the Transtar Credit Agreement and release of all liens granted thereunder;

(vi) Evidence of release of the Cross Guarantees, to the extent such releases have been obtained prior to the Closing Date;

(vii) Such other agreements and certificates as USX and Holdings shall agree to be delivered; and

(viii) Certificates of Good Standing for Transtar and each Transtar Company.

(g) At the Closing, the following parties shall execute and deliver:

(i) USX, Holdings, Transtar and each Transtar company--the Tax Matters Agreement;

(ii) USX and Fleet-- the Substitute Fleet TSA;

(iii) USX, Holdings, DM&IR and B&LE--the Substitute TSA;

(iv) USX, Holdings and Transtar-- the Stockholders Agreement Termination;

(v) USX, Transtar, Holdings and Fleet --the Asbestos Agreement;

(vi) USX, Holdings, Transtar and each Transtar Company--the Environmental Agreement;

(vii) USX and Fleet--the USS Name License Agreement;

(viii) USX, Holdings and the Holdings Companies, Transtar and each Transtar Company--the Asset Purchase Agreement Amendment;

(ix) USX and Transtar--the 1988 Services Agreement Amendment;

(x) Holdings, the Holdings Companies, Transtar and each Transtar Company--the Services Agreement;

(xi) USX, Transtar (the USX Companies), B&LE and Holdings--the B&LE Services Agreement; and

(xii) USX, Transtar and each Transtar Company -- the Environmental Agreement Termination.

12.3 Effective Date.

The transaction shall be effective as of the close of business on the Closing Date.

12.4 Termination.

(a) This Agreement may be terminated by either USX or Holdings by written notice to the other if:

(i) The Closing does not occur by March 31, 2001; or

(ii) A permanent non-appealable order, decree or judgment has been issued by a court of competent jurisdiction which prevents the consummation of the transactions contemplated herein.

(b) This Agreement may be terminated by USX by written notice to Holdings if:

(i) There is a material breach by Holdings of this Agreement which is not remedied within 30 days of written notice thereof; or

(ii) The USX Companies taken as a whole suffer a Material Adverse Effect;

(c) This Agreement may be terminated by Holdings by written notice to USX if:

(i) There is a material breach by USX of this Agreement which is not remedied within 30 days of written notice thereof; or

(ii) The Holdings Companies, taken as a whole, suffer a Material Adverse Effect;

(d) Except in the case of a material breach of this Agreement, in the event of such termination, no party shall be liable to the other party for any damages, costs or expenses incurred in connection with the negotiation and execution of this Agreement and no party shall have any further obligation under this Agreement.

12.5 Time Is Of The Essence.

The parties agree that time is of the essence in this Agreement.

Miscellaneous

13.1 Expenses.

Except as expressly provided in this Agreement, whether or not the transactions contemplated hereunder shall be consummated, each party shall pay its own expenses incident to the preparation of this Agreement and for consummating the transaction, including all outside counsel and accountant fees incurred by it. Each party shall also pay all filing fees and other expenses required to be paid by it under applicable laws, regulations or contracts to perform the covenants and obligations hereunder. Notwithstanding anything contrary contained herein, if the transactions contemplated hereunder are not consummated, Transtar shall reimburse each of Holdings and USX for their reasonable expenses incurred in connection herewith. For purposes of determining USX's expenses (other than filing fees) for reimbursement above, USX's expenses (other than filing fees) shall be deemed to be the same as Holdings' reimbursable expenses (excluding filing fees).

13.2 Notices.

All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been given if actually delivered by any reasonable means or if mailed by registered or certified mail, return receipt requested, to the following addresses or to such other address as any party may subsequently designate in writing:

(a) If to USX, then to:

USX Corporation
600 Grant Street
Pittsburgh, PA 15219-4776
Attention: E. F. Guna
Vice President & Treasurer

With copy to:

Richard J. Munsch, Esquire
Assistant General Counsel
USX Corporation
600 Grant Street
Pittsburgh, PA 15219-4776

(b) If to Holdings, then to:

Transtar Holdings, L.P.
345 Park Avenue
New York, NY 10154-0191
Attention: James Mossman
President

With a copy to:

William F. Wynne, Jr., Esquire
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787

(c) If to Transtar then to:

Transtar, Inc.
135 Jamison Lane
Monroeville, PA

Attention: Thomas W. Sterling
President

With copies to:

Transtar Holdings Company LP
345 Park Avenue
New York, NY 10154-0191
Attention: James Mossman
President

USX Corporation
600 Grant Street
Pittsburgh, PA 15219-4776
Attention: E. F. Guna
Vice President & Treasurer

13.3 Applicable Laws; Counterparts, Consent to Jurisdiction.

(a) This Agreement shall be construed and enforced in accordance with the laws of the State of Delaware. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute but one and the same instrument.

(b) Each party hereby consents to the jurisdiction of the United States District Court for Delaware, the Chancery Court of the State of Delaware or the Court of Common Pleas of New Castle County Delaware for the resolution of any matter under this Agreement. Each party also waives any right it may have to challenge the venue or to argue the non-convenience of any such court.

13.4. Entire Agreement.

This Agreement, including the Exhibits hereto and any document incorporated by reference therein and herein or executed simultaneously herewith, contains the full agreement between the parties hereto, supersedes any and all agreements and amendments thereto, which may have been heretofore negotiated or entered into between them. There are no further understandings written or oral between the parties.

13.5. Advisors.

USX acknowledges that it has consulted with Goldman Sachs in connection with this matter and that any fees or compensation due Goldman Sachs shall be paid solely by USX. Except for the foregoing, neither party has retained any advisor or broker and each party shall indemnify the other against any claim arising for an action taken by such party concerning any commission or other fees.

13.6. Publicity.

Each Party agrees to issue a joint press release promptly upon the execution and delivery of this Agreement and USX and Holdings may file a Current Report on Form 8-K with the Securities and Exchange Commission within ten (10) days of the date hereof. Except for such disclosure or as otherwise required by law or pursuant to request of any governmental agency, each party agrees that neither it nor its attorneys, advisors, accountants and agents shall make any press release or other disclosure concerning the transactions contemplated herein without the consent of the other party, which consent shall not be unreasonably withheld or delayed. Each party agrees that prior to making any press release or other disclosure concerning the transactions, it will make available a copy of the proposed press release or other disclosure for the other party's comments. Notwithstanding anything to the contrary contained herein, Holdings may make any disclosure concerning the transactions contemplated herein

to any limited partner of Holdings or to any financing source for purposes related to the transactions contemplated herein.

13.7. Descriptive Heading.

The descriptive headings of this Agreement are inserted for convenience only and are not intended to indicate all of the matter following them. Accordingly, they shall not control or affect the meaning or construction of any of the provisions hereof.

13.8. Severability.

If any provisions of this Agreement shall be determined to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall remain enforceable to the maximum extent permitted by law.

13.9. Survival.

All representations, warranties and covenants of the parties shall terminate on the Closing Date except for those covenants specified in Articles III, IV, and Sections 2.4, 2.5, 2.6, 5.2, 10.3, 10.6, 10.7 and 10.8. All such covenants (other than the covenants specified in Article IV, which shall survive for the periods specified therein) shall survive until the earliest of (a) the termination date specified within the section related to such covenant, (b) the expiration of the statute of limitations applicable thereto or (c) the date that is ten years from the Closing Date.

13.10 Parties.

This Agreement is intended solely for the benefit of the parties and no rights are created or intended to be created in favor of any third parties. This Agreement cannot be assigned by either party hereto without the written consent of the other party.

13.11 Amendment.

This Agreement may not be amended or modified other than by written agreement executed by the parties hereto expressly stating that it is a modification of this Agreement.

13.12 Successors and Assigns.

This agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors administrators, successors and assigns.

<PAGE>

IN WITNESS WHEREOF, the undersigned parties hereto have duly executed this Agreement as of the date first set above.

TRANSTAR, INC.

By:/s/ Thomas W. Sterling

Name: Thomas W. Sterling
Title: President

USX CORPORATION

By:/s/ E. F. Guna

Name: E. F. Guna
Title: Vice President & Treasurer

TRANSTAR HOLDINGS, L.P.

By: BLACKSTONE TRANSPORTATION COMPANY, INC., its General Partner

By: /s/ James Mossman

Name: James Mossman
Title: President

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SCHEDULE 2.4(C) CALCULATION OF ANNUAL FEE PAYABLE FROM FLEET TO USX

<TABLE>
<CAPTION>

Charter Hire Payment Date	(Principal) Applicable Amount A	(Lease Payment) Applicable Amount B	(Interest) Applicable Amount C	(Total) Applicable Amount D
<S>	<C>	<C>	<C>	<C>
3/19/00	1,302,893.75	1.54	1,621,005.90	2,923,901.1
9/19/00	1,381,067.37	1.02	1,524,917.49	2,905,985.8
3/19/01	1,463,931.42	1.23	1,423,063.77	2,886,996.4
9/19/01	1,551,767.30	1.16	1,315,098.83	2,866,867.2
3/19/02	1,644,873.34	1.12	1,200,655.99	2,845,530.4
3/19/02	1,743,565.74	1.13	1,079,346.58	2,822,913.4
3/19/03	1,848,179.69	1.14	950,758.60	2,798,939.4
9/19/03	1,959,070.47	1.30	814,455.35	2,773,527.1
3/19/04	2,076,614.70	0.97	669,973.91	2,746,589.5
3/19/04	2,201,211.58	1.57	516,823.57	2,718,036.7
3/19/05	2,333,284.27	1.14	354,484.22	2,687,769.6
9/19/05	2,473,281.39	0.99	182,404.50	2,655,686.8
3/19/06	0.00	2,621,678.22		2,621,678.2
9/19/06	0.00	2,621,678.22		2,621,678.2
3/19/07	0.00	2,621,678.22		2,621,678.2
9/19/07	0.00	2,621,678.22		2,621,678.2
3/19/08	0.00	2,621,678.22		2,621,678.2
9/19/08	0.00	2,621,678.22		2,621,678.2
3/19/09	0.00	2,621,678.22		2,621,678.2
9/19/09	0.00	2,621,678.22		2,621,678.2
3/19/10	0.00	2,621,678.22		2,621,678.2
9/19/10	0.00	2,621,678.22		2,621,678.2
3/19/11	0.00	2,621,678.22		2,621,678.2
9/19/11	0.00	2,621,678.22		2,621,678.2
3/19/12	0.00	2,621,678.22		2,621,678.2
9/19/12	0.00	2,621,678.22		2,621,678.2

Total	21,979,741.02	36,703,495.08	11,652,988.71	70,336,239.1

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SCHEDULE 2.4(C) CALCULATION OF ANNUAL FEE PAYABLE FROM FLEET TO USX

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Verification

Charter Hire Payment Date	Beginning Principal Amount	Ending Principal Amount	Interest Payment
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3/19/00	21,979,741.02	20,676,847.27	1,621,005.90
9/19/00	20,676,847.27	19,295,779.90	1,524,917.49
3/19/01	19,295,779.90	17,831,848.48	1,423,063.77
9/19/01	17,831,848.48	16,280,081.18	1,315,098.83
3/19/02	16,280,081.18	14,635,207.84	1,200,655.99
3/19/02	14,635,207.84	12,891,642.10	1,079,346.58
3/19/03	12,891,642.10	11,043,462.41	950,758.60
9/19/03	11,043,462.41	9,084,391.94	814,455.35
3/19/04	9,084,391.94	7,007,777.24	669,973.91
3/19/04	7,007,777.24	4,806,565.66	516,823.57
3/19/05	4,806,565.66	2,473,281.39	354,484.22
9/19/05	2,473,281.39	-0.00	182,404.50
3/19/06	-0.00	-0.00	-0.00
9/19/06	-0.00	-0.00	-0.00
3/19/07	-0.00	-0.00	-0.00
9/19/07	-0.00	-0.00	-0.00
3/19/08	-0.00	-0.00	-0.00
9/19/08	-0.00	-0.00	-0.00
3/19/09	-0.00	-0.00	-0.00
9/19/09	-0.00	-0.00	-0.00
3/19/10	-0.00	-0.00	-0.00
9/19/10	-0.00	-0.00	-0.00
3/19/11	-0.00	-0.00	-0.00
9/19/11	-0.00	-0.00	-0.00
3/19/12	-0.00	-0.00	-0.00
9/19/12	-0.00	-0.00	-0.00

Total	11,652,988.70

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Schedule 3.2(x) Listing of Non-Shared Union B&LE Transferees

Union employees identified at time of sale as non-shared employees:

CC	DEPT	Active Employee Count
Assumed to be assigned to a USX Transtar Company (a.)		
815	Asset	2
873	ACCTG	34
874	ACCTG	22
875	FSERV	1
878	TAX	1
Subtotal of Above		60

(a.) Union employees are assumed to be assigned from cost centers as shown, however the ultimate assignment will not be known until TCIU Approval is reached with the Union. All Union counts identified above are B&LE administrative employees.

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Schedule 3.2(y) Listing of Shared Union B&LE Transferees

Union employees identified at time of sale as shared employees:

CC	DEPT	Active Employee Count
Assumed to be assigned to a USX Transtar Company (a.)		
819	Asset	3
828	ACCTG	7
872	ACCTG	13
886	FSERV	2
Subtotal of Above		25

(a.) Union employees are assumed to be assigned from cost centers as shown; however the ultimate assignment will not be known until TCIU Approval is reached with the Union. All Union counts identified above are B&LE administrative employees.

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Schedule 3.6(a)

Non-Union Employees Identified to Holdings and USX Transtar

All non-union active employees of the following companies as of the Closing Date will become employees of Holdings with the exception of individuals identified below by count by cost center. Also listed below by count and cost center are non-union employees identified to Transtar's headquarters location who will transfer to Holdings as of the Closing Date. Employees not identified as Holdings' on this listing either by way of their direct employment in a company being transferred to Holdings or by way of their inclusion as part of the headcount identified below as subject to transfer to Holdings are deemed to be USX Transtar employees.

BI/B2 Location	Name of Company Transferred to Holdings
QD 216	Duluth, Missabe & Iron Range Railway Company
QG 213	LISS Great Lakes Fleet
QG 280	LISS Great Lakes Fleet - Sault Ste. Marie Warehouse
None	GLF Great Lakes Corporation
QL 211	Bessemer and Lake Erie Railroad Company ("B&LE Company")
QP 222	Pittsburgh & Conneaut Dock Company

The following individuals will transfer from Holdings' B&LE Company to a USX-Transtar Company as of the Closing Date:

CC	DEPT	Active Employee Count
400	MECH	1
607	TRANS	2
815	ASSET	4
827	MIS	17
828	MIS	7
829	MIS	6
830	MIS	8
836	LABOR	4
844	CLAIM	3
858	MKTG	4
872	ACCTG	5
873	ACCTG	5
874	ACCTG	7
875	FSERV	10
878	TAX	3
884	GENLS	3
886	ENGRG	11
886	OSYST	2
890	POLIC	2
Subtotal Above		103

Additionally, the following employees from Transtar's headquarters location will transfer to a Holdings Company as of the Closing Date:

CC	DEPT	Active Employee Count
400	CAR	1
807	VPO	3
819	PERS	2
871	VPF	2
871	TREAS	3

871	CONSL	1
Subtotal Above		12

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Schedule 3.6(b)

Union Employees Identified to Holdings and USX Transtar

All union active employees of the following companies as of the Closing Date will become employees of Holdings with the exception of individuals identified from the B&LE to be assigned to USX Transtar and listed below by headcount only. Employees not identified as Holdings' employees either by way of their direct employment in a company being transferred to Holdings or by way of their assignment as a B&LE administrative employee to be transferred to USX Transtar shown by headcount below are deemed to be USX Transtar employees.

B1/B2 Location	Name of Company Transferred to Holdings
QD 216	Duluth, Missabe & Iron Range Railway Company
QG 213	LISS Great Lakes Fleet
QG 280	LISS Great Lakes Fleet - Sault Ste. Marie Warehouse
None	GLF Great Lakes Corporation
QL 211	Bessemer and Lake Erie Railroad Company ("B&LE Company)
QP 222	Pittsburgh & Conneaut Dock Company

The following employee counts will transfer from Holdings' B&LE Company to a USX-Transtar Company as of the Closing Date or later depending upon when TCIU Approval takes place.

CC	DEPT	Active Employee Count
815	ASSET	2
819	BENEF	3
828	MIS	7
872	ACCTG	13
873	ACCTG	34
874	ACCTG	22
875	FSERV	1
878	TAX	1
886	ENGRG	2
Total Union Employee Count		85

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SCHEDULE 8.1.1

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COMPANY	STOCKHOLDER
<S>	<C>

Bessemer and Lake Erie Railroad Company	Transtar, Inc.
Birmingham Southern Railroad Company	Transtar, Inc.
Cuyahoga Dock, Inc.	The Pittsburgh & Conneaut Dock
Duluth, Missabe and Iron Range Railway Company	Transtar, Inc.
Elgin, Joliet and Eastern Railway Company	Transtar, Inc.
Fairfield Southern Company, Inc.	Birmingham Southern Railroad C
GLF Credit Corp.	USS Great Lakes Fleet, Inc.
GLF Great Lakes Corp.	USS Great Lakes Fleet, Inc.
The Lake Terminal Railroad Company	Transtar, Inc.
McKeesport Connecting Railroad Company	Transtar, Inc.
Mobile River Terminal Company, Inc.	Warrior & Gulf Navigation Comp
Mon Valley Railway Company	The Pittsburgh & Conneaut Dock
The Pittsburgh & Conneaut Dock Company	Transtar, Inc.
Tracks Traffic and Management Services, Inc.	Transtar, Inc.
Union Railroad Company	Transtar, Inc.
USS Great Lakes Fleet, Inc.	Transtar, Inc.
Warrior & Gulf Navigation Company	Transtar, Inc.

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7/27/00

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Schedule 8.1.9

TRANSTAR, INC.
BENEFIT PLANS NOT FILED BY TRANSTAR AS EXHIBITS
TO THE TRANSTAR DISCLOSURE DOCUMENTS

Sponsored by Transtar, Inc.

1. Transtar, Inc Non-Contributory Pension Plan, effective 1/1/89
2. Transtar, Inc. Savings Plan for Represented Employees, effective 7/1/91
3. Transtar, Inc. Plan for Employee Insurance Benefits, effective 1/1/89
4. Transtar, Inc Supplemental Unemployment Benefits Plan, effective1/1/89
5. Transtar, Inc. Welfare Benefit Plan, effective 1/1/89
6. Transtar, Inc. VEBA Trust #1, effective 8/29/94
7. Transtar, Inc.Severance Pay Plan for Represented Employees, Effective 1/1/89
8. Supplemental Sickness Benefit Plan, effective 7/1/92

9. Off Track Vehicle Accident Welfare Benefit Plan

Multi-Employer Plans in which Transtar participates

10. The Railroad Employees National Early Retirement Major Medical Benefit Plan
11. The Railroad Employees National Vision Plan
12. The Railroad Employees National Health and Welfare Plan
13. The Railroad Employees National Dental Plan
14. The National Health & Welfare Plan, GA-23000
15. American Marine Officers 401(k) Plan
16. American Marine Officers Medical Plan
17. American Marine Officers Pension Plan and Subsidiary
18. American Marine Officers Vacation Plan
19. American Marine Officers Joint Employment Committee
20. American Marine Officers Safety & Education Plan
21. Great Lakes Training & Assignment Fund
22. Seafarers' Welfare, Pension & Vacation Plans

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SCHEDULE 8.1.13(X)

EXCLUDED ASSETS OF HOLDINGS COMPANIES

NONE

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SCHEDULE 8.1.13(Y)

EXCLUDED ASSETS OF USX COMPANIES

NONE

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SCHEDULE 10.4

REQUIRED CONSENTS

TRANSTAR, INC.

Credit Agreement dated as of June 29, 1999 among Transtar, Inc., The Lenders Named Therein and The Chase Manhattan Bank, as Administrative Agent.

BESSEMER AND LAKE ERIE RAILROAD COMPANY

EXPIRATION LESSOR	UNITS LEASED	DATE
Heller Financial	4 Locomotives	10/31/01
BancOne Leasing	4 Locomotives	12/31/07
BancOne Leasing	2 Locomotives	6/30/08

DULUTH MISSABE AND IRON RANGE RAILWAY COMPANY

EXPIRATION LESSOR	UNITS LEASED	DATE
Heller Financial	5 Locomotives	12/31/05
Heller Financial	5 Locomotives	08/01/06
Heller Financial	5 Locomotives	12/31/05
PNC Leasing	5 Locomotives	01/15/04
LaSalle National Leasing	60 Side Dump Cars	10/31/08
LaSalle National Leasing	63 Side Dump Cars	07/31/09

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EXHIBIT A

SUBCHARTER

THIS SUBCHARTER, effective as of the close of business on June 30, 1981, between USX CORPORATION, a Delaware corporation ("USX") and USS GREAT LAKES FLEET, INC., a Delaware corporation ("Fleet").

W I T N E S S E T H

WHEREAS, USX is the original charterer of the M/V EDGAR B. SPEER (the "Vessel") pursuant to a Charter, dated as of September 1, 1980 between State Street Bank and Trust Company of Connecticut, National Association, the successor to The Connecticut Bank and Trust Company, as Owner Trustee and USX (the "Charter"), as amended by a Charter Amendment dated as of May 26, 1983 (the "Charter Amendment") with The Connecticut Bank and Trust Company, National Association; and

WHEREAS, the parties intend that Fleet subcharter and operate the Vessel.

NOW, THEREFORE, the parties hereto, in consideration of the premises, the covenants herein set forth, and intending to be legally bound, agree as follows:

1. USX hereby subcharters the Vessel to Fleet on the same terms and

conditions set forth in the Charter, as amended. In particular, but not by way of limitation, the Subcharter shall be for the same term as that of the Charter. Fleet shall have, with respect to USX, all the rights, duties and obligations of the Charterer under the Charter, as amended, and USX shall have, with respect to Fleet, all the rights, duties and obligations of Owner Trustee under the Charter, as amended. USX and Fleet hereby further agree and stipulate that, for maritime law purposes, USX shall be considered the owner pro hac vice during the term of the Charter, as amended. Furthermore, the Charterer, as owner pro hac vice of the Vessel, has delegated certain rights and powers to the Subcharterer and, in operating the Vessel pursuant to this Subcharter, the Subcharterer is authorized and empowered to act as the owner pro hac vice.

2. This Subcharter is not intended to be an assignment and shall not release USX from any responsibility under the Charter, as amended. This Subcharter is and shall in all respects be subject and subordinate in priority to the Charter and to all renewals, modifications, consolidations, replacements and extensions of the Charter.

3. USX and Fleet hereby declare that the Charter, as amended by the Charter Amendment and the Subcharter, is ratified, confirmed and carried forward in all respects and it shall be and remain in full force and effect.

4. This Subcharter may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original and such counterparts, together, shall constitute and be one and the same instrument.

IN WITNESS WHEREOF, the undersigned parties have executed and delivered this Subcharter as of September 1, 2000.

USX CORPORATION

By: /s/ E. F. Guna

Title: Vice President & Treasurer

USS GREAT LAKES FLEET, INC.

By: /s/ J. Schulte

Title: V P FINANCE & CFO

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Exhibit B

ACCESSION AGREEMENT

ACCESSION AGREEMENT (this "Agreement"), dated as of the ___ day of October, 2000, by and among PNC Bank, N.A., a national bank acting solely as trustee of the Transtar Management Stock Trust Agreement and, except as specifically set forth herein, not in its individual capacity (the "Trustee"), Transtar, Inc., a Delaware corporation, USX Corporation, a Delaware corporation ("USX"), Transtar Holdings, L.P., a Delaware limited partnership ("Holdings"). This Agreement is entered into pursuant to Section 11.3.5 of the Reorganization and Exchange Agreement (the "Reorganization Agreement") dated as of October ___, 2000 by and among Transtar, Inc., USX and Holdings. Capitalized terms used herein and not

otherwise defined herein shall have the meanings ascribed thereto in the Reorganization Agreement.

W I T N E S S E T H:
- - - - - - - - - - -

WHEREAS, it is a condition precedent to the closing of the transactions contemplated in the Reorganization Agreement that the Trustee execute this Agreement; and

WHEREAS, the Trustee believes that it is in the best interest of the beneficiaries of the Trust for the Trustee to become party to the Reorganization Agreement and effect the transactions contemplated thereby;

NOW, THEREFORE, it is agreed:

SECTION 1. Accession. The Trustee hereby agrees to become a party to, to be bound by, and to perform all actions required of the Trustee pursuant to, the Reorganization Agreement, as if the Trustee had been an original signatory thereto. This Agreement shall take effect and shall become a part of the Reorganization Agreement immediately upon execution.

SECTION 2. Representations and Warranties of the Trustee. The Trustee represents and warrants to USX and Holdings that:

(a) Existence and Organization. Trustee is a national bank, duly chartered and existing under the laws of the United States.

(b) Trust Powers and Status as Trustee. Trustee has the power and authority necessary to act as a trustee of the Trust. Trustee was duly appointed as trustee of the Trust on December 28, 1988.

(c) Authorization.

(i) The execution and delivery of this Agreement by the Trustee has been approved by the appropriate governing bodies of the Trustee and no other corporate approval or action is required.

(ii) Solely as trustee and not in its individual capacity, the Trustee represents that the execution and delivery of this Agreement and the consummation of the transactions contemplated herein have been authorized and approved as required under the Trust, and no beneficiary or other similar approval or action is required on the part of the Trustee. This Agreement constitutes a legal, valid and binding obligation of the Trustee enforceable against it in accordance with its terms, except to the extent that its enforceability may be subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting the enforcement of creditors' rights generally and by general equitable principles.

(d) Conflicts and Consents. Solely as trustee, and not in its individual capacity, the Trustee represents that the execution and delivery by the Trustee of this Agreement and the consummation of the transactions contemplated herein does not conflict with, violate, constitute an event of default, require the consent of any government entity or other third party or result in the creation of a lien or encumbrance under (a) the Trust Agreement and the Management Plans; (b) any law, regulation, ordinance, judicial decree or administrative order binding upon the Trust or its properties except for approvals required from the STB and under HSR .

(e) No Prior Discussions. As of the date this Agreement is executed, the Trustee is not party to any agreement, understanding, arrangement or substantial negotiations concerning the sale, transfer or other disposition, either directly or indirectly, of the stock of Transtar or any Transtar Company or substantially

all of the assets of Transtar or a Transtar Company and there have been no substantial negotiations concerning such a sale, transfer or other disposition by any partner, officer, employee or advisor or agent (if such advisor or agent is acting pursuant to the direction of such partner, officer or employee) of the Trustee.

(f) Ownership of Management Stock. The Trustee owns beneficially and of record all of the Management Stock free and clear of any lien claim or encumbrance arising by, through or under any actions taken by the Trustee.

SECTION 3. Agreement to Deliver Shares.

The Trustee hereby agrees to deliver certificates representing the Management Stock to Transtar on the Closing Date.

SECTION 4. Non-Interference. The Trustee hereby agrees that unless required to do so by law or compelled to act by subpoena or other judicial or regulatory process, for a period of five (5) years after the Closing Date, it will not, and shall not permit any of its directors and agents (but only in such individual's capacity as a director or agent), officers, representatives, counsel, subsidiaries or affiliates to (i) comment in an adverse manner or in any manner express an adverse opinion on behalf of any person including, without limitation, by submitting any adverse written, oral or other comments or testimony before any federal, state or local legislative body, court or other tribunal, governmental agency, commission or other instrumentality (each a "Governmental Entity") in respect of any proposed sale or other transaction involving the disposition by the other party of any of Holdings Companies or the USX Companies (a "Unit Sale"); (ii) in any way on behalf of such party or any other person to assist, encourage or provide information to any other person, entity or group seeking to comment in an adverse manner and/or in any manner express an opinion which in any way opposes any proposed Unit Sale; (iii) respond on behalf of such party or any other person in an adverse manner to any investigation, inquiry, or request for comment or information by or from any Governmental Entity or any other person group or entity in respect of any proposed Unit Sale; or (iv) take any action on behalf of such party to oppose a proposed Unit Sale. Nothing in this Section 4 shall be construed or interpreted to prevent or preclude either party from providing exclusively factual information and/or data in response to any request from a Governmental Entity.

SECTION 5. Miscellaneous.

(a) Applicable Laws; Consent to Jurisdiction. This Agreement shall be construed and enforced in accordance with the laws of the State of Delaware. The Trust hereby consents to the jurisdiction of the United States District Court for Delaware, the Chancery Court of the State of Delaware or the Court of Common Pleas of New Castle County Delaware for the resolution of any matter under this Agreement. The Trust also waives any right it may have to challenge the venue or to argue the non-convenience of any such court.

(b) Entire Agreement. This Agreement and the Reorganization Agreement (including the Exhibits hereto and any document incorporated by reference therein and herein), contains the full agreement between the Trust and the parties to the Reorganization Agreement, supersedes any and all agreements and amendments thereto, which may have been heretofore negotiated or entered into between them. There are no further understandings written or oral between the parties.

(c) Publicity. Except for such disclosure or as otherwise required by law or pursuant to request of any governmental agency, the Trust agrees that neither it nor its attorneys, advisors, accountants and agents shall make any press release or other disclosure concerning the transactions contemplated herein or in the Reorganization Agreement without the consent of the other parties to the Reorganization Agreement, which consent shall not be unreasonably withheld or

delayed. The Trust agrees that prior to making any press release or other disclosure concerning the transactions, it will make available a copy of the proposed press release or other disclosure for the other parties' comments.

(d) Descriptive Headings. The descriptive headings of this Agreement are inserted for convenience only and are not intended to indicate all of the matter following them. Accordingly, they shall not control or affect the meaning or construction of any of the provisions hereof.

(e) Severability. If any provisions of this Agreement shall be determined to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall remain enforceable to the maximum extent permitted by law.

(f) Survival. All representations, warranties and covenants of the Trustee shall terminate on the Closing Date except for those covenants specified in Section 4. Such covenant shall survive until the termination date specified in such section.

(g) Parties. This Agreement and the Reorganization Agreement are intended solely for the benefit of the parties to the Reorganization Agreement and no rights are created or intended to be created in favor of any third parties. This Agreement and the Reorganization Agreement cannot be assigned by the Trustee without the written consent of each of the other parties to the Reorganization Agreement.

(h) Amendment. This Agreement may not be amended or modified other than by written agreement executed by each of the parties to the Reorganization Agreement expressly stating that it is a modification of this Agreement.

(i) Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the undersigned parties hereto have duly executed this Accession Agreement as of the date first set above.

PNC Bank, N.A., as trustee of the
Transtar Management Stock Trust Agreement

By: _____
Name:
Title:

TRANSTAR, INC.

By: _____
Name:
Title:

USX CORPORATION

By: _____
Name:
Title:

TRANSTAR HOLDINGS, L.P.

By: BLACKSTONE TRANSPORTATION COMPANY, INC., its General Partner

By: _____
Name:
Title:

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EXHIBIT C

TAX MATTERS AGREEMENT

This Tax Matters Agreement ("Agreement") is entered into this __ day of October, 2000, by and among (i) USX Corporation, a Delaware corporation ("USX"); (ii) Transtar Holdings, L.P., a Delaware limited partnership ("Holdings"); (iii) Bessemer and Lake Erie Railroad Company ("B&LE"); Cuyahoga Dock, Inc.; Duluth, Missabe and Iron Range Railway Company ("DM&IR"); GLF Credit Corporation; GLF Great Lakes Corporation; Mon Valley Railway Company; The Pittsburgh & Conneaut Dock Company ("Dock"); and USS Great Lakes Fleet, Inc. ("Fleet") (individually referred to as a "Holdings Company" and collectively as the "Holdings Companies"); and (iv) Transtar, Inc. ("Transtar"); Birmingham Southern Railroad Company; Elgin, Joliet and Eastern Railway Company ("EJ&E"); Fairfield Southern Company, Inc.; The Lake Terminal Railroad Company; McKeesport Connecting Railroad Company; Mobile River Terminal Company; Union Railroad Company; Warrior and Gulf Navigation Company; and Tracks Traffic and Management Services, Inc. (individually referred to as a "USX" Company and collectively as the "USX Companies") (collectively, the "Parties");

WHEREAS: Transtar, Holdings and USX have entered in the Reorganization and Exchange Agreement, dated as of October __, 2000 (the "Reorganization Agreement");

WHEREAS: The Parties are entering into this agreement to provide for the allocation of Taxes involving taxable periods (or portions thereof) ending on or before the Closing Date and with respect to Operations on or before the Closing Date, and to provide for various administrative matters relating to Taxes, including:

1. the preparation and filing of Tax Returns along with the payment of Taxes shown as due and payable thereon;

2. the retention and maintenance of relevant records necessary to prepare and file appropriate Tax Returns, as well as providing for appropriate access to those records by the Parties;

3. the conduct of audits, examinations, and proceedings by Taxing Authorities which could result in a redetermination of Taxes; and

4. the cooperation of the Parties with one another in order to fulfill their duties and responsibilities under this Agreement and under the Code and other applicable law; and

WHEREAS: it is the intent of the Parties to share in certain Taxes that may result from the transactions described in the Reorganization Agreement in the manner set forth in Section 4.1 of the Reorganization Agreement.

NOW, THEREFORE, in consideration of the mutual promises, covenants, and conditions contained in this Agreement, and intending to be legally bound hereby, the Parties hereto agree as follows:

Article I
Definitions

Section 1.1 General. As used in this Agreement, the following terms shall have the following meanings (such meanings to be equally applicable to both the singular and plural of the terms involved). Any capitalized term used but not defined herein shall have the meaning set forth in the Reorganization Agreement.

"Agreement" shall mean this Tax Matters Agreement.

"Code" shall mean the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder.

"Closing Date" shall mean the date that Transtar exchanges the stock of B&LE, DM&IR, Fleet and Dock for all of Holdings' stock in Transtar pursuant to Section 1.2 of the Reorganization Agreement.

"Combined Minnesota Corporate Income Tax" shall mean Taxes shown on or due with respect to the combined Minnesota Corporate Income Tax Return filed by Transtar that primarily includes the Operations of DM&IR.

"Holdings Company" shall have the meaning as defined in the recitals hereto.

"IRS" shall mean the Internal Revenue Service.

"Non-FIT Pre-Closing Taxes" shall mean all Taxes, other than Pre-Closing Federal Income Taxes, incurred by or imposed on any Transtar Company with respect to (i) taxable periods ending on or before the Closing Date, (ii) the portion of a Straddle Period ending on and including the Closing Date, and (iii) Operations on or before the Closing Date. "Non-FIT Pre-Closing Tax Return" shall mean any Tax Return involving Non-FIT Pre-Closing Taxes. "Operations" shall mean any business activity of a Party.

"Paying Party" shall have the meaning in Section 5.3.

"Parties" shall have the meaning as defined in the recitals hereto.

"Post-Closing Carryback" shall have the meaning in Section 2.4(b).

"Pre-Closing Federal Income Taxes" shall mean all Taxes incurred by or imposed on the Transtar Group or any Transtar Company with respect to the consolidated federal income tax return of the Transtar Group for a taxable period (or portion thereof) ending on or before the Closing Date.

"Pre-Closing Federal Income Tax Return" shall mean the consolidated

federal income tax return of the Transtar Group for a taxable period (or portion thereof) ending on or before the Closing Date.

"Pre-Closing Taxes" shall mean Non-FIT Pre-Closing Taxes and Pre-Closing Federal Income Taxes.

"Preparing Party" shall have the meaning in Section 3.4.

"Recipient Party" shall have the meaning in Section 5.3.

"Reviewing Party" shall have the meaning in Section 3.4.

"Straddle Period" shall mean any taxable period that begins on or before the Closing Date and ends after the Closing Date.

"Tax" or "Taxes" shall mean all taxes, assessments or other governmental charges, including, without limitation, all federal, state, local or foreign taxes, charges, fees, duties, levies or other assessments including, without limitation, net or gross income, gross receipts, net or gross proceeds, ad valorem, real and personal property (tangible and intangible), sales, use, franchise, user, transfer, value-added, fuel, excess profits, occupational, employees' income withholding, unemployment, Social Security, Railroad Retirement, Railroad Unemployment Insurance, alternative or add-on minimum, estimated, environmental and franchise taxes, including interest, penalties or additions to tax attributable to or imposed on or with respect to such taxes, which are imposed by any governmental body whether disputed or not, and shall include any liability for such amounts as a result of either being a member of a combined, consolidated, unitary or affiliated group or of a contractual obligation to indemnify any person or other entity. "Tax Adjustment Amount" shall mean the amount of Taxes, excluding interest, that would be owed as the result of (i) filing an amended Non-FIT Pre-Closing Tax Return or (ii) adjustments, assessments or other changes proposed to be made by a Taxing Authority with respect to a Non-FIT Pre-Closing Tax Return determined as if such adjustments, assessments or other changes are appropriate and correct. "Taxing Authority" shall mean a governmental authority or any subdivision, agency, commission or authority thereof or any quasi-governmental or private body having jurisdiction over the assessment, determination, collection or imposition of any Tax.

"Tax Benefit" shall mean any reduction to Taxes that otherwise would have been due and payable that is actually realized by a Holdings Company or a USX Company and that arises from a correlative adjustment made to a Pre-Closing Federal Income Tax Return as the result of filing an amended Pre-Closing Federal Income Tax Return or as the result of an adjustment or assessment or other change by the IRS, but such reduction shall not be in excess of the amount of Pre-Closing Federal Income Taxes paid after the Closing Date with respect to such adjustment.

"Tax Return" shall mean any report or return (including information returns, amended returns and refund claims) required to be filed or that may be filed for any period with any Taxing Authority (whether domestic or foreign) in connection with any Tax or Taxes (whether domestic or foreign).

"Transtar Company" shall mean each and any of the Holdings Companies and the USX Companies.

"Transtar Group" shall mean Transtar and its directly and indirectly owned corporate subsidiaries that join in the filing of a consolidated federal income tax return for taxable periods ending on or before the Closing Date.

"Unitary Illinois Corporate Income Tax" shall mean Taxes shown on or due with respect to the unitary Illinois Corporate Income Tax Return filed by Transtar that primarily includes the Operations of EJ&E.

"USX Company" shall have the meaning as defined in the recitals hereto.

Section 1.2. References: Interpretation. References in this Agreement to any gender shall be deemed to include references to all genders, and references to the singular include references to the plural and vice versa. The words "include," "includes," and "including," when used in this Agreement shall be deemed to be followed by the phrase "without limitation." Unless the context otherwise requires, (i) references in this Agreement to Articles and Sections shall be deemed references to Articles and Sections of this Agreement, and (ii) the words "hereof," "hereby," and "herein" when used in this Agreement refer to this Agreement in its entirety and not to any particular Article, Section or other provision of this Agreement.

Article II
Allocation of Pre-Closing Taxes

Section 2.1 Federal Income Taxes. Any liability for Pre-Closing Federal Income Taxes shall be allocated 56% to the Holdings Companies and 44% to the USX Companies.

To the extent an IRS adjustment, or an adjustment reflected in an amended Pre-Closing Federal Income Tax Return described in Section 3.2(b)(ii), increasing Pre-Closing Federal Income Taxes results in a Tax Benefit to a Holdings Company for a taxable period (or portion thereof) ending after the Closing Date, such Holdings Company shall pay an amount equal to 44% of such Tax Benefit to USX on or before the due date (including extensions) for filing the federal income tax return for such taxable period in which the Tax Benefit is actually realized.

To the extent an IRS adjustment, or an adjustment reflected in an amended Pre-Closing Federal Income Tax Return described in Section 3.2(b)(ii), increasing Pre-Closing Federal Income Taxes results in a Tax Benefit to a USX Company for a taxable period (or portion thereof) ending after the Closing Date, such USX Company shall pay an amount equal to 56% of such Tax Benefit to Holdings on or before the due date (including extensions) for filing the federal income tax return for such taxable period in which the Tax Benefit is actually realized.

Section 2.2 Other Pre-Closing Taxes. Any liability for Non-FIT Pre-Closing Taxes as reflected on (1) a Tax Return as initially filed (regardless of the due date or the date actually filed) or an initial tax bill or assessment from a Taxing Authority (in the case of property taxes only) or (2) an amended Tax Return filed after the Closing Date but on or before the due date (including extensions) of the initial return, shall be allocated 56% to the Holdings Companies and 44% to the USX Companies.

Any liability for Non-FIT Pre-Closing Taxes other than described in Section 2.2(a) shall be allocated as follows.

Except as provided in Section 2.2(b)(3), if the Tax Adjustment Amount is $150,000 or more, such liability shall be allocated 56% to the Holdings Companies and 44% to the USX Companies.

Except as provided in Section 2.2(b)(3), if the Tax Adjustment Amount is less than $150,000, such liability shall be allocated to or among the Transtar Company or Transtar Companies whose assets or Operations are the subject of such Tax.

If the total cumulative liability for Non-FIT Pre-Closing Taxes allocated to a Transtar Company under Section 2.2(b)(2) exceeds $400,000, then Sections 2.2(b)(1) and 2.2(b)(2) shall be applied with respect to Tax Adjustment Amounts arising after such threshold has been reached by substituting "$75,000"

for each place "$150,000" appears.

For purposes of this Section 2.2, EJ&E shall be treated as the Transtar Company whose assets or Operations are the subject of the Unitary Illinois Corporate Income Tax.

For purposes of this Section 2.2, DM&IR shall be treated as the Transtar Company whose assets or Operations are the subject of the Combined Minnesota Corporate Income Tax.

Taxes for the portion of a Straddle Period ending on the Closing Date shall be computed (i) in the case of income, franchise, gross receipts, sales and use, payroll, transfer, value added, and withholding taxes, on the basis of an interim closing of the books, and (ii) in the case of all other taxes, on a per diem basis.

Section 2.3 Split-Off Taxes. Notwithstanding the other provisions of this Article II, any Taxes described in Section 4.1 of the Reorganization Agreement shall be allocated among the Parties as set forth in such Section 4.1.

Section 2.4 Carrybacks. Each Holdings Company may make an election under Section 172(b)(3) of the Code to relinquish the entire carryback period with respect to any net operating loss attributable to such Holdings Company in any taxable period ending after the Closing Date that could be carried back to a Pre-Closing Federal Income Tax Return.

Notwithstanding Section 2.1, any refund or credit of Pre-Closing Federal Income Taxes that results from the carryback to any taxable period ending on or before the Closing Date of any net operating loss, capital loss, or tax credit arising in any taxable period ending after the Closing Date (referred to as a "Post-Closing Carryback") shall be allocated entirely to the USX Companies.

The Holdings Companies shall not be allocated any Pre-Closing Federal Income Taxes if such Taxes would not otherwise have been due and payable but for a Post-Closing Carryback described in (b) above.

Notwithstanding Section 2.2, any refund or credit of Non-FIT Pre-Closing Taxes that results from the carryback to any taxable period ending on or before the Closing Date of any net operating loss, capital loss, or tax credit arising in any taxable period ending after the Closing Date shall be allocated entirely to the Transtar Company required to file the relevant Tax Return pursuant to Section 3.3.

Section 2.5 Refunds of Pre-Closing Taxes. Except as provided in Section 2.4, any refund or credit of Pre-Closing Federal Income Taxes shall be allocated 56% to the Holdings Companies and 44% to the USX Companies.

Except as provided in Section 2.4, any refund or credit of Non-FIT Pre-Closing Taxes shall be allocated as follows.

To the extent such refund or credit is not in excess of the amount of such Non-FIT Pre-Closing Tax paid after the Closing Date, such refund or credit shall be allocated to each Holdings Company and each USX Company in proportion to such Non-FIT Pre-Closing Tax paid after the Closing Date by such Holdings Company or USX Company.

To the extent such refund or credit is in excess of the amount of such Non-FIT Pre-Closing Tax paid after the Closing Date, such refund or credit shall be allocated 56% to the Holdings Companies and 44% to the USX Companies.

Article III
Preparation and Filing of Returns and Payment of Taxes

Section 3.1 Returns Filed On or Before the Closing Date. Transtar shall prepare and file or cause to be prepared and filed, consistent with past practice, all Tax Returns required to be filed (after taking into account extensions) by any Transtar Company on or before the Closing Date and shall pay or cause to be paid all amounts shown as due and payable thereon. However, after the Closing Date, Transtar shall have no liability to Holdings or any Holdings Company due to the failure of Transtar to timely file or pay or cause to be timely filed or paid any Pre-Closing Tax Return (i) required to be filed or paid (after taking into account extensions) on or before the Closing Date or (ii) actually filed or paid on or before the Closing Date.

Section 3.2 Federal Consolidated Income Tax Return of Transtar Group. Transtar shall prepare and file or cause to be prepared and filed, consistent with past practice, all Pre-Closing Federal Income Tax Returns required to be filed after the Closing Date and shall pay or cause to be paid all amounts shown as due and payable thereon (with such amounts being subject to allocation under Section 2.1 and reimbursement under Article V).

Transtar, at the reasonable request of any Party (including itself), and at such Party's expense except for an amended return described in (ii) herein, shall prepare and file an amended Pre-Closing Federal Income Tax Return, provided (i) the filing of such amended return does not increase the amount of Pre-Closing Federal Income Taxes with respect to such return allocated to any Party under Section 2.1(a), (ii) such return is being amended to correct an error or omission to such return as previously filed, provided that all Parties whose Pre-Closing Federal Income Taxes are increased by the amendment reasonably agree such error or omission has occurred, or (iii) the Party requesting that such amended return be filed (x) reimburse any Party for the increase, if any, in the amount of Pre-Closing Federal Income Taxes with respect to such return allocated to such Party under Section 2.1(a) and bear all costs and expenses resulting from such increase or (y) obtain the written consent of such other Party whose Pre-Closing Federal Income Taxes have increased, which consent will not be unreasonably withheld or delayed.

Section 3.3 Pre-Closing Non-FIT Tax Returns Filed After the Closing Date. Any Non-FIT Pre-Closing Tax Return (i) with a due date (including extensions) on or before the Closing Date but which is not initially filed until after the Closing Date or (ii) with a due date (including extensions) after the Closing Date and any amended Non-FIT Pre-Closing Tax Return filed after the Closing Date, shall be prepared and filed or cause to be prepared and filed, consistent with past practice, by the Transtar Company legally required to file such Tax Return, and such Transtar Company shall pay or cause to be paid all amounts shown as due and payable thereon (with such amounts being subject to allocation under Section 2.2 and reimbursement under Article V).

A Transtar Company legally required to file a Non-FIT Pre-Closing Tax Return shall not file an amended Tax Return with respect to such Non-FIT Pre-Closing Tax Return after the due date (including extensions) for filing the initial Tax Return unless either (1) or (2) met.

The Tax Adjustment Amount with respect to such amended Tax Return is less than $150,000, or is less than $75,000 if Section 2.2(b)(3) applies, or

If the Transtar Company is a Holdings Company, the consent of USX is obtained, and if the Transtar Company is a USX Company, the consent of Holdings is obtained. In each case such consent shall not be unreasonably withheld or delayed.

Section 3.4 Review and Approval of Pre-Closing Tax Returns. At least thirty (30) days prior to the due date (including extensions) of a Pre-Closing Tax Return, USX, in the case of a Tax Return required to be prepared and filed by a USX Company pursuant to this Article III, shall submit such Tax Return to

Holdings if any Holdings Company is allocated any portion of the Taxes shown on such Tax Return pursuant to this Agreement, for the review and approval of Holdings.

At least thirty (30) days prior to the due date (including extensions) of a Pre-Closing Tax Return, Holdings, in the case of a Tax Return required to be prepared and filed by a Holdings Company pursuant to this Article III, shall submit such Tax Return to USX if any USX Company is allocated any portion of the Taxes shown on such Tax Return pursuant to this Agreement, for the review and approval of USX.

The Party reviewing the Pre-Closing Tax Return pursuant to Section 3.4(a) or (b) above ("Reviewing Party"), shall be deemed to approve such Tax Return unless it notifies the Party submitting such Pre-Closing Tax Return ("Preparing Party") within seven (7) days of the receipt of such Tax Return. If such Reviewing Party notifies the Preparing Party of its disapproval of such Tax Return within such 7-day period, and the Preparing Party and the Reviewing Party cannot agree on the matter at issue within seven (7) days after such notification, such matter will be submitted to an independent public accounting firm following the procedure (including the cost sharing procedure) set forth in Section 4.3. If such matter cannot be resolved before the due date (including extensions) of such Tax Return, such return as submitted by the Preparing Party shall be filed, and after such matter is resolved by the independent public accounting firm, an amended Tax Return shall be prepared and filed if necessary to reflect such resolution.

Section 3.5 Tax Return Preparation Costs. Except as provided in Section 3.2(b) and Section 4.3, the Holdings Companies shall reimburse Transtar for 56% of the reasonable costs incurred by or on behalf of Transtar after the Closing Date in connection with the preparation and filing of any Pre-Closing Federal Income Tax Return.

Except as provided in Section 4.3, each Party shall bear all costs incurred by it in preparing and filing any Non-FIT Pre-Closing Tax Return.

Section 3.6 Returns Filed on Unitary or Combined Basis. For purposes of Article III and Article IV, EJ&E shall be treated as the Transtar Company legally required to file the Tax Return for the Unitary Illinois Corporate Income Tax.

For purposes of Article III and Article IV, DM&IR shall be treated as the Transtar Company legally required to file the Tax Return for the Combined Minnesota Corporate Income Tax.

Article IV
Audits

Section 4.1 Pre-Closing Federal Income Tax Returns. Except as provided in Section 4.1(b), (c) and (d) below, Transtar shall control all matters with respect to the audit of any Pre-Closing Federal Income Tax Return. Holdings and each Holdings Company may cooperate, at their own expense, with Transtar in the resolution of any matters arising from such audit.

Transtar shall not settle or resolve any issue arising from the audit of any Pre-Closing Federal Income Tax Return if such issue involves Transtar or a USX Company and the Tax Adjustment Amount with respect to such issue (and ignoring all unrelated adjustments and changes) for all Pre-Closing taxable periods in the aggregate is $100,000 or more without the consent of Holdings, which consent shall not be unreasonably withheld or delayed.

Transtar shall not settle or resolve any issue arising from the audit of any Pre-Closing Federal Income Tax Return if such issue involves a Holdings Company without the consent of Holdings, which consent shall not be unreasonably

withheld or delayed.

Transtar shall not agree to any extension of the statute of limitations for assessment of Pre-Closing Federal Income Taxes for more than six months after such statute would have otherwise expired without extension without the consent of Holdings, which consent shall not be unreasonably withheld or delayed.

Section 4.2 Non-FIT Pre-Closing Taxes. Except as provided in Section 4.2(b), all matters with respect to the audit of any Non-FIT Pre-Closing Tax Return shall be controlled by the Transtar Company legally required to file such Tax Return. Any other Party may cooperate, at its own expense, with such Transtar Company in the resolution of such matters.

If the audit of any Non-FIT Pre-Closing Tax Return results in a Tax Adjustment Amount of $150,000 or more (or $75,000 or more if Section 2.2(b)(3) applies), the Transtar Company controlling such audit shall, if a Holdings Company, obtain the consent of USX, or, if a USX Company, obtain the consent of Holdings, before settling or resolving any matters with respect to such audit. Such consent shall not be unreasonably withheld or delayed.

Section 4.3 Disputes. If Holdings or a Holdings Company fails to give its agreement, approval or consent in a situation described in Section 3.2(b), Section 3.3 (b)(2), Section 3.4, Section 4.1(b), Section 4.1(c), Section 4.1(d) or Section 4.2(b), or if USX or a USX Company fails to give its agreement or consent in a situation described in Section 3.2(b), Section 3.3(b)(2), Section 3.4 or Section 4.2(b), or if the Parties cannot agree on an amount owed under Section 5.3(a) or the allocation of a refund under Section 5.3(b), the issue involved shall be submitted to an independent public accounting firm acceptable to both USX and Holdings. If USX and Holdings cannot agree on an independent public accounting firm, each shall select an independent public accounting firm which will then select a third independent public accounting firm to resolve the dispute. The decision of independent public accounting firm in resolving the dispute shall be final and binding. The fees and expenses incurred with respect to the independent public accounting firm resolving the dispute shall be allocated 56% to the Holdings Companies and 44% to the USX Companies. All other fees and expenses incurred in resolving the dispute, including the costs of the independent public accounting firms used to select a third independent public accounting firm, shall be borne by the Party which incurs such fees and expenses.

Section 4.4 Notification of Audits. Transtar or the relevant USX Company and Holdings or the relevant Holdings Company shall promptly notify the other Party or Parties in writing upon the receipt of an actual notice from the relevant Taxing authority of any proposed adjustment, assessment or other change to a Pre-Closing Tax Return that may result in the liability of the other Party or Parties under this Agreement; provided, however, that the failure to provide such notice shall not relieve any Party's requirement to provide indemnity under this Agreement unless such Party is materially prejudiced thereby.

Section 4.5 Costs and Expenses. Except as provided in Section 4.3, each Party shall bear all fees and expenses incurred by it in resolving a dispute for Pre-Closing Taxes.

Article V
Payments Between Parties

Section 5.1 - Allocation of Taxes, Costs and Expenses and Refunds Among the Holdings Companies. The Holdings Companies' 56% share of (i) Pre-Closing Federal Income Taxes pursuant to Section 2.1, (ii) preparation and filing costs for Pre-Closing Federal Income Tax Returns pursuant to Section 3.5, (iii) fees and expenses of an independent public accountant in resolving a dispute

involving Pre-Closing Federal Income Taxes pursuant to Section 4.3 and (iv) refunds or credits of Pre-Closing Federal Income Taxes pursuant to Section 2.5, shall be allocated among the Holdings Companies as follows: B&LE - 15.81%; DM&IR - - 48.20%; Dock - 3.86%; and Fleet - 32.13%.

The Holdings Companies' 56% share of (i) Non-FIT Pre-Closing Taxes except such Taxes specifically allocated to a Holdings Company pursuant to Section 2.2(b)(2), (ii) fees and expenses of an independent public accountant in resolving a dispute involving Non-FIT Pre-Closing Taxes pursuant to Section 4.3 and (iii) refunds or credits of Non-FIT Pre-Closing Taxes except such refunds or credits specifically allocated to a Holdings Company pursuant to Section 2.5(b)(1), shall be allocated among the Holdings Companies as follows: B&LE - 30.03%; DM&IR - 66.02%; Dock - 2.90%; and Fleet - 1.05%.

Each Holdings Company shall severally indemnify and hold harmless USX and each USX Company against such Holdings Company's share of Pre-Closing Taxes, preparation and filing fees for Pre-Closing Federal Income Tax Returns, and fees and expenses of an independent public accountant in resolving a dispute involving Pre-Closing Taxes, allocated to such Holdings Company under this Section 5.1 or elsewhere in this Agreement; provided further, that Fleet shall have joint and several liability with each Holdings Company for 31.41% of all amounts allocated to such Holdings Company pursuant to Section 5.1(b).

Each Holdings Company shall pay over to a USX Company any refund or credit of Pre-Closing Taxes received by such Holdings Company that is allocable to such USX Company under Section 5.2 or elsewhere in this Agreement.

Section 5.2 Allocation of Taxes, Costs and Expenses and Refunds Among the USX Companies. The USX Companies' 44% share of (i) Pre-Closing Federal Income Taxes pursuant to Section 2.1, (ii) Non-FIT Pre-Closing Taxes except such Taxes specifically allocated to a USX Company pursuant to Section 2.2(b)(2), (iii) refunds or credits of Pre-Closing Federal Income Taxes, (iv) refunds or credits of Non-FIT Pre-Closing Taxes except such refunds or credits that are specifically allocated to a USX Company pursuant to Section 2.5(b)(1) and (v) fees and expenses of an independent public accounting firm in resolving a dispute involving Pre-Closing Taxes pursuant to Section 4.3, shall be allocated among the USX Companies as follows: Birmingham Southern Railroad Company - 17.50%; EJ&E - 51.65%; Fairfield Southern Company, Inc. - .59%; The Lake Terminal Railroad Company - 3.14%; McKeesport Connecting Railroad Company - 1.19%; Mobile River Terminal Company - 7.56%; and Union Railroad Company - 18.37%.

Each USX Company shall severally indemnify and hold harmless Holdings and each Holdings Company against such USX Company's share of Pre-Closing Taxes and fees and expenses of an independent public accountant in resolving a dispute involving Pre-Closing Taxes allocated to such USX Company under this Section 5.2 or elsewhere in this Agreement.

Each USX Company shall pay over to a Holdings Company any refund or credit of Pre-Closing Taxes received by such USX Company that is allocable to such Holdings Company under Section 5.1 or elsewhere in this Agreement.

Section 5.3 Notice and Time of Payment. Except as provided in Section 5.3(b) below, to the extent that one Party (the "Paying Party") owes an amount to another Party ("Recipient Party") pursuant to this Agreement or Section 4.1 of the Reorganization Agreement, the Recipient Party shall notify the Paying Party and shall provide the Paying Party with its calculations of such amount owed. The Paying Party shall pay the amount shown in such notice no later than fifteen (15) days after receiving the notice, unless the Paying Party disagrees with such amount, in which case the Parties agree to reasonably negotiate any difference. If such difference cannot be reasonably negotiated within thirty (30) days after the Recipient Party indicates its disagreement, then the Parties shall submit the disagreement to an independent public accounting firm following

the procedure set forth in Section 4.3.

Any Party receiving a refund of Pre-Closing Taxes shall, within fifteen (15) days of receipt, notify any other Party that may be entitled to all or a portion of the refund and provide a calculation of such other Party's share of the refund. Such other Party shall notify the first Party within fifteen (15) days of receiving such notice and calculation of its agreement or disagreement with such calculation of its share of the refund. If the Parties cannot reasonably negotiate the allocation of the refund, the Parties shall submit the disagreement to an independent public accounting firm following the procedure set forth in Section 4.3. Any refund or portion thereof that is paid to another Party more than thirty (30) days after receipt by a Party shall bear interest as set forth in Section 5.5.

Section 5.4 Agreement to Settle Taxes on a Quarterly or More Frequent Basis. Holdings and USX may agree in a signed writing to settle all payments of Pre-Closing Taxes made during the 12-month period immediately following the Closing Date on a quarterly or more frequent basis.

Section 5.5 Interest on Late Payments. If the Paying Party makes any payment to a Recipient Party beyond the 15-day period in Section 5.3(a) above (or such other time as agreed pursuant to Section 5.4), or in the case of a refund, beyond the 30-day period in Section 5.3(b) above, such Paying Party shall pay interest on the amount unpaid (after resolution of any disagreement as to such amount), starting with the first day after such 15-day period (or such other time as agreed pursuant to Section 5.4) or 30-day period, based on the interest rate for tax underpayments in Section 6621(a) of the Code.

Section 5.6 Payments Treated as Distributions and Contributions. To the extent permitted by law, all amounts payable to a Party under this Agreement, or pursuant to Section 4.1 of the Reorganization Agreement, shall be deemed to be made immediately prior to the termination of the Transtar Group, and shall be treated as a distribution by the Paying Party to Transtar, and as a contribution by Transtar to the Recipient Party.

Section 5.7 Gross Up of Payments. All payments to a Recipient Party under this Agreement shall include the payment of such amount, if any, as shall be necessary to hold the Recipient Party harmless on an after-Tax basis from all Taxes required to be paid by the Recipient Party or the Paying Party with respect to such payments (including any payments made under this Section 5.7).

Article VI
Tax Return Information

Section 6.1 Information and Assistance to be Provided by Holdings. Holdings and each Holdings Company shall provide to the relevant USX Company all information in its possession in the ordinary course of business and other assistance, in each case, that is reasonably requested to enable such USX Company to prepare and file all Tax Returns required to be filed by it pursuant to Article III of this Agreement. Each Holdings Company agrees to make any election, consent or other agreement reasonably required in order for Transtar to prepare any Pre-Closing Federal Income Tax Return in accordance with this Agreement.

Section 6.2 Information and Assistance to be Provided by USX. USX and each USX Company shall provide to the relevant Holdings Company all information in its possession in the ordinary course of business and other assistance, in each case, that is reasonably requested to enable such Holdings Company to prepare and file all Tax Returns required to be filed by it pursuant to Article III of this Agreement in accordance with this Agreement.

Article VII
Access to Records and Retention of Records and Returns

Section 7.1 Access to Records. Beginning on the Closing Date, each Party shall provide to any other Party reasonable access to such records, documents, accounting data and other information (including computer data) relating to pre-Closing Date periods and to its personnel and premises, for the purposes of the review or audit of any Pre-Closing Tax Return to the extent relevant to an obligation of such other Party under this Agreement.

Section 7.2 Retention of Records and Returns. For at least seven (7) years after the Closing Date, each Party shall retain such records, documents, accounting data and other information (including computer data) in its possession in the ordinary course of business reasonably necessary for (i) the preparation and filing of all Pre-Closing Tax Returns required to be filed by, on behalf of, or with respect to, another Party under this Agreement, and (ii) any audits and litigation relating to such Pre-Closing Tax Returns or to any Pre-Closing Taxes payable by, on behalf of, or with respect to, another Party to this Agreement.

For at least seven (7) years after the Closing Date, each Party shall not permit any other Person to dispose of or destroy any Pre-Closing Tax Returns involving another Party, or other business records and files relating to such Tax Returns.

After the close of the 7-year period described in (a) and (b) above, each Party shall not dispose of or destroy, or permit any other Person to dispose of or destroy (i) such records, data, documents and other information described in (a) above with respect to another Party or (ii) any Pre-Closing Tax Returns described in (b) above with respect to another Party, without first offering to turn over possession thereof to such other Party by written notice to such other Party at least thirty (30) days prior to the proposed date of such disposition or destruction.

Article VIII
Miscellaneous

Section 8.1 Confidentiality. Subject to any contrary requirement of law and the right of each Party to enforce its rights hereunder in any legal action, each Party agrees that it shall keep strictly confidential, and shall cause its employees and agents to keep strictly confidential, any information which it or any of its employees or agents may acquire pursuant to, or in the course of performing its obligations under, any provision of this Agreement.

Section 8.2 Complete Agreement; Construction. This Agreement and the Reorganization Agreement shall constitute the entire agreement between the Parties with respect to the subject matter hereof and shall supersede all previous negotiations, commitments and writings with respect to such subject matter.

Section 8.3 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, and shall become effective when one or more such counterparts have been signed by each of the Parties and delivered to the other Parties.

Section 8.4 Survival of Agreements. All covenants and agreements of the Parties contained in this Agreement shall survive the Closing Date.

Section 8.5 Expenses. Except as otherwise set forth in this Agreement, each Party shall bear its own costs and expenses incurred in connection with this Agreement.

Section 8.6 Notices. All notices and other communications hereunder shall be in writing and hand delivered or mailed by registered or certified mail (return receipt requested) or sent by any means of electronic message

transmission with delivery confirmed (by voice or otherwise) to the Parties at the following addresses (or at such other addresses for a Party as shall be specified by like notice) and will be deemed given on the date on which such notice is received:

(a) If to USX or a USX Company, then to:

USX Corporation
600 Grant Street
Pittsburgh, PA 15219-4776
Attention: Scott A. Krebs
Manager - Tax Accounting

With copy to:

Michael J. Hosler
Senior General Tax Attorney
USX Corporation
600 Grant Street
Pittsburgh, PA 15219-4776

(b) If to Holdings or a Holdings Company, then to:

Transtar Holdings, L.P.
345 Park Avenue
New York, NY 10154-0191
Attention: James Mossman
President

With a copy to:

William F. Wynne, Jr., Esquire
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787

Section 8.7 Waivers. The failure of any Party to require strict performance by any other Party of any provision in this Agreement will not waive or diminish that Party's right to demand strict performance thereafter of that or any other provision hereof.

Section 8.8 Amendments. This Agreement may not be modified or amended except by an agreement in writing signed by each of the Parties.

Section 8.9 Assignment. This Agreement shall not be assignable, in whole or in part, directly or indirectly, by any Party without the prior written consent of the other Parties, which consent shall not be unreasonably withheld or delayed, and any attempt to assign any rights or obligations arising under this Agreement without such consent shall be void.

Section 8.10 Successors and Assigns. The provisions to this Agreement shall be binding upon, inure to the benefit of and be enforceable by the Parties and their respective successors and permitted assigns.

Section 8.11 Termination. This Agreement shall not terminate except by an agreement in writing signed by the Parties. Following termination of this Agreement, no Party shall have any liability under this Agreement.

Section 8.12 Third Party Beneficiaries. This Agreement is solely for the benefit of the Parties and should not be deemed to confer upon third parties any remedy, claim, liability, reimbursement, claim of action or other right in excess of those existing without reference to this Agreement.

Section 8.13 Title and Headings. Title and headings to sections herein are inserted for the convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement.

Section 8.14 Pre-Closing Date Earnings and Profits. The Holdings Companies and the USX Companies agree to allocate pre-Closing Date earnings and profits in accordance with Treasury Regulation Sections 1.312-10 and 1.1502-33.

Section 8.15. Governing Law. THIS AGREEMENT AND ALL DEALINGS OF THE PARTIES WITH RESPECT TO THE MATTERS ADDRESSED HEREIN SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE (WITHOUT REGARD TO THE PRINCIPLES OF THE CONFLICTS OF LAWS THEREOF) APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED IN SUCH STATE.

IN WITNESS WHEREOF, each of the parties hereto has caused its name to be hereunto subscribed by its duly authorized officer as of the date first written above.

USX CORPORATION

By: _____
Name:
Title:

TRANSTAR HOLDINGS, L.P.

By: BLACKSTONE TRANSPORTATION COMPANY, INC., its General Partner

By: _____
Name:
Title:

HOLDINGS COMPANIES:

BESSEMER AND LAKE ERIE RAILROAD COMPANY

By: _____
Name:
Title:

CUYAHOGA DOCK, INC.

By: _____
Name:
Title:

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

By: _____
Name:
Title:

GLF CREDIT CORPORATION

By: _____
Name:
Title:

GLF GREAT LAKES CORPORATION

By: _____
Name:
Title:

MON VALLEY RAILWAY COMPANY

By: _____
Name:
Title:

THE PITTSBURGH & CONNEAUT DOCK COMPANY

By: _____
Name:
Title:

USS GREAT LAKES FLEET, INC.

By: _____
Name:
Title:

USX COMPANIES:

TRANSTAR, INC.

By: _____

Name:
Title:

BIRMINGHAM SOUTHERN RAILROAD COMPANY

By:

Name:
Title:

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

By:

Name:
Title:

FAIRFIELD SOUTHERN COMPANY, INC.

By:

Name:
Title:

THE LAKE TERMINAL RAILROAD COMPANY

By:

Name:
Title:

MCKEESPORT CONNECTING RAILROAD COMPANY

By:

Name:
Title:

MOBILE RIVER TERMINAL COMPANY

By:

Name:
Title:

UNION RAILROAD COMPANY

By:

Name:
Title:

WARRIOR AND GULF NAVIGATION COMPANY

By:

Name:
Title:

TRACKS TRAFFIC AND MANAGEMENT
SERVICES, INC.

By:

Name:
Title:

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EXHIBIT D

AMENDMENT
OF
TRANSPORTATION SERVICES AGREEMENT

THIS AMENDMENT is made and entered into this ____ day of October, 2000, by and between USX CORPORATION - U.S. STEEL GROUP, a Delaware Corporation with an office at 600 Grant Street, Pittsburgh, Pennsylvania 15219-2749 (hereinafter "USS"); REPUBLIC TECHNOLOGIES INTERNATIONAL, LLC, a Delaware limited liability company with offices at 3770 Embassy Parkway, Akron, Ohio 44333 (hereinafter "RTI"); and USS GREAT LAKES FLEET, INC., a Delaware Corporation with an office at 400 Missabe Building, Duluth, Minnesota 55082-1990 (hereinafter "CARRIER").

WITNESSETH:

WHEREAS, USS, RTI (successor to USS/KOBE Steel Company) and CARRIER are parties to a Transportation Services Agreement, effective July 1, 1998 (hereinafter the "Agreement"); and WHEREAS, USS, RTI and CARRIER desire to amend the Agreement;

NOW, THEREFORE, in consideration of the mutual promises and covenants hereinafter set forth, the parties hereto, intending to be legally bound, agree as follows:

1. This Amendment shall be effective on the date first set forth above.

2. The term of the Agreement, as set forth in section 1 of the Agreement, is hereby extended until March 15, 2009 (end of 2008 SHIPPING SEASON).

3. Except as provided herein, all terms and conditions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their duly authorized representatives on the date first above written.

USX CORPORATION - U.S. STEEL GROUP

By: _____
Name:
Title:

USS GREAT LAKES FLEET, INC.

By: _____
Name:
Title:

REPUBLIC TECHNOLOGIES INTERNATIONAL, LLC

By: _____
Name:
Title:

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EXHIBIT E

AMENDMENT
OF
TRANSPORTATION SERVICES AGREEMENT

THIS AMENDMENT is made and entered into this ___ day of October, 2000, by and between USX Corporation - U.S. Steel Group, a Delaware corporation with offices at 600 Grant Street, Pittsburgh, Pennsylvania 15219 (hereinafter "USS"); Transtar, Inc, a Delaware corporation with offices at 135 Jamison Lane, Monroeville, Pennsylvania 15146 (hereinafter "Transtar"); and Transtar Holdings L.P., a Delaware limited partnership (hereinafter "Holdings").

WITNESSETH:

WHEREAS, USS and Transtar are parties to a Transportation Services Agreement, effective July 1, 1998 (hereinafter the "TSA"); and

WHEREAS, the TSA sets forth certain duties and obligations between USS and certain Transtar subsidiaries, including the Duluth, Missabe and Iron Range Railway Company (hereinafter "DMIR") and the Bessemer and Lake Erie Railroad Company (hereinafter "Bessemer"); and

WHEREAS, Transtar, Holdings and USS have entered into a "Reorganization and Exchange Agreement", pursuant to which Holdings has obtained ownership and control of DMIR and Bessemer; and

WHEREAS, Transtar, with the consent of USS, desires to assign to Holdings, Transtar's rights and obligations under the TSA, insofar as they pertain to DMIR and Bessemer, and Holdings desires to accept such assignment; and

WHEREAS, USS and Holdings desire to extend the term of the TSA, to the extent that it pertains to DMIR and Bessemer.

NOW, THEREFORE, the parties hereto, intending to be legally bound, and in consideration of the mutual agreements herein contained, hereby agree as follows:

The Amendment shall be effective on the date first set forth above.

Transtar hereby assigns to Holdings Transtar's rights and obligations under the TSA, but only to the extent that such rights and obligations pertain to the DMIR and Bessemer. Holdings accepts and USS consents to this assignment.

The terms and conditions of the TSA, to the extent that they pertain to DMIR and Bessemer, are hereby incorporated herein by reference.

Section 2 of the TSA, to the extent that it pertains to DMIR and Bessemer, is hereby deleted, and the following Section 2 is substituted in its place:

2. TERM. This Agreement shall become effective on July 1, 1998 and shall remain in effect through June 30, 2008 ("Initial Term"). At the end of the Initial Term of this Agreement or at the end of the Additional Term established in Section 3 herein, if any of the services previously performed by DMIR and/or Bessemer pursuant to this Agreement are subject to competitive bidding, the DMIR and/or Bessemer shall be offered an opportunity to participate in any competitive bidding for such services.

5. Except as assigned and modified herein, all terms and conditions of the TSA shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their duly authorized representatives on the date first above written.

TRANSTAR, INC.

By: _____
Name:
Title:

USX CORPORATION-
U.S. STEEL GROUP

By: _____
Name:
Title:

TRANSTAR HOLDINGS, L.P.

By: BLACKSTONE TRANSPORTATION COMPANY, INC., its General Partner

By: _____
Name: James J. Mossman
Title: President

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EXHIBIT F

TERMINATION OF STOCKHOLDERS' AGREEMENT

TERMINATION AGREEMENT (this "Agreement") dated as of _____ __, [2000] by and among USX CORPORATION, a Delaware corporation ("USX"), TRANSTAR HOLDINGS, L.P., a Delaware limited partnership ("Holdings") and TRANSTAR, INC., a Delaware corporation (the "Company").

W I T N E S S E T H:

WHEREAS, the Company, USX and Holdings are parties to a Stockholders' Agreement dated as of December 28, 1988 (the "Existing Stockholders' Agreement"); and

WHEREAS, the Company, Holdings and USX have entered into that certain Reorganization and Exchange Agreement (the "Reorganization Agreement") dated as of October __, 2000; and

WHEREAS, pursuant to the terms of the Reorganization Agreement, simultaneous with the execution of this Agreement the Company will redeem all of its currently outstanding capital stock held by Holdings;

NOW, THEREFORE, in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Termination. The Existing Stockholders' Agreement shall be terminated and have no further force and effect, effective as of the Closing. Notwithstanding any provision to the contrary contained in the Existing Stockholders' Agreement, none of the rights, obligations and liabilities of the parties under the Existing Stockholders' Agreement shall survive the termination of the Existing Stockholders ' Agreement.

2. Resignations of Directors. Holdings agrees to use its reasonable efforts to cause each of James J. Mossman, Peter G. Peterson and Stephen A. Schwarzman (or any of such directors' replacements) to resign.

3. Applicable Law. This Agreement shall be governed by, and construed and enforced in accordance with and subject to, the laws of the State of New York applicable to agreements made and to be performed entirely within such State.

4. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

5. Entire Agreement. This Agreement contains the entire understanding of the parties hereto with respect to the subject matter hereof. This Agreement supersedes all prior agreements and understandings between the parties with respect to such subject matter.

6. Third Party Beneficiaries. Each party hereto intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any person other than the parties hereto.

* * * *

IN WITNESS WHEREOF, USX, Holdings and the Company have each executed and delivered this Agreement as of the date first above written.

USX CORPORATION

By:

Name:
Title:

TRANSTAR HOLDINGS, L.P.

By: BLACKSTONE TRANSPORTATION
COMPANY, INC., its General Partner

By:

Name: James J. Mossman
Title: President

TRANSTAR, INC.

By:

Name:
Title:

<PAGE>

EXHIBIT G

AMENDED AND RESTATED ASSUMPTION AND INDEMNIFICATION AGREEMENT

AMENDED AND RESTATED ASSUMPTION AND INDEMNIFICATION AGREEMENT (this "Agreement") dated as of _____ __, [2000] among USX CORPORATION, a Delaware corporation ("USX"), USS GREAT LAKES FLEET, INC., a Delaware corporation ("Fleet") and TRANSTAR, INC., a Delaware corporation ("Transtar").

WHEREAS, Transtar, Fleet and certain other corporations entered into, and USX consented to, that certain Asset Purchase Agreement dated as of December 15, 1988 (the "Asset Purchase Agreement"); and

WHEREAS, USX, Fleet, Transtar and Great Lakes Fleet Acquisition, Inc. ("Transtar Sub") entered into an Assumption and Indemnification Agreement dated as of December 28, 1988 (the "Original Agreement"); and

WHEREAS, Fleet merged with and into Transtar Sub and Transtar Sub changed its name to Fleet pursuant to a Certificate of Merger dated [December 28, 1988] ; and

WHEREAS, Transtar, Transtar Holdings, L.P. ("Holdings") and USX have entered into that certain Reorganization and Exchange Agreement (the "Reorganization Agreement") dated as of October __, 2000, the transactions pursuant to which shall take place on the closing date specified therein (the "Reorganization Closing Date"); and

WHEREAS, under the terms of the Original Agreement, USX, Transtar, Fleet and Transtar Sub agreed to a certain allocation of obligations for losses, liabilities, claims, damages, costs and expenses (including counsel fees) allegedly resulting directly from the use or existence of or exposure to

asbestos (including any product or material containing asbestos) (collectively "Asbestos Claims"); and

WHEREAS, pursuant to the terms of the Reorganization Agreement, the parties hereto desire to amend and restate the Original Agreement in its entirety to provide that (i) USX shall continue its indemnification obligations and (ii) Fleet's and Transtar's indemnification obligations shall be modified as set forth herein;

NOW, THEREFORE, in consideration of the mutual covenants and obligations and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. USX agrees to assume, indemnify and hold Fleet harmless against any and all Asbestos Claims as to which legal proceedings were commenced under applicable laws, regulations or court rules before the Closing Date (as defined in the Asset Purchase Agreement).

2. (a) Fleet agrees to assume, indemnify and hold USX harmless against any and all Asbestos Claims relating to activities, vessels or properties of the Fleet or the USX Lake Shipping Division as to which legal proceedings were commenced under applicable laws, regulations or court rules on or after the Closing Date (as defined in the Asset Purchase Agreement); provided, however, with respect to Asbestos Claims relating to activities, vessels or properties of the Fleet or the USX Lake Shipping Division as to which legal proceedings were commenced under applicable laws, regulations or court rules on or after the Closing Date (as defined in the Asset Purchase Agreement) but prior to the Reorganization Closing Date, Fleet shall assume, indemnify and hold USX harmless for only 56% of all liabilities associated with such Asbestos Claims.

(b) With respect to Asbestos Claims relating to activities, vessels or properties of the Fleet as to which legal proceedings were commenced under applicable laws, regulations or court rules on or after the Closing Date (as defined in the Asset Purchase Agreement) but prior to the Reorganization Closing Date, Transtar shall assume, indemnify and hold Fleet harmless for 44% of all liabilities associated with such Asbestos Claims.

(c) For the purposes of this Agreement, proceedings with respect to claims which have been filed prior to the Reorganization Closing Date and which have been " administratively dismissed" by a court of competent jurisdiction and which are subsequently re-filed or otherwise revived by the plaintiff shall be deemed to have been commenced on the date on which the original claim with respect to which such re-filed or revived claim relates was first filed.

(d) Other than as set forth in this Section 2, Transtar is hereby released from any obligation it may previously have had under the Original Agreement to assume, indemnify and hold USX harmless against any Asbestos Claim.

3. The parties agree that all shall cooperate with each other and make available to the responsible party all records and documents which, and all employees who, are reasonably necessary to defend any proceeding without charge other than reimbursement of out-of-pocket expenses actually incurred by the indemnified party.

4. The interpretation and construction of this Agreement, and all other matters relating hereto, shall be governed by the laws of the Commonwealth of Pennsylvania.

5. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

6. This Agreement sets forth the entire agreement and understanding of

the parties hereto relating to the subject matter contained herein and merges all prior discussions between the parties, and neither party shall be bound by any previous agreements, negotiations, commitments and writings, including, but not limited to the Original Agreement, other than as expressly stated in this Agreement.

IN WITNESS WHEREOF, each of Transtar, Fleet and USX has caused its corporate name to be hereunder subscribed by its officer duly authorized as of the date first above written.

USX CORPORATION

By: _____
Name:
Title:

USS GREAT LAKES FLEET, INC.

By: _____
Name:
Title:

TRANSTAR, INC.

By: _____
Name:
Title:

<PAGE>

EXHIBIT H

ENVIRONMENTAL INDEMNIFICATION AGREEMENT

ENVIRONMENTAL INDEMNIFICATION AGREEMENT (this "Agreement"), dated as of _____ __, [2000], among USX CORPORATION, a Delaware corporation ("USX"), TRANSTAR HOLDINGS, L.P., a Delaware limited partnership ("Holdings") and each of the subsidiaries of Holdings signatory hereto listed under the caption "Holdings Companies" (collectively, the "Holdings Companies").

W I T N E S S E T H:
- - - - - - - - - -

WHEREAS, Transtar, Inc., a Delaware corporation ("Transtar") entered into that certain Asse t Purchase Agreement dated as of December 15, 1988 (the "Purchase Agreement") among Transtar and each of the subsidiaries of USX listed on Exhibit I hereto (the "USX Subs") pursuant to which Transtar agreed to purchase substantially all of the assets of the USX Subs and to acquire such assets by mergers of the USX Subs into each of the subsidiaries of Transtar listed on Exhibit II hereto (collectively, the "Transtar Subs"); and

WHEREAS, USX received, as consideration for such purchase, payments of cash

and subordinated notes of Transtar; and

WHEREAS, it was a condition to the obligation of Transtar to consummate such purchase that USX indemnify Transtar and the Transtar Subs against certain liabilities; and

WHEREAS, to effect that indemnification, USX, Transtar and the Transtar Subs entered into an Environmental Indemnification Agreement dated as of December 28, 1988 (the "Original Agreement"); and

WHEREAS, Transtar, Holdings and USX have entered into that certain Reorganization and Exchange Agreement (the "Reorganization Agreement") dated as of October __, 2000; and

WHEREAS, pursuant to the terms of the Reorganization Agreement, the parties hereto desire to terminate the Original Agreement and enter into this Agreement to provide that Holdings and the Holdings Companies are the only beneficiaries of the indemnification obligation of USX; and

WHEREAS, USX, Transtar and the Transtar Subs have agreed to terminate the Original Agreement by means of a Termination Agreement dated as of the date hereof.

NOW, THEREFORE, the parties hereto agree as fol-lows:

Section 1. Indemnity. USX agrees to indemnify Holdings and each of the Holdings Companies, and hold each of them harm-less from and against any and all claims, losses, liabili-ties, obligations, damages, deficiencies, costs and expenses, including, without limitation, expenses of inves-tigation and reasonable attorneys' fees and disbursements, suffered or paid directly or by application of any assets of Holdings or any Holdings Company after the Closing Date (as defined in the Purchase Agreement), arising out of or re-lating to (a) any environmental condition of any kind or na-ture existing prior to the Closing Date at any of the locations listed in Exhibit III hereto (each such location a "Cleanup Site"), (b) any pollution of the environment, including without limitation, ambient air, surface water ground water or land, waste, hazardous or toxic substances, whether relating to manufacture, storage, disposal, transport, handling or reporting, or any other environmental condition of any kind or nature existing prior to the Closing Date on any real property including, with limitation, the sites listed on Exhibit IV hereto owned by any of the Existing Transportation Units (as defined in Purchase Agreement) and leased to a third party, including, without limitation,, USX (the " Leased Sites") which Holdings or any Holdings Company is required by law to remediate and after reasonable efforts, Holdings and the relevant Holdings Company are unable to have such remediation performed by lessee, and (c) any event occurring before the Closing Date or condition existing as of the Closing Date involving any Cleanup Site or Leased Site which constitutes or is all to constitute a violation of any currently applicable Federal, state or local environmental law, regulation or ordinance including, without limitation, CERCLA, the Resource Conservation and Recovery Act, the Superfund Amendments Reauthorization Act of 1986, the Clean Air Act, the Clean Water Act and the Toxic Substances Control Act, to the extent that such claims, losses, liabilities, obligations, damages, deficiencies, costs and expenses, in the case of clauses (a), (b) and (c) exceed, in the aggregate, $1,158,826 ("USX Deductible Amount"), in which event USX shall be liable for indemnification hereunder only for 75 of every $1 in excess of the USX Deductible Amount; provided that USX shall be liable for indemnification hereunder for the full amount (subject to no USX Deductible Amount) of all claims, losses, liabilities, obligations, damages, deficiencies, costs and expenses, arising out of or relating to events, conditions or other matters described in clause (b) above to the extent USX is the lessee of the Leased Site in question.

Section 2. Arbitration. If USX and Holdings are unable to agree upon the

apportionment of responsibility for, or the date of existence of, any environmental condition covered by the terms of this Agreement, the dispute shall be referred to binding arbitration by an arbitral tribunal (the "Tribunal") composed of three arbitrators, of whom USX shall nominate one, Holdings shall nominate one and the two arbitrators so nominated shall agree upon a third. If either USX, on the one hand, or Holdings, on the other, fails to nominate an arbitrator within thirty (30) days of receiving notice of the nomination of such arbitrator by the other nominating party, such arbitrator shall at the written request of any party be appointed by the American Arbitration Association's office in Washington, D.C. As soon as practicable after its appointment, the Tribunal shall convene a meeting with USX, and Holdings or their representatives. Not less than ten (10) Business Days prior to such meeting, each of USX, on the one hand, or Holdings, on the other, shall make a written submission to the Tribunal with regard to the issues to be resolved. At such meeting, the Tribunal shall hear oral presentations by each of USX, on the one hand, or Holdings, on the other, or its representative and shall have an opportunity to question each of USX and Holdings with respect thereto. The Tribunal may issue a decision to resolve the dispute at any time. Alternatively, the Tribunal may, at its option, schedule one or more further meetings and request that the parties to the dispute provide further oral testimony or written submissions with respect to the issues to be resolved. The Tribunal shall endeavor to complete its review of the issues and issue its decision with respect to the dispute as soon as practicable. In the event any party fails to cooperate with the Tribunal or comply with its requests for oral testimony or written submissions, the Tribunal shall be entitled to draw appropriate conclusions from such failure and consider such conclusions in reaching its decision on the dispute. The Tribunal shall issue its final decision in a written statement addressed to each of USX and Holdings. The procedural decision of the Tribunal shall be made by a majority of the Tribunal.

Section 3. Expenses. The parties shall cooperate with each other to develop cost effective and business-justified solutions to the matters described herein. Holdings and the Holdings Companies shall give USX notice prior to incurring any expenses for which USX shall be responsible hereunder.

Section 4. Benefits. This Agreement shall inure to the benefit of Holdings and each of the Holdings Companies and their successors and assigns.

Section 5. Amendments. No changes, amendments or modi-fications of this Agreement shall be valid unless in writing and signed by all of the parties hereto affected by any such change, amendment or modification.

Section 6. Notices. All notices, consents, requests, instructions, approvals and other communications provided for herein and all legal process in regard hereto shall be validly given, made or served, if in writing and delivered by any reasonable means, including but not limited to per-sonal delivery, overnight courier, telex or registered or certified mail, return-receipt requested and postage pre-paid:

(a) if to Holdings, to:

Transtar Holdings, L.P.
345 Park Avenue
New York, New York 10154-0191
Attention: James J. Mossman

with a copy to:

THE BLACKSTONE GROUP
345 Park Avenue
30th Floor
New York, New York 10154
Attention: James J. Mossman

and to:

WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
Attention: William F. Wynne Jr., Esq.

(b) if to USX, to:

USX CORPORATION
600 Grant Street
Pittsburgh, Pennsylvania 15219-4776
Attention: President

with a copy to:

USX Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15219-4776
Attention: General Counsel

or to such other address as any such party hereto may, from time to time, designate in writing delivered in a like manner.

Section 7. Governing Law. This Agreement shall be governed by the law of the Commonwealth of Pennsylvania.

IN WITNESS WHEREOF, USX, Holdings and the Holdings Companies have each executed and delivered this Agreement as of the date first above written.

USX CORPORATION

By:

Name:
Title:

TRANSTAR HOLDINGS, L.P.
By: BLACKSTONE TRANSPORTATION
COMPANY, INC., its General Partner

By:

Name:
Title:

HOLDINGS COMPANIES:

BESSEMER AND LAKE ERIE RAILROAD COMPANY

By:

Name:
Title:

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

By:

Name:
Title:

USS GREAT LAKES FLEET, INC.

By:

Name:
Title:

PITTSBURGH & CONNEAUT DOCK COMPANY

By:

Name:
Title:

<PAGE>

USX SUBSIDIARIES

Bessemer Acquisition, Inc.
Birmingham Southern Acquisition, Inc.
DM&IR Acquisition, Inc.
EJ&E Acquisition, Inc.
Lake Terminal Acquisition, Inc.
McKeesport Acquisition, Inc.
P&C Dock Acquisition, Inc.
Union Railroad Acquisition, Inc.
Great Lakes Fleet Acquisition, Inc.
Warrior & Gulf Acquisition, Inc.
Fairfield Southern Acquisition, Inc.
MRT Acquisition, Inc.
Mon Valley Merger, Inc.
Tracks Traffic Acquisition, Inc.
Transall Acquisition, Inc.

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TRANSTAR SUBSIDIARIES

Bessemer and Lake Erie Railroad Company
Birmingham Southern Railroad Company
Duluth, Missabe and Iron Range Railway Company
Elgin, Joliet and Eastern Railway Company
The Lake Terminal Railroad Company
McKeesport Connecting Railroad Company
The Pittsburgh & Conneaut Dock Company
Union Railroad Company
USS Great Lakes Fleet, Inc.
Warrior & Gulf Navigation Company
Fairfield Southern Company, Inc.
Mobile River Terminal Company

Mon Valley Railway Company
Tracks Traffic and Management Services, Inc.
Transall, Inc.

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List of Existing Environmental Cleanup Sites

BESSEMER AND LAKE ERIE RAILROAD Company

1. Douglassville National Superfund Site a/k/a Berks Associates, Inc. Cleanup Site, Douglassville, Pennsylvania. B&LE's contributed diesel lube oil to this site -- 4,032 gallons in 1973 and 2,600 gallons in 1975. Federal EPA involvement.

2. Delta Chemicals Cleanup Site, Worthington, Pennsylvania. B&LE contributed used solvents and waste oil to the site in 1985. Both state and federal authorities are involved.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

1. Arrowhead Refinery National Superfund Site, Hermantown, Minnesota. DM&IR's contribution is 9,000 gallons waste oil. Federal EPA involvement.

2. Proctor Cleanup Site. Waste oil and PCB con-tamination at DM&IR facility in Proctor, Minnesota. Removal is being coordinated with state agency.

3. Two Harbors Facility - Abex Site. Two Har-bors, Minnesota. Hazardous foundry sludge has been discovered on property owned by the DM&IR.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

1. Lenz Oil Cleanup Site, DuPage County, Illi-nois. EJ&E's contributed 3,985 gallons of waste oil; groundwater contamination has resulted. State agency involved.

PITTSBURGH AND CONNEAUT DOCK COMPANY

1. Laskin/Poplar Oil National Superfund Site, Jefferson, Ohio. United States of America vs. Alvin Laskin, et al. and General Motors, et al. vs. A.A. Automotive Ser-vice & Parts, et al. (including P&C Dock). P&C Dock contributed 16,315 gallons waste oil to this site. Federal EPA involvement. (See also USS Great Lakes Fleet.)

UNION RAILROAD COMPANY

1. Swissvale National Superfund Site, Swissvale, Pennsylvania. Ben Kalik and Frances Kalik d/b/a Swissvale Auto Surplus Co. vs. Allis-Chalmers Corp., et al. (including URR). Swissvale Auto Surplus Company site involves cleanup of PCBs and contaminated soil. Federal EPA involvement.

2. Delta Chemicals Cleanup Site, Worthington, Pennsylvania. Union contributed used solvents and waste oil to the site in 1985. Both state and federal authorities are involved.

USS GREAT LAKES FLEET, INC.

1. Laskin/Poplar Oil National Superfund Site, Jefferson, Ohio. United States of America vs. Alvin Laskin, et al. and General Motors, et al. vs. A.A. Automotive Service & Parts, et al. (including the Fleet). The Fleet contributed 342,000 gallons of waste oil to the site. Federal EPA involvement.

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Certain Leased Sites

1. Albion, Pennsylvania Cleanup Site. A solid waste site at the Bessemer' s car clean-out site currently leased to a third party may necessitate the cleanup and disposal of soil. The state's Department of Environmental Resources has app roved the on-going remediation.

2. Endion Yard Cleanup Site. Duluth, Minnesota. Contaminated soil has been discovered on property formerly owned and/or leased by the DM&IR. State agency involvement.

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EXHIBIT I

TERMINATION OF ENVIRONMENTAL INDEMNIFICATION AGREEMENT

TERMINATION AGREEMENT (this "Agreement") dated as of _____ __, [2000] by and among USX CORPORATION, a Delaware corporation ("USX"), TRANSTAR, INC., a Delaware corporation ("Transtar") and each of the subsidiaries of Transtar signatory hereto listed under the caption "Transtar Subs" (collectively, the "Transtar Subs").

W I T N E S S E T H:

WHEREAS, USX, Transtar and the Transtar Subs are parties to an Environmental Indemnification Agreement dated as of December 28, 1988 (the "Existing Agreement"); and

WHEREAS, Transtar, Transtar Holdings, L.P. ("Holdings") and USX have entered into that certain Reorganization and Exchange Agreement (the "Reorganization Agreement") dated as of October __, 2000; and

WHEREAS, USX, Holdings and certain subsidiaries of Holdings are parties to an Environmental Indemnification Agreement dated as of the date hereof which Transtar, Holdings and USX intend to replace the Existing Agreement; and

WHEREAS, pursuant to the terms of the Reorganization Agreement, the parties hereto desire to terminate the Existing Agreement;

NOW, THEREFORE, in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Termination. The Existing Agreement shall be terminated and have no further force and effect, effective as of the Closing. Notwithstanding any provision to the contrary contained in the Existing Agreement, none of the rights, obligations and liabilities of the parties under the Existing Agreement shall survive the termination of the Existing Agreement.

2. Applicable Law. This Agreement shall be governed by, and construed and enforced in accordance with and subject to, the laws of the State of Pennsylvania applicable to agreements made and to be performed entirely within such State.

3. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which

together shall constitute one and the same instrument.

4. Entire Agreement. This Agreement contains the entire understanding of the parties hereto with respect to the subject matter hereof. This Agreement supersedes all prior agreements and understandings between the parties with respect to such subject matter.

5. Third Party Beneficiaries. Each party hereto intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any person other than the parties hereto.

* * * *

IN WITNESS WHEREOF, USX, Holdings and the Company have each executed and delivered this Agreement as of the date first above written.

USX CORPORATION

By: _____
Name:
Title:

TRANSTAR, INC.

By: _____
Name:
Title:

TRANSTAR SUBS:

BESSEMER AND LAKE ERIES RAILROAD COMPANY

By: _____
Name:
Title:

BIRMINGHAM SOUTHERN RAILROAD COMPANY

By: _____
Name:
Title:

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

By: _____
Name:
Title:

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

By: _____
Name:
Title:

THE LAKE TERMINAL RAILROAD COMPANY

By: _____
Name:
Title:

MCKEESPORT CONNECTING RAILROAD COMPANY

By: _____
Name:
Title:

THE PITTSBURGH AND CONNEAUT DOCK COMPANY

By: _____
Name:
Title:

UNION RAILROAD COMPANY

By:

Name:
Title:

USS GREAT LAKES FLEET, INC.

By:

Name:
Title:

WARRIOR & GULF NAVIGATION COMPANY

By:

Name:
Title:

FAIRFIELD SOUTHERN COMPANY, INC.

By:

Name:
Title:

MOBILE RIVER TERMINAL COMPANY

By:

Name:
Title:

MON VALLEY RAILWAY COMPANY

By:

Name:
Title:

TRACKS TRAFFIC AND MANAGEMENT SERVICES, INC.

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 15

10/16

(1)

Loss of Bumping —
Assignment of Jobs — 7 —



Dual Bump work for all other Route should be included in Loss of Bumping —

(Jim Quick) NO - to Seniority Transfer rights —
Get Back to them on Transfer Rights —

(Employee who refuses 2 jobs or bumps - NYO apply - to all offered —

1985

(NO Change in RR Status —)

Under Sled —)
The language in Pension Plan —

TTMS - Side -
Ref JOA - Reference - Sect 3.1 C

J. INCLAN

(2)

Clerical Positions

118 - today - NON BLE positions
proposed - 30 of 118 - remain on BLE.
88 transfer to USX side -
of 88 - 27 would be in shared area - TTMS
61 non shared - USX - Blank

13 Payroll
7 MIS
3 Benefits
2 MISC

Balance non shared
Remain w/ Seniority

Remain - Plan 401K INS -

Blanket buy to create more Benefit Plans -

Transfer assets to New Blanket Plans -

93 ~~USX~~ Will entitled New Copy protection -
New one or add one -

J1 - 155.00 JOB BLE to TTMS

JQ TPA - 2,000 - NYO - 3,000 - / Family NE w TPA
1ST 1 on letter Request New Cards

TCU EXHIBIT 15
PAGE 2

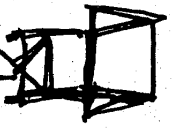
3

JQ Do you want me to
JI Should Frantz -
Will go by Surety — when filling for
under TT MS
reassigned Jan - 1 -

(Mail — [redacted] —)
BLE
Will think about

Ted — III LOA People -
Chuck Will do position be 

JQ NYD — kick in —

JI
Arbitrary Section for notice 
Handled with BLE 1st -
JI Can put it in New National Agreement —

CB. MOW — Dept —
JI Under Operations -
May have to add that in —
ANY BLE Roster

11/17 -BCE 11:15 AM (4)

Jud CSR - NONE BCE ?

Rate Clerks only / Lateral - ✓
Property Clerk - ✓
Rec Acct. Agent ISS -

J1 - Send - a Runner - after the split - 1 rate clerk
To other rate clerk dumped - 1 created -
Add a Tag Clerk - ** ** PEX Bump -

TS Head Property Clerk - BCE
" " " Transfer -
7 ISS. 51
3153.10 -

J1 1 Rec ISS - BLE
Transfer
4 H 2 @ C - ISS -
3 ISS Transfer

J. INGHAM MOST APPEALING
Advertise Jobs most appealing
Increments ISJ
Willing to give TPA-S - Bid in Position
under Boundary rule -

5

Will all Club - people get a TPA — 11/17

Need TPA's —

X III

8 Vice - 13 -

JI Present Sunday Brin

Bulletin on all jobs coming — —

10/18 - BCF > C.B. Meeting 11 Clerks

1. Temporary Job - What status does that clerk fall into - ?

Fed-
2. NYD-1

—2004- Does projects overlap - ?
J.Q - 15 -
↘ Drawing projects two years - / New PAs
if you have 4yrs remaining
can stay on 1st or new Hyder
can't be Clerk 2nd NYD;

PA 4,000
Hours · 240

that's a new word

Job 1 Sick Leave - carryover days that they have - already -

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V.

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EMPLOYEES' EXHIBIT NO. 16

11-16-00 Filed October 4

BLE Negotiations

Class I Carrier vs Class III - N Y D benefits ?

Leave of Absence people

(are they impossible) Health + Welfare + Pension - What kind of coverage

No Article for Health + Welfare

1) Now transferring to Tronator
2) same H+W Welfare + same pension Plan
3) Not planning on bulletining positions

Leave of Absence People

2 holding non-agreement in Transportation
1 - Material Leave
will protect incumbency rate

Bidding Positions + filling

TPA - willing to give TPA who bid in job under incumbency rule

1) Cust Service Clerks - None left on BLE
2) Rate Clerks - only 1 listed
3) Property Clerk (OMIR) - should remain on BLE ?
4) 155 clerks - operate them
5) 1 Toy Clerk on each side
6) relief on entry rates on janitors (class II rate)

TCU EXHIBIT 16
PAGE 1

6 40 Pf Ext 8 11

payroll work will be part of the shared work

24 of the remaining clerks in general will be performing work for the remaining roads

Blackstone has to create minor benefits - including pension & 401 plans

they will expect them to protect their Fed Rate

9 or 10 different rates today

Questions for Mitch

What about loss of business formula in Feb 7
don't forget those people on L of absence
What about outstanding section 6 notice
Don't forget Nat. Handling to be applied to New RR
What about new agreement + Railway Labor act on new railroad

upgrade protection on 2001
include other carriers in loss of business

New pension plan - how is it funded - in,

check on language (plus proceeds from trackage rights arrangements

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EMPLOYEES' EXHIBIT NO. 17

Subj: **Labor Relations chat with members in MVL**
Date: 10/28/00 8:40:05 AM Central Standard Time
From: t (Bennett)
To: te d P. Stafford)

October 28, 2000

Hi Ted and Sam,

Here is an overview of what I gleaned from the companies session with members Friday (10/27):

1. At both sessions, they said that the NY Dock agreement would be for up to 6 years.

2. Blackstone owns the building and will handle Mailroom and Janitors (statement was only made in the 1st session).

3. TPA's will be calculated for those exercising rights to Tracks, but they will NOT be provided prior to decision of whether you go to Tracks or not. They also "danced" around whether those who currently have a TPA would elect which agreement they would stay under or go to. Also, no straight answer when asked if you had to bump to a lower position if you would get TPA. Did state that overtime COULD be figured in when calculating TPA's if they position worked overtime on a regular basis and it was not because of "special" work if you DID NOT get an offer of a position with Tracks.

4. There "vision" of how the election of going to Tracks positions was presented very different from my take on how it was to take shape from our meeting with them. If I understood them correctly, it would still be by Department in the case of Revenue and General Accounting, but they presented a very different picture. In there scenario, they go strictly based by seniority and offer the different positions. So much for specific positions being designated at B & L E or Tracks positions. They also "waffled" when asked whether a senior person could exercise seniority into a 2-star position (partial exempt) at this time or not. However this works, people will have to know that they have to go to the highest rated position they can hold in order NOT to loose their "Protected" or TPA rates. WE WILL HAVE TO MAKE SURE WE ARE BOTH ON THE SAME PAGE BEFORE WE AGREE ON HOW THE ELECTION TO POSITIONS TAKE PLACE.

5. Companies have an oral agreement not to "raid" employees, so they have not intention of permitting current employees of one company to be considered ahead of new hires for the other company.

6. They still do not have it figured out which or how may positions in some areas are going to be Tracks. When asked the question, they said they may know in a week.

7. Could not answer HOW the new position offering would take place – pre-canvassing was mentioned. Also would not give an idea of HOW LONG someone would have before making the decision. Also, were asked if you would have a "bump" if you elected not to transfer, and the answer was a very shaky "perhaps".

8. They have no plans on hiring anyone new to fill positions currently vacant (temporary vacancies).

9. Were asked about SEC filing stating there were no strikes threatened against any Transtar Companies – since Steelworkers had not taken their "strike" vote, and they still are not free to strike yet, there were no major things yet.

10. Were told that an implementing agreement has to be in place and can be reached mutually or VIA imposed arbitration.

11. Asked if people would be RE-CANVASSED for positions incumbents chose not to go with, and there was not a clear answer, just a qualified "maybe" at best.

12. Position qualifications will be the same as they are now on the B & L E when moving to Tracks. Good time to have Speedwriting/Shorthand put together and Data Entry/Keypunch. No one asked how or who would fill vacancies in the different areas.

13. There are also a few positions which currently have "incumbent rates on them. What is going to happen if the incumbents on them are not moving with the positions due to having to make an election and the position is taken by someone with more seniority. Could happed if the Company vision on filling positions takes place.

14. Is there any way that it can be set up that when and if someone does have to file for TPA payments, that they do NOT have to file for it each month in order to receive payments? The company knows who is eligible for payments and should automatically make the payments since they have to collect the information to start with.

Chuck Bennett

---------- Headers ----------
Return-Path:
Received: fro((rly 04.mail.aol.com (v76_r1.23) with
ESMTP; Sat, 28 Oct 2000 10:40:05 -040
Received: from new-server.pathway.net (www.) by rly-yc04.mx.aol.com (v76_r1.19) with ESMTP;
Sat, 28 Oct 200 0400
Received: from ! .ified [63.70.174.27]) b; et
(Rockliffe SMTPRA 3.4.2) with SMTP id <B00222 .pathway.net> for <tedstaf@aol.com>;
Sat, 28 Oct 2000 10:37:27 -0400
From: "Bennett" <data@pathway.net>
To: "Ted P. Stafford" <tedstaf@aol.com>
Subject: Labor Relations chat with members in MVL
Date: Sat, 28 Oct 2000 10:36:52 -0400
Message-ID: <M CEAA.data@pathway.net>
MIME-Version:
Content-Type: text/plain;
charset="iso-8859-1"
Content-Transfer-Encoding: 8bit
X-Priority: 3 (Normal)
X-MSMail-Priority: Normal
X-Mailer: Microsoft Outlook IMO, Build 9.0.2416 (9.0.2910.0)
Importance: Normal
X-MimeOLE: Produced By Microsoft MimeOLE V5.00.2615.200

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 18

Tracks, Traffic & Management Services, Inc.
Monroeville, PA 15146

May 15, 2001

TO: W. J. Barman

FROM: W. G. Sjoberg, Director Labor Relations

SUBJECT: New York Dock Test Period Averages

This letter is in reply to your request for Test Period Average (TPA) information in accordance with the December 22, 2000 Implementing Agreement between the Bessemer & Lake Erie Railroad, Tracks, Traffic & Management Services, Inc., and the Transportation Communications International Union.

Your TPA is $3,218.84 per month, and the monthly average number of hours for which you were compensated is 174.67.

Your TPA and your average monthly hours were determined by using the four fiscal quarters beginning in March 2000 and ending in March 2001. If you were on extended sick leave during that time, one or more earlier months were substituted to obtain the minimum work history necessary to complete the calculations.

Those employees who are still covered under New York Dock (NYD) from an earlier coordination must elect whether to remain under such coverage, or to come under the coverage of the December 22, 2000 Implementing Agreement using the new TPA and the new average hours per month set forth above. The maximum duration of coverage under either coordination is six years **or** the individual employee's length of service prior to the applicable transaction, whichever is least. An employee who chooses to remain covered by a prior NYD transaction will continue to be covered only for his/her eligibility period remaining from such prior transaction. Enclosed is an election form for your use in choosing coverage; please complete and return it within ten (10) days of the date of this letter.

Employees who believe that they have been "adversely affected" as a result of the March 23, 2001 transaction may obtain NYD claim forms from their supervisor.

W. G. Sjoberg

enclosure
T:TPA Letter.TTM

TCU EXHIBIT 18
PAGE 1

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

V.

TTMS/B&LE

EMPLOYEES' EXHIBIT NO. 19

BESSEMER AND LAKE ERIE RAILROAD
INTERDEPARTMENT CORRESPONDENCE

June 13, 2001

TO: K. Shepard

FROM: R. B. McGinley

SUBJECT: New York Dock Protection

You requested that you be advised as to what your monthly displacement allowance (TPA) is under the terms of the New York Dock protection conditions, which were imposed in connection with the dissolution of Transtar that took place on March 23, 2001.

This is to advise you that your monthly TPA allowance is $3,330.73 and your monthly average hours worked are 178.71.

You are reminded that the foregoing dollar amount and hours are not simply a compensation guarantee, but rather such allowance is payable only "so long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced." In other words, if you are holding a position now that pays the same rate of pay or more than the position you held prior to March 23, 2001, you are not a displaced employee simply because in a particular month (February being only twenty-eight days for example) you earn less than your TPA. In order for the TPA to be payable you must be unable, as a result of the dissolution transaction, to hold a position paying the same or higher rate of pay or having comparable overtime opportunities.

In the event you believe you are unable to hold a position paying the same or higher rate of pay, or having comparable overtime opportunities, as a result of the transaction, and believe that the dissolution of Transtar is the cause of that situation, you should contact your supervisor to obtain the proper form for making a claim for that particular month.

R B McGinley

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RAS

Founded December 29, 1899

Transportation Communications International Union

Challenging the future with over a century of pride!

Robert A. Scardelletti, *International President*
James L. Quilty, *International Vice President*

August 28, 2001

File: BLE/TTMS

Mr. Jim Street
Transtar (BLE)
P. O. Box 68
Monroeville, PA 15146

Mr. John F. Ingham
Tracks, Traffic Management Services, Inc. (TTMS)
P. O. Box 68
Monroeville, PA 15146

RECEIVED
SEP - 5 2001
INT'L PRES. OFFICE

Dear Sirs:

This is regarding our conversations of July 24th through 26th involving, among other issues, the explicit provisions of our New York Dock (NYD) Article I, § 4 Implementing Agreement (IA) of December 22, 2000. More specifically, the focus of this letter is the dispute we have over the provisions of Article VII of that IA.

For reference, Article VII states:

> BLE will, on written request, furnish a test period average (TPA) to all BLE employees who pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPS/s will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits written request for same.
>
> Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.

In the discussions I pointed out that it is TCU's position that all TCU represented employees of BLE were directly affected by the transaction which coordinated certain

clerical work into Tracks, Traffic and Management Services, Inc. I also referenced the negotiations that took place during the §4 process and the actual framing of Article VII which supported my position.

I have since had the opportunity to review my notes of the negotiating sessions leading up to our IA along with the numerous telephone conversations that we had during that process. Gentlemen, my notes reflect that the explicit language of Article VII was fashioned, by your requests, to lessen the impact of a so-called "Sadie Hawkins" rundown process.[1] In exchange for lessening that impact, it was agreed that if employees remained with BLE on their original positions, they would be recognized as affected by the transaction and provided with a TPA and NYD entitlement, as stated in Article VII.[2]

Article VII also plainly stated that BLE employees transferring to TTMS either with work, or by choice, would be provided with their TPAs and NYD entitlement (see Items 1 & 2 of IA Article VII).

As I pointed out to both of you in July, BLE employees that remained with BLE on their original positions, and former BLE employees presently working for TTMS, have been denied their NYD entitlements in violation of our IA. The reasons given to TCU members by BLE and TTMS in denying their NYD claims contained conflicting reasoning and contradict each other. What bothers me the most is that both BLE and TTMS are ignoring the provisions of Article VII and the good faith bargaining that lead up to its inclusion in our IA – again at your requests.

While employees affected by the coordination may or may not be due displacement allowances in a particular month, they nonetheless <u>are</u> protected under the auspices of NYD and our IA. Article I §§ 1 & 5 of NYD mandate this inescapable fact and each protective period commences at the very first instance of being affected by the transaction (again see IA Articles V & VII).

What you gentlemen have proffered to me in our discussions is that although you have provided each affected employee with a TPA, that fact does not mean that they are entitled to the NYD protection mandated by our IA. This reasoning I find insupportable and contradictory to the clear language of our IA.

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[1] Sadie Hawkins is a term of art which describes the rundown process by which all BLE employees would have had the opportunity to choose the most attractive assignments and exercised their respective seniority displacement rights to that choice.

[2] Article V of our IA also provided that:

Section 1 – Employees affected by this transaction will be entitled to the employee protective conditions set forth in New York Dock, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of New York Dock.

The calculation and providing of a TPA to employees was in recognition that each was affected and entitled to their respective NYD protective benefit. As previously stated, a subsequent displacement allowance is made by comparison of the employee's TPA versus what he/she earned in that particular month. If an employee worked up to his/her TPA hours and earned the compensation guarantee, then they are not entitled to a displacement allowance in that month. However, this elemental operation of NYD does not relieve the Carrier from its full term responsibilities to the employee under NYD and our IA.

TPAs are composed of the total compensation and total hours which the employee earned and worked in the prior twelve (12) month period.[3] Once that figure is derived, these totals are divided by twelve (12) to calculate a monthly average by which each ensuing month is compared to determine if a displacaement allowance is due. When an employee suffers a loss in compensation, it is their explicit right to a displacement allowance for that month, as dictated by the NYD TPA and our IA.

One reason you have denied our members their NYD protection is because, in your words, they were not "adversely affected" by the transaction. Let me point out that employees affected by a NYD transaction may not suffer an immediate loss in compensation, but that fact does not negate future entitlements. Moreover, your use of the terminology "adversely affected" is also misplaced. See for instance the decision of John LaRocco (FD 30000) in UP/MP v TCU (3-1-88) wherein he observed that:

> "As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even the though an adverse effect may not materialize until long after the transaction is implemented . . . . The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after . . ." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to

[3] The protective period starts from the first instance of being affected (displaced or dismissed) and continues so long after the employee is unable to obtain a position producing total compensation equal to or exceeding the TPA. The protective entitlement is calculated based upon the individual's TPA and the compensation earned in any month. If the compensation is less than his TPA, then he/she is due the difference. See Article I, § 5 of NYD.

pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions."[4]

Your assertions that providing the TPA to affected employees did not also provide them with an entitlement to NYD is both insupportable and a misrepresentation of our IA. It is TCU's position that the IA is clear on this matter. I suggest that you reflect upon the facts surrounding Article VII, and that we arrange to meet once again on this matter with the aim of settling this dispute.

Please promptly advise me of an available date to discuss this matter.

Yours,

J. L. Quilty
International Vice President

Cc: R. A. Scaradelletti, IP TCU
T. P. Stafford, Pres. ASD/TCU
S. Siriano, Vice Pres. ASD/TCU

[4] See Docket No. 67 of the Section 13 Committee (WJPA) wherein it was reasoned: "The five year protective period for a displaced employee would make little sense and provide little protection if each subsequent loss of earnings in the period had to be directly related to the coordination."

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Tracks Traffic and Management Services, Inc.

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

William G. Sjoberg
Director Labor Relations

Phone: 412/829-6730
Fax: 412/829-3455

September 7, 2001

Mr. James L. Quilty
International Vice President
Transportation Communications International Union
12712 Miami Circle
Omaha, NE 68164

Dear Mr. Quilty:

Reference is made to your August 28, 2001 letter addressed to Mr. Ingham and received on September 4, 2001 regarding our dispute over the Carrier's application of the December 22, 2000 Implementing Agreement. Your letter has been referred to me for response.

Prior to the March 23, 2001 transaction, TCU-represented clerks employed by the Bessemer and Lake Erie Railroad (BLE) performed the headquarters clerical work (primarily accounting) for all 11 Transtar companies. The transaction resulted in BLE and three other companies splitting off from Transtar, and 83 BLE clerks transferring to Tracks Traffic and Management Services Inc. (TTMS), a Transtar company. TTMS provides accounting services for the remaining Transtar companies and it provides some clerical services for the four companies that split away.

As *New York Dock* coordinations go, this should have been simple. No employees were to be relocated, and every employee would have a job after the transaction. The negotiations to develop an Implementing Agreement focused mainly on developing an orderly system whereby employees would be able to move to the job of their choice. We needed a system that would permit employees to "follow their work" in accordance with their incumbency rights under *New York Dock*, while simultaneously honoring each employee's seniority. Those two goals are not entirely compatible. As example, what were the parties to do if the senior-most employee wanted to take the job held by the junior-most employee, yet that junior employee had a right under *NYD* to follow his/her work.

Over the course of our negotiations, the parties overcame that problem by pooling similar jobs so that the incumbents in each such pool would be protected for purposes of

obtaining a post-transaction job in the same pool. If an employee chose to bid to a different pool, he/she would be at risk of being outbid by a junior employee who was protected account of his/her status as an incumbent of the "different" pool.

The parties were not inexperienced at developing implementing agreements; the Organization recognized that the Carriers could force a prompt parties-pay arbitration under *New York Dock* if progress were to drag in the voluntary talks, and that such arbitration routinely yields a barebones award. The Carriers recognized that nonetheless, some incentive would be needed to expedite the process. Accordingly, the Carriers proposed to increase the wage rates for a number of positions and the Organization agreed.

Finally, as you are well aware, carriers in similar circumstances can simply refuse to provide TPA information when claimants are unable to readily demonstrate that they were adversely affected by a transaction. As a further incentive to make the agreement acceptable to your members, the Carrier agreed to provide TPA information to virtually all headquarters TCU-represented employees who requested such information, without requiring such employees to demonstrate that they were adversely affected. On written request, BLE would "furnish a test period average to all BLE employees who, pursuant to this agreement:

1) follow(ed) their position/work to TTMS;
2) transfer(red) to TTMS;
3) or remain(ed) with their position/work on BLE."

In addition, BLE agreed that it would also..."on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company."

At no time during the negotiations to reach an Implementing Agreement did the carriers ever promise, suggest or even imply that our offer to provide TPA information was tantamount to pre-certifying any employees. The commitment to provide TPA information was nothing more than a good will gesture that we felt would be of interest to the employees. It was not a commitment of pre-certification of all headquarters employees; and it certainly was not a six-year commitment by the Carriers to pay over a hundred employees a displacement allowance every month that their earnings would randomly fall short of their TPA.

We said repeatedly throughout the negotiations that we did not envision any employees being adversely affected by the transaction. It is unimaginable that we would simply waive our right to argue that they were not "adversely" affected, and make the six-year commitment that you allege.

In the next paragraph of Article VII of the Implementing Agreement, the parties agreed as follows:

> "Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claim for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made."

* * * * *

The Organization argued at our July 2001 meetings that because that sentence used the single word "affected" and not the standard *NYD* term "adversely affected," the parties must have mutually intended that everybody was somehow certified as being displaced. We disagree; we never agreed that all such employees would be deemed "displaced."

Regardless, eligibility for such allowances does not hinge on the presence or absence of the word "adversely" in the Implementing Agreement. The obvious purpose of that sentence is to make clear that **the only eligible employees** are those employees "who are entitled to a monthly displacement or dismissal allowance under...New York Dock." (underlining added)

Employees are not eligible for displacement or dismissal allowances under *New York Dock* unless they can demonstrate that they were adversely affected, i.e., displaced or dismissed as a direct result of the transaction.

I suggest that we meet here in Conference Room 1-A at 10:00 a.m. on Wednesday, October 3, 2001 to discuss this further.

Respectfully,

W. G. Sjoberg

cc: J. F. Ingham
S. Siriano
T. P. Stafford
J. E. Streett

4

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	
TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, (BRAC) Organization,	OPINION AND AWARD
and	Pursuant to Article I, Section 11 of the New York Dock Conditions
MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY, Carriers.	Case No. 4 Award No. 5

Hearing Date: November 11, 1987
Hearing Location: Sacramento, California
Date of Award: March 1, 1988

MEMBERS OF THE COMMITTEE

Employees' Member: F. T. Lynch
Carriers' Member: L. A. Lambert
Neutral Member: John B. LaRocco

ORGANIZATION'S QUESTIONS AT ISSUE

(1) Is James Brewer a displaced employe pursuant to New York Dock?

(2) Shall Carrier now be required to restore James Brewer's displacement allowance retroactive to the date he was affected by displacement pursuant to Implementing Agreement No. 28?

CARRIER'S QUESTION AT ISSUE

(1) Is Omaha Clerk J. Brewer entitled to the restoration of New York Dock Conditions under Merger Implementing Agreement No. 28?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (MP) and the Western Pacific Railroad (WP). [ICC Finance Docket No. 30000.] To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

By stipulation, the Organization and the Carrier filed post hearing letter briefs with this Committee. The Neutral Member received the final correspondence (from the Organization) on Februay 13, 1988. Thus, this decision is being issued within the Section 11(c) time limitation.[1]

II. BACKGROUND AND SUMMARY OF THE FACTS

Pursuant to Section 4 of the New York Dock Conditions, the MP and UP served written notice, dated January 14, 1986, on the Organization of their intent to transfer and coordinate UP

---

[1]All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will only cite one particular section number.

Operation Control Specialists with MP On-line System Support Specialists. On April 16, 1986, the parties entered into Implementing Agreement No. 28 to cover employees affected by the transaction. The Carrier executed the transaction during September, 1986. The work was transferred from Omaha and coordinated with similar work performed at St. Louis.

As part of the coordination, the Carrier abolished Clerk Roth's Operation Control Specialist position effective September 18, 1986. In accord with Implementing Agreement No. 28, Clerk Roth exercised his seniority to displace Claimant from his General Clerk position in the Banking Operation Bureau of the UP Accounting Department. The record is unclear if thereafter a General Clerk vacancy arose or if the Carrier created a new General Clerk position. The evidence, however, strongly suggests that the latter occurred because the Carrier wanted to stop the chain of displacements. Whether old or new, Claimant procured a position with the same job title, identical duties, equal pay rate and same location, bureau, and department as the position from which he was displaced.

On September 23, 1986, the Carrier told Claimant the amount of his protective guarantee under both the New York Dock Conditions and the February 7, 1965 Job Stabilization Agreement so Claimant could elect his protective benefits in compliance with the first proviso of Section 3 of the New York Dock Conditions. The Carrier computed Claimant's test period monthly average

earnings under the New York Dock Conditions to be $2,670.95 with test period hours of 176.6 per month. Claimant's protected rate under the February 7, 1965 Agreement amounted to $2,225.22 a month. Since Claimant's General Clerk position carried a monthly rate of $2,425.18, Claimant chose New York Dock protection.

The Carrier paid Claimant a monthly displacement allowance of $245.77 for a short period subsequent to the transaction. In early November, 1986, a UP Labor Relations Manager advised Claimant that the Carrier had erroneously provided him with protective benefits under the New York Dock Conditions. The Manager asserted that Claimant had not been adversely affected by the transaction and thus he was not a displaced employee as defined by Section 1(b) of the New York Dock Conditions. The Carrier reverted Claimant's protective status back to the February 7, 1965 Agreement and recovered from his later pay checks the displacement allowance it had earlier disbursed to him.

The primary issue in this case is whether or not Claimant is a displaced employee. In addition, resolution of the main issue involves consideration of several ancillary issues especially since this claim represents a lead case and similar claims are being held in abeyance on the property awaiting the outcome of this dispute. Specifically, the parties have requested this Committee to provide it with general guidelines for handling similar cases, which involve not only the definition of a displaced employee but also test period overtime earnings, the

necessity for an immediate entitlement to protective benefits and the extent to which a New York Dock transaction could possibly affect employees of the merged Carriers.

The definition of a displaced employee is set forth in Section 1(b) of the New York Dock Conditions which reads:

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

The formula for calculating a displacement allowance and the conditions under which a displaced employee receives the allowance are set forth in Section 5(a) of the New York Dock Conditions as follows:

> "So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.
>
> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and <u>provided further</u>, that such allowance shall also be adjusted to reflect subsequent general wage increases.
>
> If a displaced employee's compensation in his retained position in any month is less in any month in which he

performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position." [Emphasis in text.]

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Claimant obviously fits the definition of a displaced employee since he was displaced by a senior Clerk who was directly affected by the transaction. The Carrier implicitly conceded that Claimant was entitled to a Section 5 displacement allowance inasmuch as it provided him with protective payments after Claimant was displaced.

Initially, the Organization argues that the words "adversely affected" do not appear in the New York Dock Conditions. Even without any difference between Claimant's test period average earnings and his current compensation, Claimant would satisfy the eligibility criteria for being a Section 1(b) displaced employee. Thus, Claimant need not show any adverse effect to be granted protective benefits.

Alternatively, Claimant was harmed by the transaction. Although Claimant attained a job with the same title, pay rate and general duties as his prior position, the transaction placed him in a worse position with respect to his aggregate compensation.

Claimant's test period average earnings were $245.77 higher per month than the monthly rate of his new assignment. Claimant was affected immediately upon being unable to attain a position producing compensation equal to or exceeding the compensation he had received in the position from which he was displaced. The Carrier improperly equates the term "position" to the word "assignment." Arbitration Board No. 284 (Robertson) ruled that the term "position" is "...not synonymous with job or assignment but rather connotes status, situation or posture." The Board went on to observe that the purpose of protective conditions is "...to assure an affected employe that his employment status insofar as compensation and working conditions were concerned would be preserved to him for the ...protective period..." Therefore, an employee may be placed in a worse position with respect to his compensation or rules governing working conditions even if he obtains a position with the same rate of pay as his former job. See also Public Law Board No. 1409 (Edgett).

The Organization further argues that even if there was a gap between the date of the transaction and the month Claimant incurred a diminution in compensation, the delayed repercussions would be attributable to the transaction. UP/MP v UTU, NYD §11 Arb., Case 3 (Fredenberger, Jr.; 6/24/86). Thus, Claimant need not suffer a decrease in compensation simultaneous with implementation of the transaction to become a displaced employee.

Section 5(a) of the New York Dock Conditions provides that the Carrier shall use Claimant's total compensation during the test period to obtain his test period average earnings. Acknowledging that the formula for calculating the displacement allowance is arbitrary, Arbitration Board No. 284 nonetheless decided that the Carrier must count all earnings derived from a protected employee's employment status. Thus, the Carrier cannot deduct what it calls extraordinary overtime from Claimant's test period average earnings. Even if abnormal overtime compensation were to be excluded from the displacement allowance formula, the Carrier has failed to demonstrate that Claimant received extraordinary overtime during his test period. Instead, subsequent to Claimant's displacement, the Carrier created a new position which was awarded to Claimant. The increase in office manpower eliminated overtime work.

B. The Carrier's Position

While the Carrier admits that Claimant was displaced because of a New York Dock transaction, it vigorously argues that Claimant was not placed in a worse position with regard to either his compensation or rules governing his working conditions. Claimant procured a position with exactly the same rate of pay as his prior job. In essence, nothing changed. He worked an identical job at the same location with the same duties. Claimant worked under the same collective bargaining agreement that he was subject to prior to his displacement. Thus, there was no change

in the rules governing Claimant's working conditions. An employee who is able to exercise his seniority to a position carrying the same or higher rate of pay as the position from which he was displaced is not entitled to a displacement allowance. BRAC v. CUT, Appendix C-1 Arb. (Rohman; 7/13/73); IBEW v. PC, Appendix C-1 Arb. (Rohman; 8/6/74); RED v. AT & SF, Appendix C-1 Arb. (Gilden; 2/25/74). Put simply, Claimant was not adversely affected. For a short time, the Carrier incorrectly provided Claimant with a displacement allowance but as soon as it detected its error, the Carrier promptly recovered the overpayments and accurately reverted Claimant's protection back to the February 7, 1965 Job Stablization Agreement.

Due to some extraordinary conditions necessitating overtime, Claimant received unusually high earnings during his test period. With its submission, the Carrier submitted a statement from Banking Manager Stogdall attesting that, between January, 1985 and January, 1986, the Banking Bureau was developing a new mechanized system for processing MP employee wage attachments. The installation of the new computer system was made in anticipation of several Accounting Department consolidations. The Manager emphasized that Claimant did not earn any overtime subsequent to his test period demonstrating that the prior overtime compensation was extraordinary and excessive. The ICC did not promulgate the New York Dock Conditions to confer a windfall upon employees. In Docket 137 of the Section 13 Disputes

Committee, Referee Bernstein adjudged that an unusual increase in overtime earnings, directly caused by the impending coordination, are excluded from the total compensation used to determine an employee's test period average earnings. When Claimant's excessive overtime compensation is factored out of the displacement allowance formula, he suffered no loss of earnings.

In a related issue, the Carrier is alarmed by the chain of displacements caused by employees who exercise their seniority. According to the Carrier, a single displacement causes a domino effect creating absurd situations where the Carrier inequitably pays eight (or more), instead of merely one, displacement allowances.

IV. DISCUSSION

To some extent, the parties, especially the Carriers, have combined what is really two separate issues into one issue. To minimize any confusion, the Committee will separately address the following issues. First, was Claimant a displaced employee within the meaning of Section 1(b) of the New York Dock Conditions? Second, if Claimant was a displaced employee, was he entitled to a displacement allowance during any month subsequent to September, 1985?

Section 1(b) lays down a two pronged, cause and effect test for determining if a worker is a displaced employee. The causation step of the test concerns whether Claimant was directly or indirectly affected by a New York Dock transaction. In this

case, the parties concur that Claimant was displaced from his General Clerk position as a result of a transaction. To satisfy the second prong of the test (the effect), an employee must have been placed in a worse position with respect to either his compensation or rules governing his working conditions. It should be noted that the employee need not suffer both a reduction in compensation and be placed in a disadvantageous position with respect to rules covering his working conditions. The employee must only show one or the other. As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented. UP/MP v. UTU, NYD § 11 Arb., Case No. 3 (Fredenberger, Jr.; 6/24/86). The Appendix C-1 arbitration decisions cited by the Carriers are distinguishable since the employees in those cases did not show a reduction in compensation at any time during their protective period. Nonetheless, the critical words "worse position" contemplate that an employee must suffer some detriment to his employment status. The parties' dispute herein centers on whether or not Claimant was placed in a worse position with respect to his compensation. More precisely, the parties disagree over whether or not Claimant's test period average earnings were improperly inflated because he performed overtime service during his test period.

Prior Arbitration decisions differ over what earnings should be included in a worker's test period average earnings calculation. Compare Arbitration Board No. 284 (Robertson) with Section 13 Disputes Committee, Docket No. 137 (Bernstein). Thus, the term "total compensation" appearing in Section 5(a) of the New York Dock Conditions is susceptible to more than one interpretation. However, the term cannot be wholly void of meaning. If the ICC had desire to restrict test period average earnings to an amount less than aggregate earnings, it would have used words such as "straight time wages" or "monthly rate of pay" or "hourly pay rate" or "normal earnings" in lieu of the broad terms "monthly compensation" and "total compensation" which are found in Section 5(a). While test period average earnings cannot be computed solely with straight time earnings, the term "total compensation" in protective arrangements like the New York Dock Conditions has evolved over the years into a meaning slightly at variance with the literal language. As the Section 13 Disputes Committee ruled, excessive overtime earnings directly attributable to the imminent coordination are outside the ambit of total compensation. The exception is narrow. The Carrier bears the heavy burden of proving that the overtime was extraordinary and linked directly to the impending implementation of the transaction. Regular overtime, recurring overtime or casual overtime attached to any assignment is properly included within the test period average earnings. The narrow exception, which

excludes only one type of overtime, is designed to prevent employees from profiting from the transaction. Excessive overtime earnings arising directly from the transaction would not have otherwise accrued to the employee if the Carrier did not implement the transaction. In such instances, the employee would obtain a windfall multiplied by the number of years in his protective period. Whether any overtime which an employee earns during this test period should be included or excluded from the Section 5(a) formula must be decided on a case by case basis using the guidelines discussed above.

In this particular case, the Carrier has not demonstrated that the overtime Claimant performed during his test period arose directly in anticipation of the imminent transaction. When the Carrier initially revoked Claimant's New York Dock protective status, it did not allege a miscalculation in Claimant's test period average earnings. Instead, the Carrier premised the revocation entirely on Claimant's capacity to procure an identical position with a pay rate equal to his prior position. The Carrier focused solely on Claimant's basic monthly pay and wanted to exclude all earnings above that rate. However, as we discussed above, the test period average earnings often will include earnings above and beyond straight time wages. As this case neared arbitration, the Carrier raised the abnormal overtime issue. To buttress its assertion, the Carrier submitted the statement from the Banking Manager. However, his statement

reveals that Claimant's overtime earnings, which were fairly constant during his test period, were neither abnormal nor related to the transaction covered by Implementing Agreement No. 28. The introduction of the computer program was completed by January, 1986, yet Claimant continued to perform overtime service through June, 1986. Indeed, his overtime earnings apparently peaked in March, 1986 when he received overtime pay of $704.27. As the Manager attested, the workload was greater than the clerical staff could handle during regular work hours. With the addition of another position following Claimant's displacement, the overtime disappeared. Therefore, the most plausible explanation for the test period overtime was a steady workload which employees could not handle without working overtime. Finally, this Claimant did not participate in the transaction covered by Implementing Agreement No. 28 (although he was clearly affected by the transaction). The Carrier has not explained to this Committee how Claimant's test period overtime was due to an impending coordination which did not result in the abolishment of his position. Therefore, an employee can incur a reduction in compensation even if he retains the same job title, same straight time rate of pay and general duties. Arbitration Board No. 289, Docket No. 2 (Bernstein).

Claimant fell squarely within the definition of a displaced employee.

Because we have found that Claimant is a displaced employee, we must address our second issue, that is, whether he is entitled to a displacement allowance. Even if an employee satisfies the definition of a displaced employee, he might not be entitled to a displacement allowance during each month of his protective period. UTU v. C&O/B&O, NYD § 11 Arb. (Prover; 5/18/87).

The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.

The Carrier is concerned about the chain of displacements which, in the long run, steadily expands the pool of employees receiving New York Dock protective benefits. Nothing in the New York Dock Conditions places a cap on the number of employees who might receive displacement allowances. The employee need only

trace his displacement to a Section 1(a) transaction. [See also Section 1(c) which defines a dismissed employee.] The Carriers nonetheless contend that the chain of displacements causes them to disburse an excessive and inequitable number of displacement allowances. We are unpersuaded by this argument. The Carriers are forgetting the source of their problem. It is the Carriers' transaction that disturbs work place tranquility. Absent the transaction, there would not be a chain of displacements. In addition, the bumping which occurs when a transaction is implemented simply reflects the natural operation of the well entrenched seniority principle. The parties recognized, in Article III, Section 3 of Implementing Agreement No. 28, that the effects of a transaction could flow to areas remote from the department where the transaction was actually implemented. Finally, while the chain of displacements may require the Carriers to pay many allowances, the Carriers' liability is not limitless. Should an employee fail to exercise his seniority to an available position producing compensation greater than the position he elects to retain, Section 5(b) of the New York Dock Conditions allows the Carriers to offset the employee's protective guarantee.

AWARD AND ORDER

The Answer to the First Question at Issue submitted by the Organization is Yes.

The Answer to the Second Question at Issue submitted by the Organization is Yes.

The Answer to the Question at Issue submitted by the Carrier is Yes.

Dated: March 1, 1988

F. T. Lynch
Employees' Member

L. A. Lambert
Carriers' Member

John B. LaRocco
Neutral Member

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ARBITRATION PURSUANT TO ARTICLE I, SECTION 11 OF THE NEW YORK DOCK CONDITIONS

In the matter of ICC Finance Docket No. 32549 between

Burlington Northern Santa Fe Railway Company

-and-

Transportation-Communications International Union

DECISION

Before the Arbitration Committee

J. C. Campbell, Organization Member
Dan Kozak, Carrier Member
Joseph A. Sickles, Neutral Member

BACKGROUND INFORMATION

The Interstate Commerce Commission (ICC), the predecessor agency of the Surface Transportation Board (STB), approved a merger and consolidation of the Burlington Northern Railroad Co. (BN) and the Atchison, Topeka and Santa Fe Railway Co. (SF) on August 16, 1995 (ICC Finance Docket No. 32549). The ICC imposed the *New York Dock* labor protective conditions for affected employees. On December 19, 1995, the Burlington Northern Santa Fe Railway Company (BNSF or the Carrier) and the Transportation-Communications International Union (TCU or the Organization) reached an implementing agreement under the *New York Dock* requirements.

Subsequently, the Carrier notified the Organization on January 10, 1997, of its plans to relocate certain clerical work. The Carrier planned to move the field support work that was performed in SF Seniority District 709 in Topeka, Kansas, to a BN district in Fort Worth, Texas; 114

clerical positions were affected. At the same time, the customer service work that was being performed in Fort Worth would move to SF Seniority District 709 in Topeka. This swap was accomplished on March 22, 1997. All of the customer service positions in Topeka were rebulletined.

Meanwhile, the Carrier also notified the Organization in December 1996 and January 1997 of its plans to move most of the accounting work being done in SF Seniority District 101 in Topeka to the BN in St. Paul, Minnesota. A total of 87 clerical accounting positions in Topeka (out of 101) were abolished in February and March 1997. The affected employees were placed in other SF positions in Topeka.

Many of the employees in SF Seniority Districts 709 and 101 were displaced or dismissed as a result of the two transactions and are receiving *New York Dock* protective benefits. However, the Carrier denied benefits to 24 employees from Seniority District 709 and 2 employees from Seniority District 101. When the parties were unable to reach agreement on the eligibility of these 26 employees for *New York Dock* protective benefits, the Organization invoked arbitration under Section 11 of the *New York Dock* conditions by letter of July 10, 1998.

A hearing was held on January 28, 1999, at the offices of the National Mediation Board in Washington, DC. The parties exchanged prehearing submissions on January 14, 1999, including numerous prior arbitration awards. Both parties were afforded full opportunity to present their arguments before the three-person arbitration committee.

ORGANIZATION'S STATEMENT OF THE ISSUE

"Are T.G. Bingham, et al., displaced employees pursuant to *New York Dock*? Shall Carrier now be required to determine the claimants' test period averages as of the date they were affected by a transaction and allow their claims for *New York Dock*?"

CARRIER'S STATEMENT OF THE ISSUE

"Are claimants entitled to a "displacement allowance" under the *New York Dock* conditions, Article 1, Section 5, even though each claimant displaced to a position with the same daily rate of pay as their former position, working conditions remained unchanged, and the quantum of work in the department, as measured by actual available overtime, increased subsequent to the transaction?"

STATEMENT OF FACTS

The relevant provisions of the *New York Dock* conditions state:

> 1. Definitions — (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
>
> (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction, is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> * * * *
>
> 5. Displacement allowances — (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protection period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.
>
> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further that such allowance shall also be adjusted to reflect subsequent general

wage increases.

> If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

The parties agree that the swap of field support work and customer service work in Seniority District 709 and the transfer of accounting work out of Seniority District 101 were transactions under *New York Dock*. All 26 claimants in this dispute were placed in jobs at the identical wage grades they held before the subject transactions. Prior to the transactions, the 26 claimants had worked various amounts of overtime; subsequent to the transactions, they also worked various amounts of overtime.

The Carrier states, without refute from the Organization, that the amount of overtime actually worked in the two seniority districts increased substantially in the year after the transactions. In Seniority District 709, overtime hours increased 24.9 percent from 1996 to 1997. In Seniority District 101, overtime increased 32.8 percent from 1996 to 1997.

The 26 claimants concluded that their incomes declined in at least some of the months following the transactions. The TCU requested that the Carrier compute the test period averages (TPAs)—average monthly compensation and average monthly time paid for—for the 26 claimants. The Carrier refused to compute the TPAs, insisting that the 26 employees were not adversely affected by the transactions.

POSITIONS OF THE PARTIES

Carrier's Position

The BNSF asserts that the claimants are not displaced employees under the *New York Dock* conditions because they were not placed in a "worse position" as a result of the transactions. Although the 26 claimants were affected by transactions, they were not adversely affected, the BNSF insists. All 26 claimants were placed in jobs at the same wage grade, and with the increase in overtime in their departments, they all maintained the same or greater potential for earnings:

> A reduction in earnings for a month or so cannot automatically be assumed to be the result of a transaction, especially since the quantum of work in the affected offices, as measured by available overtime hours, actually increased in each of the seniority districts after the transaction. . . . An occasional diminution in earnings in a particular month after the transaction does not make an individual a 'displaced' employee.

The Carrier continues that a comparison of the average monthly compensation during the test period:

> . . . to an isolated month of compensation following the transaction is not [the] proper criterion to determine whether an employee has been placed in a worse position regarding compensation as a result of a transaction.

The Carrier says that the claimants' reduced earnings were due to factors unrelated to the transactions. It notes that if the claimants did not work as much overtime after the transactions—despite the increased availability of overtime work— it was simply because many of them had not bothered to qualify for the overtime work on other positions that was available to them. According to the BNSF, qualifying would have been a simple matter, as it was the same type of work the claimants did on their regular jobs, but involved different commodities. Prior to the transactions, the claimants had taken the initiative to qualify for overtime work on other positions, and they are obligated to do so in their post-transaction positions in order to work the same number of hours they did before the transactions.[1]

The BNSF further contends that it has no obligation to compute TPAs for employees who are not adversely affected by a transaction. The BNSF claims that the

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[1]The Carrier also briefly notes that some employees, on occasion, have refused overtime for which they were qualified.

Organization has requested TPAs as a back door approach to demonstrate that the claimants were in a "worse position." The Carrier cites several arbitration awards that have held that the TPA is a formula intended to calculate the **amount** of *New York Dock* protective benefits owed, not if such benefits are due. The Organization has the burden of first proving that the claimants were adversely affected by the transactions; and, the Carrier maintains, it has failed to do so in this case.

Organization's Position

According to the TCU, the Carrier initially denied *New York Dock* benefits to the claimants based solely on the grounds that they had been assigned to positions at the same wage grade and, therefore, were not placed in a "worse position" with respect to their compensation. The Carrier is mistakenly interpreting the term "compensation" as used in Section 5(a) of the *New York Dock* conditions to mean "rate of pay." The Organization submitted numerous arbitration decisions supporting its argument that "compensation" under *New York Dock* means total earnings, including overtime, allowances, bonuses, and other elements of pay.[2]

Using their pay stubs for the 12 months prior to the transactions and the months following the transactions, the claimants concluded that they had suffered a loss of earnings as a result of the transactions. The loss of earnings was due to post-transaction overtime, an element of "compensation" under *New York Dock*. Once there is a transaction and employees have identified facts which they believe demonstrate an adverse effect of the transaction, the burden shifts to the employer to prove that something **other than the transaction** was the cause, the Organization argues.

Moreover, it is not necessary that an employee's reduction in earnings occur **immediately** after a transaction in order to be related to that transaction, the Organization adds.

Late in the stages of handling on the property, according to the TCU, the Carrier seized upon the issue of overtime to bolster its argument that the claimants were not in a "worse position" as a result of the transaction, but rather as a result of their failure to work overtime. If the Carrier feels that individual employees are not fulfilling their obligations to make themselves available for sufficient overtime service to satisfy their average time paid for in the test period:

> . . . then the Carrier needs to decline their monthly claims on that basis, pay the displacement allowance which the Carrier calculates to

[2]The Carrier also submitted numerous arbitration decisions that equate "compensation" with "rate of pay." It is apparent that arbitral authority is split on this issue.

be correct, and let the displaced employee appeal the Carrier's declination if desired.

The TCU argues:

> It is not appropriate for the Carrier to paint all of the displaced employees with the same broad brush, as it has done in this dispute.

The relocation of the clerical functions involved in this case was anticipated by the Carrier in its merger application to the ICC, the TCU notes. The transfers of functions between the BN and SF seniority districts would have been prohibited by the collective bargaining agreements were it not for the ICC-approved merger, and labor protective conditions were imposed as a quid pro quo. There can be no dispute that there was a "transaction" as defined by *New York Dock*, and the employees have identified facts (reduced earnings, as determined from their pay stubs) that demonstrate that they are in a "worse position." Therefore, the Organization asserts, the Carrier is obligated to compute the TPAs for the 26 claimants.

DISCUSSION

The initial issue that must be addressed—because it is central to the other issues raised—is the interpretation of the word "compensation" as it is used in Sections 1 and 5 of the *New York Dock* conditions. Both parties have cited numerous arbitration awards on this issue, and the cited awards are contradictory. The decisions submitted by the Carrier hold that an employee moved, following a transaction, to a new position at the same rate of pay is in no worse position with regard to his compensation—essentially equating "rate of pay" or "hourly rate" with "compensation." The decisions submitted by the Organization give a more expansive definition to the term "compensation," specifically stating that it includes overtime pay.

We are inclined to adopt the more expansive definition. Clearly if the ICC had intended "hourly pay" or "rate of pay" to be the criterion for assessing an adverse impact on employees affected by a transaction, they would have used one of those phrases in drafting the *New York Dock*

conditions. By using "compensation," the ICC must have had in mind elements in addition to straight hourly wages. The word "compensation" is broad enough to include shift differentials, allowances, overtime, and other elements of pay, in addition to the contractually provided hourly rate. Exceptions to the inclusion of *all* elements of compensation are very narrow.[3]

It is interesting to note that the broader definition of "compensation" could conceivably mean that an employee moved to a lower-rated job with a lower hourly rate of pay following a transaction may not be entitled to protective benefits under *New York Dock*. Such an employee could receive allowances or a shift differential or sufficient overtime work to more than make up the deficit in hourly wages. Using the Carrier's definition, this employee would be in a "worse position" because his rate of pay would be lower. Using our definition, this employee would not be entitled to a displacement allowance.

With overtime payments included in their pre- and post-transaction "average monthly compensation," and with the evidence from their pay stubs that their earnings declined in close proximity to the transactions, the claimants have established at least a rebuttable presumption that they are displaced employees entitled to *New York Dock* protective benefits. At that point, the Carrier was obligated to compute the TPAs for compensation and hours paid, as requested by the Organization. It strikes us as common sense to apply the principle Referee Bernstein articulated years ago in Docket No. 62 under the *Washington Job Protection Agreement*: "In the normal and usual case, applying the formula of Section 6(c) [which corresponds to Section 5 of *New York Dock*] will

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[3]Neutral John B. LaRocco (*TCU and Missouri Pacific/Union Pacific*, March 1, 1998) has indicated that one of the very narrow exceptions to compensation to be included in the TPA is extraordinary overtime worked in anticipation of an imminent transaction. He added that the Carrier would have a "heavy burden" of proving that the overtime was linked directly to a transaction and was not part of regular, recurring, or casual overtime.

show whether an employee is 'in a worse position with respect to compensation.'" The critical language is unchanged from the *Washington Job Protection Agreement.*

The Carrier has argued that the claimants' reduction in monthly earnings is unrelated to the transaction. The BNSF says the claimants' failure to qualify for the available overtime work and alleged refusals of overtime are responsible for the earnings deficits. The Carrier places strong emphasis on the fact that the amount of overtime actually worked in the affected seniority districts increased substantially after the transaction, and the employees had ample opportunity to earn compensation equal to their TPAs.

The overtime figures cited by the Carrier (and unrefuted by the Organization) do suggest that overtime certainly did not diminish in the affected seniority districts. However, the figures alone do not show if this overtime was suitable for the 26 claimants' wage grades or if individual claimants had sufficient seniority to be awarded the overtime. As the Organization suggests, a case-by-case investigation for each claimant would be necessary to determine if they failed to meet their obligations to make themselves available for service.

Even if a closer inspection reveals that there was sufficient overtime suitable for the claimants' wage grades and seniority, there is the issue of the claimants' failure to qualify for the particular overtime work available. The BNSF points out that the claimants had, on their own initiative, qualified for overtime work on other positions prior to the transaction, and argues that they had an obligation to do so once again after the transaction. We do not agree. In the absence of the transaction, the employees would have already been qualified for enough overtime to maintain their customary earnings. It was the transaction that put them in the "worse position" of no longer being qualified for an equivalent amount of overtime.

We also reject the Carrier's argument that fluctuations in earnings are normal and, therefore, an occasional drop in earnings does not mean an employee is "displaced." We find that the *New York Dock* conditions require a **monthly** determination for the duration of the protective period as to whether an individual employee is in a "worse position" with respect to compensation, i.e., if his monthly earnings are less than his monthly average compensation in the test period.

Therefore, the Carrier must compute the TPAs for each claimant. This amount must include all overtime worked during the test period[4] and during the protective period. In any month that a claimant's compensation falls below his TPA, the Carrier must pay a displacement allowance. The only exception that would allow a denial of the displacement allowance is if a claimant refuses to work overtime for which he is qualified and consequently does not work enough hours in the month to match his TPA for hours paid.

As a means to minimize the amount of protective benefits it must pay, the Carrier is entitled to require employees to qualify for the available overtime work—on the Carrier's time. In the absence of such a requirement, however, the Carrier may not shift the burden onto the claimants if they do not work their TPA hours because there is insufficient overtime for which they are already qualified.

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[4]The Carrier objects specifically to including the overtime earned by Claimant Usnick when he worked during his vacation period, insisting that this was an extraordinary payment. In the absence of evidence that this overtime was due directly to an imminent transaction, we find that this payment must be included in his TPA.

AWARD

The Carrier shall compute the TPAs for each claimant. The claimants are presumed to be displaced employees in any month in which their compensation falls below their TPA for compensation, assuming the claimants have made themselves available for service for their TPA hours. The Carrier shall pay a displacement allowance in each such month, unless the Carrier can prove that the monthly decline in earnings was due to factors other than the transaction.

This award shall be complied with 30 days after its effective date.

Joseph A. Sickles
Neutral Member

J. C. Campbell
Organization Member

Dan Kozak
Carrier Member

Date: May 1, 1999

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY (Arbitration Review)

STB Finance Docket No. 32760 (Sub-No. 37)

SURFACE TRANSPORTATION BOARD

2000 STB LEXIS 464

SERVICE DATE: August 16, 2000

August 11, 2000

PANEL:
[*1]

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

OPINION:

DECISION

The Brotherhood of Locomotive Engineers, General Committee of Adjustment for the Union Pacific Railroad--Eastern Region (BLE-UPER), has petitioned for review n1 of an arbitration award (the Award) entered by a panel (the Panel) chaired by neutral member Eckehard Muessig. We decline to review the Award.

n1 Appeals of arbitration decisions are permitted under 49 CFR 1115.8.

BACKGROUND

In 1996, we approved the acquisition and control of the Southern Pacific Rail Corporation and its rail carriers by the Union Pacific Corporation and its rail carriers, including the Union Pacific Railroad Company (UP or the Carrier), n2 subject to our standard New York Dock conditions for the protection of employees. n3 Under New York Dock, changes affecting rail employees and related to approved transactions must be implemented by agreements negotiated before the changes occur. If the parties cannot reach agreement or disagree on the interpretation of an implementing agreement, the issues are resolved by arbitration, subject to appeal to the Board under our deferential Lace Curtain standard of **[*2]** review. n4 Once the scope of the necessary changes is determined by negotiation or arbitration, employees adversely affected by them are entitled to receive comprehensive displacement and dismissal benefits for up to 6 years.

n2 Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

n3 See New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

n4 Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. IBEW v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Under Lace Curtain, we generally defer to arbitrators' decisions in the absence of "egregious error," and limit our review to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." "Id. at 735 - 36.
[*3]

In accordance with New York Dock, BLE and UP entered into implementing agreements concerning the coordination of BLE engineers in various hubs established by UP. The implementing agreement at issue here is the Kansas City Hub Merger Agreement (the Agreement). A dispute arose as to whether the Agreement requires that "prior rights" in Zone 2 of the Kansas City Hub be granted to 12 employees who responded to an October 10, 1998 bulletin for bids to enter engineer training. n5 BLE-UPER maintains that the employees should be on the prior rights roster; the Carrier argues that they should not.

n5 "Prior rights" generally refer to seniority rights based on pre-merger status vis-a-vis other employees on a division that once constituted another separate carrier.

When the parties could not agree, the dispute was taken to arbitration. n6 The case was docketed as "Case No. 7." n7 On February 8, 2000, the arbitrator entered an award disposing of this case and the six other cases. The arbitrator phrased and disposed of the issue in Case No. 7 as follows (Award at 15):

n6 In the arbitration proceeding, a statement in support of BLE-UPER's position was filed by the Brotherhood of Locomotive Engineers General Committee of Adjustment for the Union Pacific Railroad--Eastern District. **[*4]**

n7 The arbitration also involved six other cases, Case Nos. 1-6, which are not at issue in this petition. An appeal was also filed in Case No. 1, which is addressed in a separate decision served today in Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review), STB Finance Docket No. 32760 (Sub-No. 38) (STB served August 16, 2000) (herein, Sub-No. 38).

Question: "Are the twelve engineers who responded to the October 10, 1998 promotion notice at Kansas City entitled to prior rights in Zone 2 of the Kansas City Hub?"

Answer: "... for the same reasons as in Case No. 1, the trainees are not prior righted and the answer to the above question is in the negative."

On March 3, 2000, BLE-UPER filed a petition for review of this disposition of Case No. 7, and on March 23, 2000, UP replied.

DISCUSSION AND CONCLUSIONS

This case does not present an issue of general importance regarding the interpretation **[*5]** of our labor conditions, but rather the interpretation of a specific labor agreement, a matter which is well within the expertise of arbitrators. Therefore, the Panel's construction of the agreement is entitled to our deference under Lace Curtain, absent egregious error. n8

n8 We typically defer to the arbitrator's determination on seniority matters. See Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company - Merger, Etc., Finance Docket No. 21510 (Sub-No. 5) (STB served Dec. 22, 1998), at 6.

The Agreement here provides that: (1) prior rights are granted to "engineers holding seniority in the territory comprehended by this Agreement on the effective date thereof;" n9 and, (2) "engineers in training on the effective date of this Agreement shall also participate in the formulation of the [prior rights] roster described above" (emphasis added). n10 Thus, under the Agreement, the cutoff date for determining an employee's eligibility for prior rights is the "effective date" of the Agreement.

n9 Agreement, Article II.A. The Agreement is reproduced in BLE Exhibit A of Appendix C of BLE-UPER's petition for review.

n10 Agreement, Article II.F.

[*6]

Article X of the Agreement, which is entitled "Effective Date," provides: "This agreement implements the merger of the Union Pacific and SSW/SPCSL railroad operations in the area covered by Notice dated January 30, 1998. Signed at Denver, CO this 2nd day of July, 1998."

The dispute concerns the "effective date" of the Agreement. The Panel accepted UP's argument that the effective date of the Agreement was its July 2, 1998 signature date, i.e., before the October 10, 1998 bulletin for bids to enter engineer training. BLE-UPER argues that the effective date was the January 16, 1999 date of operational implementation announced in UP's letter of intent dated October 26, 1998. n11

n11 See: BLE-UPER's petition at 5; Appendix C of BLE's petition, BLE Exhibit C.

BLE-UPER has not shown that the Panel egregiously erred in finding that the effective date of the Agreement for the purpose of determining eligibility for prior rights was the July 2, 1998 signature date. In its discussion of Case No. 1, the Panel cited examples of other hub agreements where the parties intended to adopt cutoff dates that were (unlike the January 16, 1999 date favored by BLE-UPER here) fixed and known **[*7]** at the time of signing. The Panel reasonably presumed that the parties had a similar intention here. In the absence of a fixed and known cut-off date, employees would have been faced with

having to vote on an implementation agreement without knowing exactly how every employee would be affected by the Agreement.

The Panel in Case No. 1 also reasoned that the parties expressed their intent to use the signature date of the agreement in a side letter bearing the same signature date, which stated that employees who were "currently" in training would be added to the roster. The Panel's application of this reasoning to Case No. 7 did not involve egregious error. A side letter that is almost identical to the one cited by the Award in Case No. 1 was also agreed upon by the parties in Case No. 7. n12 That side letter reveals that the parties were referring to a known group of employees who were in training at the time, not employees who would enter training in the future.

n12 See Side Letter No. 21, reproduced on p. 65 of Appendix C of BLE-UPER's Petition, which reads in pertinent part as follows:

As discussed, there are currently a group of engineers in training for Dalhart/Pratt. Under the SSW Agreement and seniority provisions, some of these trainees bid the training vacancies from Kansas City with the hope that they could hold seniority in the Kansas City Hub after implementation of the merger. It was agreed that these trainees would stand to be canvassed for establishment of seniority in the Kansas City Hub if the roster sizing numbers are such that there are roster slots for them. If not, there is no requirement that they be added to the Kansas City Hub roster.
[*8]

BLE-UPER points out that page 1 of the Award includes a broad statement suggesting that the BLE General Chairmen were in disagreement as to the issues involved in all seven of the cases, when, in fact, the record indicates that there was no disagreement between the General Chairmen concerning the issues involved in the instant Case No. 7. However, the reasoning of the Panel in Case No. 7 is not dependent on a disagreement between the General Chairmen. The principal issue in both Case No. 1 and Case No. 7 was whether trainees who entered training after the signature date of an implementing agreement but prior to its actual implementation could claim prior rights. This issue remains the same regardless of which parties are in dispute. The Panel's generalized statement as to the positions of the BLE General Chairmen, which is generally accurate, provides no grounds for reversing this decision.

Nor has BLE-UPER demonstrated that the Panel egregiously erred by failing to address BLE-UPER's argument that the carrier's October 10, 1998 bulletin misled the 12 employees into believing that they would be entitled to prior rights. n13 The bulletin merely announced a training program. It did **[*9]** not purport to touch upon contractual rights under the Agreement. Nor, contrary to what BLE-UPER maintains, did the carrier's July 16, 1999 letter discussing the controversy admit that the bulletin was misleading. That letter stated merely that "while the employees may have perceived prior rights would be provided, the Merger Agreement language does not support such position." n14

n13 The bulletin is reproduced in BLE Exhibit D of Appendix C of BLE-UPER's petition.

n14 This letter is reproduced in BLE Exhibit F of Appendix C of BLE-UPER's petition.

For the foregoing reasons, we decline to review the decision of the Panel.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for review of the Award will not be heard.

2. This decision is effective on its date of service.

7

RIO GRANDE INDUSTRIES, INC., SPTC HOLDING, INC., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY -- CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY (Arbitration Review)

Finance Docket No. 32000 (Sub-No. 11)

SURFACE TRANSPORTATION BOARD n1

n1 The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain function to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

1996 STB LEXIS 135

SERVICE DATE: April 29, 1996

April 15, 1996

PANEL:
[*1]

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

OPINION:

This proceeding involves an appeal of an arbitrator's decision determining an employee's displacement allowance under New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). We will deny the appeal.

BACKGROUND

In New York Dock, the ICC adopted rules to implement its mandate under what was then 49 U.S.C. 11347 to provide protective benefits for employees affected by consolidations it approved. Under New York Dock, employees who are forced into lower paying jobs as a result of consolidations approved by this agency are entitled to a monthly "displacement allowance" to compensate them for diminished compensation. The length of the displacement allowance, up to 6 years, depends on the employee's length of service. The amount of the allowance depends on the employee's earnings before the displacement.

The employee's earnings before displacement are determined by the employee's compensation over a 12-month "test" period immediately preceding the date of the displacement. Benefits under New York Dock are available for both union (or contract) employees and non-union (or non-contract) [*2] employees.

This proceeding arose out of a dispute between Southern Pacific Transportation Company (SP or the carrier) and one of its employees, Ms. K.V. McAvoy (McAvoy), over the computation of McAvoy's test period pay after she was displaced. Until October 1, 1993, McAvoy was a corridor manager in SP's Denver Transportation Services Center. On that date, McAvoy lost her corridor manager position as a result of a systemwide involuntary reduction in force affecting both contract and non-contract employees. McAvoy then exercised her seniority under SP's collective bargaining agreement with the Transportation-Communications International Union (TCU) to assume a position as a crew caller, a lower paid contract position in Denver, CO. On or about February 4, 1994, McAvoy was displaced from her position as a crew caller. McAvoy then exercised her seniority to obtain a position as waybill monitor representative in SP's Denver service center.

The ICC consistently held that benefits under New York Dock are available only if the adverse effect on an employee is due to a consolidation approved by that agency, as distinguished from general business conditions or efforts to cut costs that are [*3] not linked to a consolidation approved by that agency. This tenet has not been challenged here. SP agrees that McAvoy is entitled to a displacement allowance because her displacement from the crew caller position was a result of operational changes that were a part of the consolidation approved in Finance Docket No. 32000. n2 Both parties agree that McAvoy's displacement from her prior position as a corridor manager did not entitle her to protection under New York Dock, because that displacement was due to general, systemwide business conditions rather than operational changes that can be linked to the consolidation approved in Finance Docket No. 32000 or any other ICC-approved transaction.

n2 Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834 (1988).

The parties differ, however, over the pay that should be included in McAvoy's test period. SP maintains that the test period should reflect only McAvoy's rate of pay for the 4 months when she was a crew caller. n3 TCU argues that the test period must reflect McAvoy's higher pay as a corridor manager for the initial 8 months of the test period when she occupied that position, as well as the lower pay in the [*4] subsequent 4 months when she was a crew caller. n4 TCU took the dispute to arbitration under New York Dock.

n3 SP calculated McAvoy's monthly test period earnings to be $ 3077.16, her average monthly compensation over the 4 months when she was a crew caller. The carrier did not use a 12-month test period, arguing that McAvoy's compensation could not reflect her higher rate of compensation as a corridor manager because she was not entitled to benefits due to her displacement from that position.

n4 Based on her theory that the test period must be 12 months and must reflect all income earned during that 12 months, she calculated her monthly test period compensation to be $ 3892.39.

In an award dated October 2, 1995, an arbitrator, William E. Fredenberger, Jr., ruled in favor of McAvoy, holding that her test period compensation must

reflect her salary as a corridor manager. The arbitrator relied on the direct language of Article I, section 5(a) of New York Dock, which, without qualification, provides for a 12-month test period based on "total compensation received" during "the last 12 months in which [the employee] performed services immediately preceding the date of his displacement **[*5]** as a result of the transaction." n5

n5 Article I, section 5(a) of New York Dock provides in pertinent part as follows (360 I.C.C. at 78):

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of compensation and average monthly time paid for the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases. [Emphasis in the original.]

Fredenberger cited three arbitration decisions as precedent. n6 The lead decision is the Stallworth arbitration. There, employees who held management positions were displaced to non-management positions, and were then displaced or dismissed from their non-management positions by a transaction that was merger related. The carrier argued that test period wages could not include the higher, non-management compensation. The Stallworth panel held to the contrary, reasoning that: (1) the literal language of section 5(a) requires that all **[*6]** income during the 12-month period be considered; and (2) if the ICC had intended to preclude consideration of income from more than one job, the agency would have simply directed that wages at the time of severance be considered and there would have been no need to go back an entire year.

n6 The three decisions, reproduced in the separate volume of exhibits filed with SP's appeal, are: (1) TCU and Union Pacific Railroad Company, Feb. 28, 1989 (Stallworth, Neutral); (2) International Brotherhood of Electrical Workers and CSX Transportation, Inc., Oct. 3, 1990 (Fletcher, Neutral); and (3) CSX Transportation, Inc. and TCU, July 20, 1992 (Eischen, Neutral).

The other two cited decisions involved the same factual pattern as the Stallworth arbitration, citing that decision. The Fletcher award added two additional arguments. First, the Fletcher panel held that, while the Stallworth precedent protected demoted employees at their higher pay prior to the demotion, the formula benefitted carriers vis-a-vis employees who receive a promotion during the 12-month period prior to their separation. Second, the panel found that the language of section 5(a) refers to "compensation," not rate of **[*7]** pay. n7

n7 In this latter argument, the panel seems to have reasoned that "compensation" involves a broad interval of time rather than the instantaneous picture implied by the term "rate of pay."

By petition filed October 23, 1995, SP appealed the Fredenberger award. On December 13, 1995, TCU filed its reply. In its reply, TCU requests that McAvoy be awarded interest on the amounts alleged to have been wrongfully withheld from the date of the arbitrator's decision.

ARGUMENTS OF THE PARTIES

The parties dispute whether the award is reviewable under the deferential Lace Curtain standard of review. n8 SP argues that the award is reviewable because the arbitrator made a mistake in his interpretation of how test period earnings should be defined under section 5(a) of New York Dock. According to SP, this is an important legal issue involving the scope of benefits, not a factual issue that should be deferred to arbitrators under Lace Curtain.

n8 Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom., International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under the Lace Curtain standard, the Board (1) does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error" and (2) limits its review to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Id. at 735-36. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), the ICC elaborated on the Lace Curtain standard as follows:

Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]
[*8]

TCU argues that Lace Curtain requires that the Board refuse to hear the merits of the appeal. TCU calls attention to the ICC's statement in Lace Curtain that the agency did not intend "to become a regular participant in the [arbitration] process as a reviewer of arbitration decisions" and asserts that this will happen if the Board reviews the Fredenberger award.

SP's then claims that the award is contrary to the intent and purposes of New York Dock. First, SP argues that the ICC had a longstanding general principle that employees are not entitled to benefits under New York Dock unless there is a link between the transaction and the loss of earnings suffered by the employee. SP cites Atlantic Richfield Co. and Anaconda Co.--Control--Butte Anaconda and Pacific Railroad Co. and Tooele Valley Railroad Company, Finance Docket No. 28490 (Sub-No. 1) (ICC served Mar. 2, 1988) at 8-9, subsequent decision printed at 5 I.C.C.2d 934, 948 (1989). SP also argues that the direct language of section 5(a) of New York Dock requires such a link. n9

n9 Article I, section 5(a) of New York Dock provides in pertinent part as follows (360 I.C.C. at 78):

(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protected period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced. [Emphasis SP's.]

SP also notes that the remainder of section 5(a) (quoted in note 5, above) defines the test period as the 12 months preceding the date of "displacement as a result of the transaction." **[*9]**

SP argues that the required link between the New York Dock-protected transaction and the employee's loss would be severed if the employee's benefits were to reflect wages earned in a prior position, the displacement from which was not subject to New York Dock. According to SP, TCU's position would allow employees who were removed from a higher paying job for disciplinary reasons and subsequently displaced under New York Dock to be compensated for their misconduct by receiving an allowance reflecting their prior salary. SP also argues that TCU's position would encourage employees seeking New York Dock benefits to take "anticipatory employment actions," such as voluntarily resigning from a management position and taking a job soon to be eliminated under New York Dock in order to receive a dismissal allowance reflecting the higher compensation. SP asserts (p. 12) that "arbitrators have universally rejected the argument that an employee who voluntarily resigns from a non-agreement position is entitled to protective benefits. n10

n10 SP cites In the Matter of United Transportation Union and Boston and Maine Railroad Co., an August 30, 1990 arbitration award (SP exhibit 3.) There, the panel held that a carman displaced under New York Dock was not entitled to benefits reflecting his salary in a prior managerial position from which he had voluntarily resigned 3 months before. Concerning the general purpose of labor protection, the panel reasoned (Arbitration decision, p. 6):

This allowance is intended to stabilize that level of income which attached to and most likely would have continued for an adversely affected employee had the transaction not taken place.

After having established the claimant's right to at least some compensation, the arbitrators found (Id.):

However, that the Grievant is a covered employee, does not establish that he is, as claimed, entitled to be protected against any loss of compensation as a consequence of his voluntary resignation from a management, or non-represented, position some three months prior to the transaction. He was not, by any stretch of the imagination, placed as a result of the transaction in a worse position with respect to compensation which had been paid to him in his management position.
[*10]

SP attempts to distinguish the three precedents cited by Fredenberger (see note 6, above). SP seeks to distinguish the Stallworth arbitration by arguing that the prior displacements to non-management positions involved in that award were also covered by New York Dock (along with the subsequent displacements), unlike McAvoy's prior displacement from her managerial position. SP argues that, to the extent that the Eischen and Fletcher awards cannot be distinguished on their facts, they were in error.

TCU, by contrast, argues that the ICC had a policy of deferring to the consistent interpretations of arbitrators and that arbitrators have consistently upheld Fredenberger's interpretation of the test period.

In support of its argument that the ICC had a policy of deferring to the consistent decisions of arbitrators, TCU cites the following language from American Train Dispatchers Association v. CSX Transportation, Inc., 9 I.C.C.2d 1127 (1993), aff'd American Train Dispatchers Ass'n v. I.C.C., 54 F.3d 842 (D.C. Cir. 1995), petition for cert. pending, No. 95-273 (American Train Dispatchers) (9 I.C.C.2d at 1133-4):

The WJPA [Washington Job Protection Agreement] "generally is conceded **[*11]** to be the blueprint for all subsequent job protection agreements." New York Dock Ry. v. United States, 609 F.2d 83, 86 (2d Cir. 1979). We have noted that the Transportation Act of 1940, the source of present § 11347, was, in effect, a Congressional endorsement of the WJPA. See Carmen, supra, 6 I.C.C.2d at 739. In any event, article I, § 5 of the New York Dock conditions was in turn taken without substantive change from the WJPA. Thus, we conclude that the WJPA arbitral awards do present persuasive precedent on which a New York Dock arbitration committee may rely.

To show that arbitrators have consistently upheld Fredenberger's interpretation of the test period, TCU relies on the three decisions cited by Fredenberger and the following three additional decisions.

The Rinaldo Decision. An arbitration panel (Thomas N. Rinaldo, neutral member) held that the test period of a displaced carman who had worked as a supervisor during an earlier part of his 12-month test period must reflect his higher compensation as a supervisor, not merely his compensation as a carman. In reaching this result, the panel interpreted the language of a negotiated implementing agreement similar to section **[*12]** 5(a) of New York Dock.

The Robertson Decision. In a 1964 arbitration decision interpreting language in the ICC's Oklahoma n11 conditions that was similar to section 5(a) of New York Dock, an arbitrator, Francis J. Robertson, held that the test period earnings of a clerk displaced by abandonment of a car float operation must reflect his higher earnings in positions held prior to the one from which he was displaced. TCU cited the following language in Robertson's decision (TCU Exhibit C, pp. 4-5):

It will be noted that the words "worse position" as they first appear in the language of the Conditions are in line with the provisions of the statute. There can be no doubt that as the word position is used in the statute it is not synonymous with job or assignment but rather connotes status, situation or posture. The provisions of section 4 apply to all classes of employes operating and non-operating. It is common knowledge that in the operating group a large proportion of such employes work on assignments which might vary from day to day. Hence in referring to an employe's position with respect to compensation and rules governing work conditions it is apparent that in this context the **[*13]** word "position" cannot be intended to mean a specific job or assignment. Hence it is clear that what the Commission was seeking to accomplish in imposing the Oklahoma Conditions was to assure an affected employe that his employment status insofar as compensation and working conditions were concerned would be preserved to him for the four years protective period.

Robertson's decision also contained the following pertinent reasoning (TCU Exhibit C, p. 5):

To determine what amount of compensation would be protected it is clear that the Commission adapted a pragmatic and arbitrary formula. A formula which it must be presumed to have recognized would result in inequities at times against the employe and at times against the Carrier. For example, during the twelve months immediately preceding displacement an affected employe might have experienced a long period of illness and the amount of his "protected" compensation would be substantially affected by operation of the formula. On the other hand, perhaps in anticipation of an abandonment, the carrier might have curtailed its hirings with the result that considerable amount of overtime would be worked during the test period. We **[*14]** cannot believe that the Commission was blind to these factors. Its emphasis upon "compensation received" during the test period and "compensation produced" during the protective period indicates that its concern was with the actual earnings attributable to the affected individual's employment status rather than the earnings accruing on a given assignment.

n11 In Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177 (1944), the ICC adopted its then standard "Oklahoma" labor protection conditions for leases and trackage rights.

The Rogers Decision. In upholding claims for benefits in a 1960 arbitration decision, a panel (Daniel C. Rogers, neutral member) interpreted language in the Burlington conditions n12 that was similar to section 5(a) of New York Dock. TCU calls attention to the following portion of Rogers' decision (TCU Exhibit D, p.4):

From a reading of Section 1 of the "[Burlington conditions]", as a whole, it is discerned that the "position" from which an employee is displaced in an abandonment case is not limited, necessarily, to the single assignment on which the employee was working at the time of the abandonment. The term "position", in this first sense in which **[*15]** it is used, comprehends as many assignments, including both regular and extra assignments, as an employee may have worked during the "test period". And the average monthly compensation of such "position" is the aggregate of his earnings during the "test period" divided by 12. [Emphasis in original.]

n12 In Chicago, B. & O. R. Co. Abandonment, 257 I.C.C. 700 (1944) the ICC adopted its then standard "Burlington" labor protections conditions for abandonments.

DISCUSSION

We find that the award is reviewable on its merits under Lace Curtain because it involves an important and recurring issue of the proper calculation of the test period averages for dismissal or displacement allowances for employees under all of our labor protective conditions. We will deny the appeal because the award was based on a reasonable and consistent line of arbitral interpretation of section 5(a) of New York Dock and of comparable predecessor provisions.

The issue is whether a displaced employee's 12-month test period earnings must reflect only the compensation earned in the position from which the employee was displaced as a result of the transaction for which New York Dock conditions were imposed, **[*16]** or whether the test period must also reflect earnings in prior positions held in the test period from which the employee was displaced for reasons not related to the transaction.

We have no evidence or documents showing how the original drafters of the test period average definition in section 5(a) intended to define test period earnings. The test period average definition (see note 5) originated in 1936 in section 6(c) of the Washington Job Protection Agreement (WJPA), a privately negotiated labor protection agreement that provided the basic framework for the labor protection provisions that were subsequently enacted by Congress and implemented by the ICC. n13 This definition of the test period eventually became Article I, section 5 of New York Dock.

n13 A legislative history of the labor protection provisions appears in CSX Corp.--Control--Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990). The WJPA appears in Appendix B of that decision. Section 6(c) of that Agreement provided as follows (6 I.C.C.2d at 780):

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period. **[*17]**

We interpret this provision in light of its plain language, the overall purposes of the New York Dock protection scheme, and the general policies of subtitle IV of title 49. We agree with the reasoning in the Stallworth arbitration that the literal language of section 5(a) requires that all income during the 12-month period be considered, and that if the ICC had intended to preclude consideration of income from more than one position, it could have simply directed that only an average of earnings from the position held at the time of severance be considered.

Arbitral precedent also favors TCU's approach. SP's attempt to distinguish the Stallworth arbitration by arguing that the prior displacements to non-management positions involved in that award were also covered by New York Dock (along with the subsequent displacements) is not persuasive because that opinion contains no indication that the prior displacements would in fact have been covered by New York Dock.

As Arbitrator Robertson noted, reliance on a 12-month period comports with the statutory intent that the test period reflect the fact that some employees

work on assignments that last only a relatively short time. The [*18] use of a 12-month period to determine the prior compensation of such an employee is a reasonable attempt to paint a more accurate picture of such an employee's earnings than would be achieved by simply looking at his or her earnings in the position occupied at the time the employee was dismissed or displaced. n14

n14 As noted above, SP claims that TCU's position would allow employees who voluntarily resigned or were removed for disciplinary reasons from a higher paying job and subsequently displaced under New York Dock to receive an allowance reflecting their prior salary. However, our decision here should not be interpreted to allow such absurd results. The intent of what is now section 11326 and its predecessors was not to allow an employee to benefit from his own discretion or wrongdoing but rather to ensure that the employee is placed in no worse position with respect to his employment as a result of an approved transaction.

TCU's literal interpretation of section 5(a) has the additional advantage of deterring disputes over whether employees have been demoted in anticipation of a protected transaction. Moreover, Fredenberger's decision does not appear to discriminate against [*19] carriers. While carriers would pay higher protection payments to employees who occupied lower paying positions during the last part of a test period, they would pay lower protection payments to employees who occupied a higher paying position during the last part of a test period.

Finally, this case is easily distinguishable from American Train Dispatchers, supra. There, the ICC determined that it would be unfair and contrary to the basic purposes of New York Dock to include certain overtime wages resulting directly from the merger transaction itself in the test period computation. The ICC said that would be giving the employees a windfall of up to 6 years of increased wages based on overtime that would not have even occurred but for the merger transaction. The ICC said that such inclusion it would be inconsistent with the basic purpose of New York Dock, i.e., compensating for merger-caused harms, to give employees an increased level of pay reflecting a benefit from the merger, namely, receipt of overtime pay.

Here, we are faced with the typical sort of changes in employment that may occur during any New York Dock test period. McAvoy's displacement to her position as a crew caller [*20] was not caused by the transaction itself, unlike the transaction-caused overtime in American Train Dispatchers. Rather, her displacement was a result of normal fluctuations in employment in the railroad industry. It did not create any windfall for the employer and hence should not be considered in calculating the test period average.

For all of these reasons, we will deny the appeal.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The appeal is denied.

2. This decision will be effective on May 29, 1996.

8

AWD271
Referee:Fredenberger
Fin. Docket:32000
Carrier(s):SP
Union(s):TCU
Award Date:10-2-95
NYD Articles:Art. I, § 5

SPECIAL BOARD OF ARBITRATION
CREATED PURSUANT TO ARTICLE IV,
SECTIONS 2 AND 3 OF THE OCTOBER 27, 1992
NEW YORK DOCK IMPLEMENTING AGREEMENT

PARTIES	SOUTHERN PACIFIC LINES	)	
		)	AWARD NO. 9
TO	AND	)	
		)	CASE NO. 9
DISPUTE	TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION	)	

CARRIER'S STATEMENT OF ISSUE:

In computing K. V. (Paulson) McAvoy's TPA, did the Carrier comply with the spirit and intent of the New York Dock Conditions and the October 27, 1992, Implementing Agreement, Article I, when Carrier excluded Claimant's non-agreement officer earnings from her TPA calculation, inasmuch as such earnings would not have continued even in the absence of the New York Dock transaction?

EMPLOYEES' STATEMENT OF ISSUES:

(1) Did the Carrier comply with New York Dock Conditions, Article I, Section 5, and the October 27, 1992, Implementing Agreement, Article I, when it failed to include both agreement and non-agreement earnings in computing Mrs. K. V. (Paulson) McAvoy's TPA?

(2) If yes, the Carrier shall now be required to adjust Mrs. McAvoy's TPA to include all agreement and non-agreement earnings received in the twelve (12) month period in which she performed service immediately preceding the date she was affected.

HISTORY OF DISPUTE:

The issues in this case and the underlying dispute arose against the background outlined in Award No. 1, Case No. 1 decided by this Board. In the interest of brevity that background will not be reviewed here.

The issues and underlying dispute in this case were generated by the Carrier's refusal to include in the calculation of displaced Employee K. V. McAvoy's test period average (TPA) under Article I, Section 5(a) of the New York Dock Conditions the earnings of her nonagreement Corridor Manager position during the twelve months immediately preceding her displacement as a result of the transaction under the October 27, 1992 New York Dock Implementing Agreement (Implementing Agreement). The Organization challenged the Carrier's action. They could not resolve the dispute. Accordingly, pursuant to Article IV, Sections 2 and 3 of the Implementing Agreement the parties placed the foregoing issues before this Board.

The Board heard this case in Houston, Texas on June 28, 1995. The parties presented written submissions and oral argument. No bench decision provided in Article IV, Section 3 of the Implementing Agreement was issued at the hearing. The parties extended the time provided therein within which this Board must render a decision in this case.

FINDINGS:

The Board finds that the parties have complied with all procedural requirements to bring the issues in this case and the underlying dispute before this Board for adjudication. The Board also finds that it has jurisdiction to decide the issues and the

dispute. The Board further finds that all parties to the case were given due notice of the hearing before this Board.

By way of background, on September 30, 1993 the Carrier eliminated Employee McAvoy's officer position of Corridor Manager in Denver, Colorado as part of a downsizing in the Company's labor force. On October 1, 1993 she exercised her seniority as a Denver Crew Caller to Position No. RC750. On February 4, 1994 she was displaced from her Crew Caller position as a result of the consolidation of the Waybill, Accessorial and Industrial Service Operations in Houston, Texas and Monterey Park, California into the Denver Customer Service Center (DCSC). That consolidation constituted a New York Dock transaction covered by the Implementing Agreement.

As a result of her displacement Employee McAvoy exercised her seniority to the position of Waybill Monitor Representative in the DCSC. She currently works that position.

On February 8, 1994 Employee McAvoy requested the Carrier to provide her with her TPA for purposes of determining her displacement allowance under Article I, Section 5(a) of the New York Dock Conditions as provided in Article I of the Implementing Agreement. In response the Carrier furnished a TPA (compensation and hours worked) based upon the four months she had worked the Crew Caller position and eight previous months worked by the next junior clerk. By letter of March 29, 1994 Employee McAvoy rejected the Carrier's calculation of her test period average alleging that

the calculation should have been based on her earnings in the Corridor Manager position during the eight months prior to the time she assumed the Denver Crew Caller position and not upon the eight months' earnings of the next junior clerk.

The Carrier responded by letter of June 23, 1994 with a recalculation of Employee McAvoy's TPA producing an average based solely upon Claimant's earnings during the four months she worked the Denver Crew Caller position. Employee McAvoy responded by rejecting the Carrier's calculation and referring the Carrier to her calculation of her TPA in her letter of March 29, 1994 and further asserting that her calculated TPA should be increased to reflect a four percent wage increase.

By letter of July 6, 1994 the Carrier refused to recalculate Employee McAvoy's TPA and referred her to the Organization if she wished to appeal the Carrier's decision. She appealed through the Organization.

Subsequent correspondence between the Organization and the Carrier clarified the parties' positions. The Carrier insisted that Employee McAvoy's TPA should be calculated solely upon her four months' earnings in the agreement covered Denver Crew Caller position. The Organization maintained that the calculation of Employee McAvoy's TPA should be based upon not only her earnings in the Crew Caller position during the four months before she was displaced therefrom but also upon her earnings from her Corridor Manager position during the eight months preceding the time that

position was eliminated and she exercised her seniority to the Denver Crew Caller position.

In support of its position the Organization relies squarely upon the literal language of that portion of Article I, Section 5(a) of the New York Dock Conditions which reads:

* * *

> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases...

* * *

In further support of its position the Organization cites the following arbitral authorities the material facts of which, the Organization alleges, are analogous to the instant case and which interpret the foregoing provision of Article I, Section 5(a): TCU and Union Pacific RR Co., Feb. 28, 1989 (Stallworth, Neutral); IBEW and CSX Transp., Inc., Oct. 3, 1990 (Fletcher, Neutral); CSX Transp., Inc., and TCU, July 20, 1992 (Eischen, Neutral). The Organization maintains that in each of these cases the displaced employee's TPA was calculated on the basis of earnings over the twelve months preceding the date of displacement without regard to whether those earnings came from agreement covered positions or

from nonagreement covered positions such as an officer's position. The Organization urges the same result here.

The Carrier would distinguish the foregoing decisions on several bases the first of which is that each involves income from a nonagreement (management or official) position from which the employee was dismissed or displaced as a result of a transaction. Here, the Carrier emphasizes, nothing in the record substantiates that Employee McAvoy's dismissal from her Corridor Manager position was as a result of a transaction. Accordingly, the Carrier maintains, the income from that position should not be included in her TPA.

The Carrier urges that the foregoing distinction between the arbitral authorities relied upon by the Organization and the instant case is critical. We cannot agree. Our analysis of the three awards persuades us that the source of the income from the employees' nonagreement positions which was held to be included properly in the TPA was not a decisionally significant factor. In light of that fact and the clear wording of Section 5(a) of the New York Dock Conditions we are unpersuaded to elevate that factor to decisional significance in this case.

Next the Carrier maintains, citing numerous arbitral authorities including one from this Arbitrator, that the literal interpretation of Section 5(a) by the three arbitral authorities relied upon by the Organization is at odds with rulings holding that extraordinary overtime, special project earnings, lump sum

payments and off assignment earnings attributable to a transaction are not to be included in an employee's TPA. However, a similar argument was made to the Board in the Eischen decision and such holdings were distinguished from the situation before that Board as involving "special circumstances". We find that logic persuasive.

The Carrier argues that to sustain the Organization's position in this case would fly in the face of the Carrier's efforts to downsize and achieve operating economies particularly, in the area of labor costs. In this connection the Carrier emphasizes that Congress recognized the Carrier's financial difficulties by affording it separate treatment with respect to the most recent national wage settlement. The Carrier alleges that the same considerations warrant a rejection of the Organization's position in this case.

The Carrier's argument ignores the fact that the Interstate Commerce Commission (ICC) imposed the New York Dock Conditions upon the transaction involved in this case. This Board has no authority to grant special handling to the Carrier despite its financial condition. The three awards relied upon by the Organization dealt with a similar situation. The results of those decisions do not support the Carrier here.

The Carrier contends that to include earnings lost as a result of at-will employment in an employee's TPA is equivalent to imposing a job freeze which is inconsistent with both federal legislation and the New York Dock Conditions. The Carrier urges

that the purpose of the conditions is to make an employee whole for any loss suffered so that he or she will be treated as if the transaction had never occurred. The answer to the Carrier's argument is that the New York Dock Conditions in fact do freeze certain elements of employment for a period of six years. The ICC made the determination that such conditions would be maintained for those years when it imposed the conditions upon the transaction in this case. This Board cannot change that fact.

The Carrier asserts that the Organization's position in this case is inconsistent with the portions of Section 5(a) of the New York Dock Conditions not cited by the Organization which tie eligibility for a displacement allowance to agreement covered positions as well as the general scheme of the New York Dock Conditions which, as noted above, is to maintain an employee's compensation as if the transaction had not occurred. Employee McAvoy's management earnings, urges the Carrier, have no place in this scheme. Moreover, should the Organization's position prevail, it would result in severe inequities between Employee McAvoy and her fellow clerical workers.

This argument was addressed by one or more of the arbitral authorities relied upon by the Organization in this case. Taken as a whole those authorities reject the argument. We are persuaded to do the same here.

Finally, the Carrier alleges that the inclusion of Employee McAvoy's earnings from her management position in her TPA is

inconsistent with the fact that the New York Dock Conditions often impact seniority and seniority impacts earning potential. As the Carrier sees it, the Organization's position in this case introduces an element into New York Dock which is thoroughly foreign to the protective scheme and for that reason should be rejected. However, once again we are persuaded by the arbitral authorities relied upon by the Organization that the Carrier's argument has no merit. The holdings of those authorities squarely contravene the argument. Inasmuch as we are persuaded as to the worth of the authorities, it follows that we are unpersuaded by the argument advanced by the Carrier.

In the final analysis this case turns upon whether this Board should follow the authorities relied upon by the Organization. As the Eischen Decision noted, technically this Board is not bound by those authorities. However, given the striking similarity of the facts of those decisions and the arguments advanced therein by the parties to those of the instant case this Board is persuaded that it should follow their rationale which in the Board's view speaks volumes with respect to the dispute in this case.

We note that the Carrier has not advanced the one argument in this case which is necessary to overcome arbitral authority as powerful as that relied upon by the Organization here. The Carrier has not argued that any of the authorities are patently erroneous. Our review of the record in this case leads us to conclude that there is no evidence which would support such an argument.

We disagree with the Carrier that we are free to disregard the authorities cited by the Organization without doing serious harm to the principle that consistency and predictability in labor relations is fundamentally desirable. The three awards cited by the Organization apparently are the only authorities dealing with the underlying question in this case. The awards are unanimous in their findings and strikingly similar in their rationale. Again, although we may not be bound by the awards, we find them highly persuasive and determinative of the questions in this case.

AWARD

The Employees' Issue (1) is answered in the ~~affirmative~~ negative. The relief sought in Employees' Issue (2) is granted to the extent that Employee McAvoy's earnings from her position as Corridor Manager for the eight months preceding the elimination of that position will be included in her TPA. The Carrier's Issue is answered in the negative.

William E. Fredenberger, Jr.
Arbitrator

DATED: 10/2/95

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SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 32000 (Sub-No. 11)

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LEGAL DEPT.

RIO GRANDE INDUSTRIES, INC., SPTC HOLDING, INC., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
--CONTROL--
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(Arbitration Review)

Decided: April 15, 1996

This proceeding involves an appeal of an arbitrator's decision determining an employee's displacement allowance under New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). We will deny the appeal.

BACKGROUND

In New York Dock, the ICC adopted rules to implement its mandate under what was then 49 U.S.C. 11347 to provide protective benefits for employees affected by consolidations it approved. Under New York Dock, employees who are forced into lower paying jobs as a result of consolidations approved by this agency are entitled to a monthly "displacement allowance" to compensate them for diminished compensation. The length of the displacement allowance, up to 6 years, depends on the employee's length of service. The amount of the allowance depends on the employee's earnings before the displacement.

The employee's earnings before displacement are determined by the employee's compensation over a 12-month "test" period immediately preceding the date of the displacement. Benefits under New York Dock are available for both union (or contract) employees and non-union (or non-contract) employees.

This proceeding arose out of a dispute between Southern Pacific Transportation Company (SP or the carrier) and one of its employees, Ms. K.V. McAvoy (McAvoy), over the computation of McAvoy's test period pay after she was displaced. Until October 1, 1993, McAvoy was a corridor manager in SP's Denver Transportation Services Center. On that date, McAvoy lost her corridor manager position as a result of a systemwide involuntary reduction in force affecting both contract and non-contract employees. McAvoy then exercised her seniority under SP's collective bargaining agreement with the Transportation-Communications International Union (TCU) to assume a position as a crew caller, a lower paid contract position in Denver, CO. On or about February 4, 1994, McAvoy was displaced from her position

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain function to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

as a crew caller. McAvoy then exercised her seniority to obtain a position as waybill monitor representative in SP's Denver service center.

The ICC consistently held that benefits under New York Dock are available only if the adverse effect on an employee is due to a consolidation approved by that agency, as distinguished from general business conditions or efforts to cut costs that are not linked to a consolidation approved by that agency. This tenet has not been challenged here. SP agrees that McAvoy is entitled to a displacement allowance because her displacement from the crew caller position was a result of operational changes that were a part of the consolidation approved in Finance Docket No. 32000.[2] Both parties agree that McAvoy's displacement from her prior position as a corridor manager did not entitle her to protection under New York Dock, because that displacement was due to general, systemwide business conditions rather than operational changes that can be linked to the consolidation approved in Finance Docket No. 32000 or any other ICC-approved transaction.

The parties differ, however, over the pay that should be included in McAvoy's test period. SP maintains that the test period should reflect only McAvoy's rate of pay for the 4 months when she was a crew caller.[3] TCU argues that the test period must reflect McAvoy's higher pay as a corridor manager for the initial 8 months of the test period when she occupied that position, as well as the lower pay in the subsequent 4 months when she was a crew caller.[4] TCU took the dispute to arbitration under New York Dock.

In an award dated October 2, 1995, an arbitrator, William E. Fredenberger, Jr., ruled in favor of McAvoy, holding that her test period compensation must reflect her salary as a corridor manager. The arbitrator relied on the direct language of Article I, section 5(a) of New York Dock, which, without qualification, provides for a 12-month test period based on "total compensation received" during "the last 12 months in which [the employee] performed services immediately preceding the date of his displacement as a result of the transaction."[5]

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[2] Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834 (1988).

[3] SP calculated McAvoy's monthly test period earnings to be $3077.16, her average monthly compensation over the 4 months when she was a crew caller. The carrier did not use a 12-month test period, arguing that McAvoy's compensation could not reflect her higher rate of compensation as a corridor manager because she was not entitled to benefits due to her displacement from that position.

[4] Based on her theory that the test period must be 12 months and must reflect all income earned during that 12 months, she calculated her monthly test period compensation to be $3892.39.

[5] Article I, section 5(a) of New York Dock provides in pertinent part as follows (360 I.C.C. at 78):

> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of

(continued...)

Fredenberger cited three arbitration decisions as precedent.[5] The lead decision is the Stallworth arbitration. There, employees who held management positions were displaced to non-management positions, and were then displaced or dismissed from their non-management positions by a transaction that was merger related. The carrier argued that test period wages could not include the higher, non-management compensation. The Stallworth panel held to the contrary, reasoning that: (1) the literal language of section 5(a) requires that all income during the 12-month period be considered; and (2) if the ICC had intended to preclude consideration of income from more than one job, the agency would have simply directed that wages at the time of severance be considered and there would have been no need to go back an entire year.

The other two cited decisions involved the same factual pattern as the Stallworth arbitration, citing that decision. The Fletcher award added two additional arguments. First, the Fletcher panel held that, while the Stallworth precedent protected demoted employees at their higher pay prior to the demotion, the formula benefitted carriers vis-a-vis employees who receive a promotion during the 12-month period prior to their separation. Second, the panel found that the language of section 5(a) refers to "compensation," not rate of pay.[7]

By petition filed October 23, 1995, SP appealed the Fredenberger award. On December 13, 1995, TCU filed its reply. In its reply, TCU requests that McAvoy be awarded interest on the amounts alleged to have been wrongfully withheld from the date of the arbitrator's decision.

ARGUMENTS OF THE PARTIES

The parties dispute whether the award is reviewable under the deferential Lace Curtain standard of review.[8] SP argues

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[5](...continued)
compensation and average monthly time paid for the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases. [Emphasis in the original.]

[6] The three decisions, reproduced in the separate volume of exhibits filed with SP's appeal, are: (1) TCU and Union Pacific Railroad Company, Feb. 28, 1989 (Stallworth, Neutral); (2) International Brotherhood of Electrical Workers and CSX Transportation, Inc., Oct. 3, 1990 (Fletcher, Neutral); and (3) CSX Transportation, Inc. and TCU, July 20, 1992 (Eischen, Neutral).

[7] In this latter argument, the panel seems to have reasoned that "compensation" involves a broad interval of time rather than the instantaneous picture implied by the term "rate of pay."

[8] Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom., International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under the Lace Curtain standard, the Board (1) does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error" and (2) limits its review to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Id. at 735-36. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965
(continued...)

that the award is reviewable because the arbitrator made a mistake in his interpretation of how test period earnings should be defined under section 5(a) of New York Dock. According to SP, this is an important legal issue involving the scope of benefits, not a factual issue that should be deferred to arbitrators under Lace Curtain.

TCU argues that Lace Curtain requires that the Board refuse to hear the merits of the appeal. TCU calls attention to the ICC's statement in Lace Curtain that the agency did not intend "to become a regular participant in the [arbitration] process as a reviewer of arbitration decisions" and asserts that this will happen if the Board reviews the Fredenberger award.

SP's then claims that the award is contrary to the intent and purposes of New York Dock. First, SP argues that the ICC had a longstanding general principle that employees are not entitled to benefits under New York Dock unless there is a link between the transaction and the loss of earnings suffered by the employee. SP cites Atlantic Richfield Co. and Anaconda Co.--Control--Butte Anaconda and Pacific Railroad Co. and Tooele Valley Railroad Company, Finance Docket No. 28490 (Sub-No. 1) (ICC served Mar. 2, 1988) at 8-9, subsequent decision printed at 5 I.C.C.2d 934, 948 (1989). SP also argues that the direct language of section 5(a) of New York Dock requires such a link.[9]

SP argues that the required link between the New York Dock-protected transaction and the employee's loss would be severed if the employee's benefits were to reflect wages earned in a prior position, the displacement from which was not subject to New York Dock. According to SP, TCU's position would allow employees who were removed from a higher paying job for disciplinary reasons and subsequently displaced under New York Dock to be compensated for their misconduct by receiving an allowance reflecting their

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[8](...continued)
(Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), the ICC elaborated on the Lace Curtain standard as follows:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

[9] Article I, section 5(a) of New York Dock provides in pertinent part as follows (360 I.C.C. at 78):

> (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protected period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced. [Emphasis SP's.]

SP also notes that the remainder of section 5(a) (quoted in note 5, above) defines the test period as the 12 months preceding the date of "displacement as a result of the transaction."

prior salary. SP also argues that TCU's position would encourage employees seeking New York Dock benefits to take "anticipatory employment actions," such as voluntarily resigning from a management position and taking a job soon to be eliminated under New York Dock in order to receive a dismissal allowance reflecting the higher compensation. SP asserts (p. 12) that "arbitrators have universally rejected the argument that an employee who voluntarily resigns from a non-agreement position is entitled to protective benefits.[10]

SP attempts to distinguish the three precedents cited by Fredenberger (see note 6, above). SP seeks to distinguish the Stallworth arbitration by arguing that the prior displacements to non-management positions involved in that award were also covered by New York Dock (along with the subsequent displacements), unlike McAvoy's prior displacement from her managerial position. SP argues that, to the extent that the Eischen and Fletcher awards cannot be distinguished on their facts, they were in error.

TCU, by contrast, argues that the ICC had a policy of deferring to the consistent interpretations of arbitrators and that arbitrators have consistently upheld Fredenberger's interpretation of the test period.

In support of its argument that the ICC had a policy of deferring to the consistent decisions of arbitrators, TCU cites the following language from American Train Dispatchers Association v. CSX Transportation, Inc., 9 I.C.C.2d 1127 (1993), aff'd American Train Dispatchers Ass'n v. I.C.C., 54 F.3d 842 (D.C. Cir. 1995), petition for cert. pending, No. 95-273 (American Train Dispatchers) (9 I.C.C.2d at 1133-4):

> The WJPA [Washington Job Protection Agreement] "generally is conceded to be the blueprint for all subsequent job protection agreements." New York Dock Ry. v. United States, 609 F.2d 83, 86 (2d Cir. 1979). We have noted that the Transportation Act of 1940, the source of present § 11347, was, in effect, a

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[10] SP cites In the Matter of United Transportation Union and Boston and Maine Railroad Co., an August 30, 1990 arbitration award (SP exhibit 3.) There, the panel held that a carman displaced under New York Dock was not entitled to benefits reflecting his salary in a prior managerial position from which he had voluntarily resigned 3 months before. Concerning the general purpose of labor protection, the panel reasoned (Arbitration decision, p. 6):

> This allowance is intended to stabilize that level of income which attached to and most likely would have continued for an adversely affected employee had the transaction not taken place.

After having established the claimant's right to at least some compensation, the arbitrators found (Id.):

> However, that the Grievant is a covered employee, does not establish that he is, as claimed, entitled to be protected against any loss of compensation as a consequence of his voluntary resignation from a management, or non-represented, position some three months prior to the transaction. He was not, by any stretch of the imagination, placed as a result of the transaction in a worse position with respect to compensation which had been paid to him in his management position.

> Congressional endorsement of the WJPA. See Carmen, supra, 6 I.C.C.2d at 739. In any event, article I, § 5 of the New York Dock conditions was in turn taken without substantive change from the WJPA. Thus, we conclude that the WJPA arbitral awards do present persuasive precedent on which a New York Dock arbitration committee may rely.

To show that arbitrators have consistently upheld Fredenberger's interpretation of the test period, TCU relies on the three decisions cited by Fredenberger and the following three additional decisions.

The Rinaldo Decision. An arbitration panel (Thomas N. Rinaldo, neutral member) held that the test period of a displaced carman who had worked as a supervisor during an earlier part of his 12-month test period must reflect his higher compensation as a supervisor, not merely his compensation as a carman. In reaching this result, the panel interpreted the language of a negotiated implementing agreement similar to section 5(a) of New York Dock.

The Robertson Decision. In a 1964 arbitration decision interpreting language in the ICC's Oklahoma[11] conditions that was similar to section 5(a) of New York Dock, an arbitrator, Francis J. Robertson, held that the test period earnings of a clerk displaced by abandonment of a car float operation must reflect his higher earnings in positions held prior to the one from which he was displaced. TCU cited the following language in Robertson's decision (TCU Exhibit C, pp. 4-5):

> It will be noted that the words "worse position" as they first appear in the language of the Conditions are in line with the provisions of the statute. There can be no doubt that as the word position is used in the statute it is not synonymous with job or assignment but rather connotes status, situation or posture. The provisions of section 4 apply to all classes of employes operating and non-operating. It is common knowledge that in the operating group a large proportion of such employes work on assignments which might vary from day to day. Hence in referring to an employe's position with respect to compensation and rules governing work conditions it is apparent that in this context the word "position" cannot be intended to mean a specific job or assignment. Hence it is clear that what the Commission was seeking to accomplish in imposing the Oklahoma Conditions was to assure an affected employe that his employment status insofar as compensation and working conditions were concerned would be preserved to him for the four years protective period.

Robertson's decision also contained the following pertinent reasoning (TCU Exhibit C, p. 5):

> To determine what amount of compensation would be protected it is clear that the Commission adapted a pragmatic and arbitrary formula. A formula which it must be presumed to have recognized would result in inequities at times against the employe and at times against the Carrier. For example, during the twelve months immediately preceding displacement an affected

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[11] In Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177 (1944), the ICC adopted its then standard "Oklahoma" labor protection conditions for leases and trackage rights.

> employe might have experienced a long period of illness and the amount of his "protected" compensation would be substantially affected by operation of the formula. On the other hand, perhaps in anticipation of an abandonment, the carrier might have curtailed its hirings with the result that considerable amount of overtime would be worked during the test period. We cannot believe that the Commission was blind to these factors. Its emphasis upon "compensation received" during the test period and "compensation produced" during the protective period indicates that its concern was with the actual earnings attributable to the affected individual's employment status rather than the earnings accruing on a given assignment.

The Rogers Decision. In upholding claims for benefits in a 1960 arbitration decision, a panel (Daniel C. Rogers, neutral member) interpreted language in the Burlington conditions[12] that was similar to section 5(a) of New York Dock. TCU calls attention to the following portion of Rogers' decision (TCU Exhibit D, p.4):

> From a reading of Section 1 of the "[Burlington conditions]", as a whole, it is discerned that the "position" from which an employee is displaced in an abandonment case is not limited, necessarily, to the single assignment on which the employee was working at the time of the abandonment. The term "position", in this first sense in which it is used, comprehends as many assignments, including both regular and extra assignments, as an employee may have worked during the "test period". And the average monthly compensation of such "position" is the aggregate of his earnings during the "test period" divided by 12. [Emphasis in original.]

DISCUSSION

We find that the award is reviewable on its merits under Lace Curtain because it involves an important and recurring issue of the proper calculation of the test period averages for dismissal or displacement allowances for employees under all of our labor protective conditions. We will deny the appeal because the award was based on a reasonable and consistent line of arbitral interpretation of section 5(a) of New York Dock and of comparable predecessor provisions.

The issue is whether a displaced employee's 12-month test period earnings must reflect only the compensation earned in the position from which the employee was displaced as a result of the transaction for which New York Dock conditions were imposed, or whether the test period must also reflect earnings in prior positions held in the test period from which the employee was displaced for reasons not related to the transaction.

We have no evidence or documents showing how the original drafters of the test period average definition in section 5(a) intended to define test period earnings. The test period average definition (see note 5) originated in 1936 in section 6(c) of the Washington Job Protection Agreement (WJPA), a privately negotiated labor protection agreement that provided the basic framework for the labor protection provisions that were

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[12] In Chicago, B. & Q. R. Co. Abandonment, 257 I.C.C. 700 (1944) the ICC adopted its then standard "Burlington" labor protections conditions for abandonments.

subsequently enacted by Congress and implemented by the ICC.[13] This definition of the test period eventually became Article I, section 5 of New York Dock.

We interpret this provision in light of its plain language, the overall purposes of the New York Dock protection scheme, and the general policies of subtitle IV of title 49. We agree with the reasoning in the Stallworth arbitration that the literal language of section 5(a) requires that all income during the 12-month period be considered, and that if the ICC had intended to preclude consideration of income from more than one position, it could have simply directed that only an average of earnings from the position held at the time of severance be considered.

Arbitral precedent also favors TCU's approach. SP's attempt to distinguish the Stallworth arbitration by arguing that the prior displacements to non-management positions involved in that award were also covered by New York Dock (along with the subsequent displacements) is not persuasive because that opinion contains no indication that the prior displacements would in fact have been covered by New York Dock.

As Arbitrator Robertson noted, reliance on a 12-month period comports with the statutory intent that the test period reflect the fact that some employees work on assignments that last only a relatively short time. The use of a 12-month period to determine the prior compensation of such an employee is a reasonable attempt to paint a more accurate picture of such an employee's earnings than would be achieved by simply looking at his or her earnings in the position occupied at the time the employee was dismissed or displaced.[14]

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[13] A legislative history of the labor protection provisions appears in CSX Corp.--Control--Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990). The WJPA appears in Appendix B of that decision. Section 6(c) of that Agreement provided as follows (6 I.C.C.2d at 780):

> (c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

[14] As noted above, SP claims that TCU's position would allow employees who voluntarily resigned or were removed for disciplinary reasons from a higher paying job and subsequently displaced under New York Dock to receive an allowance reflecting

(continued...)

TCU's literal interpretation of section 5(a) has the additional advantage of deterring disputes over whether employees have been demoted in anticipation of a protected transaction. Moreover, Fredenberger's decision does not appear to discriminate against carriers. While carriers would pay higher protection payments to employees who occupied lower paying positions during the last part of a test period, they would pay lower protection payments to employees who occupied a higher paying position during the last part of a test period.

Finally, this case is easily distinguishable from American Train Dispatchers, supra. There, the ICC determined that it would be unfair and contrary to the basic purposes of New York Dock to include certain overtime wages resulting directly from the merger transaction itself in the test period computation. The ICC said that would be giving the employees a windfall of up to 6 years of increased wages based on overtime that would not have even occurred but for the merger transaction. The ICC said that such inclusion it would be inconsistent with the basic purpose of New York Dock, i.e., compensating for merger-caused harms, to give employees an increased level of pay reflecting a benefit from the merger, namely, receipt of overtime pay.

Here, we are faced with the typical sort of changes in employment that may occur during any New York Dock test period. McAvoy's displacement to her position as a crew caller was not caused by the transaction itself, unlike the transaction-caused overtime in American Train Dispatchers. Rather, her displacement was a result of normal fluctuations in employment in the railroad industry. It did not create any windfall for the employer and hence should not be considered in calculating the test period average.

For all of these reasons, we will deny the appeal.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The appeal is denied.

2. This decision will be effective on May 29, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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[14] (...continued)
their prior salary. However, our decision here should not be interpreted to allow such absurd results. The intent of what is now section 11326 and its predecessors was not to allow an employee to benefit from his own discretion or wrongdoing but rather to ensure that the employee is placed in no worse position with respect to his employment as a result of an approved transaction.

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DECISION: The discontinuance of the position of switchtenders and the resumption of the performance of their duties by employees of Carriers using the Depot facilities was not a "coordination".

DOCKET NO. 62 -- Decision by Referee Bernstein

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees
vs.
The Chesapeake and Ohio Railway Company

PARTIES TO DISPUTE

QUESTION: (a) That the Carrier violated and continues to violate provisions of Agreement between The Chesapeake & Ohio Railway Company, Chesapeake District, The Chesapeake & Ohio Railway Company, Pere Marquette District (formerly The Pere Marquette Railway Company) and its Employees represented by The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes for each District signed July 22, 1954, effective August 1, 1954, and more specifically Section 27 with respect to Washington Agreement of May 21, 1936, and job stipulations of Interstate Commerce Commission Finance Docket No. 15228, when it failed to pay to Frank John Sana the difference between the monthly average of his total time paid for during period July 1, 1953 and June 30, 1954 ($523.77/232 hours) and compensation received in his subsequently held positions (Yard Clerk A-171/Yard Clerk A-230). Claim applicable to all employees involved in the coordination and continued in service under similar conditions and withour proper adjustment as required.

FINDINGS: On August 1, 1954 the parties entered into a coordination agreement involving facilities in Chicago, Illinois. This was one of a series of coordinations and agreements growing out of the 1947 merger of The Chesapeake and Ohio Railway Company and The Pere Marquette Railway Company. The parties adopted as the test period July 1953 through June 1954.

In this coordination no employee was deprived of employment. Indeed, two additional clerks were added to the force. No employee was continued in service at a rate of pay lower than that received at the time of the coordination.

However, the employee used as an example, Mr. Frank John Sana, while being paid a rate no lower than he received at the time of the coordination, received lower compensation in some months than the "average monthly compensation" of the "test period". The dispute here invokes Sections 6(a) and 6(c); for convenience the full texts follows:

> "Section 6(a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise

"of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline."

* * * * * * * * * * * * * * * * * * * *

"(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period."

In simplified form the Organization contends that whenever an employee's monthly compensation drops below the average monthly compensation of the test period, as prescribed by Section 6(c), he is entitled to a displacement allowance.

The Carrier contends that so long as an employee has a position - full time position - with a rate of pay equal to or greater than that he received at the time of the coordination, he cannot be eligible for a displacement allowance.

I believe that each position oversimplifies the actual provisions of the Agreement.

All parts of the Agreement should be read together and as harmoniously as possible. Usually all language in an Agreement serves some purpose, although this hornbook maxim is modified by the realistic proposition that some provisions of agreements are redundant. Which is the case depends upon the provisions and possibly their history; the ultimate conclusion is a matter of judgment.

In this case, the judgment is not difficult to make. Section 6(a) and Section 6(c) each serve a different function, although they are interdependent. As contended by the Carrier, Section (a) prescribes the protections to be given

employees "continued in service" and the conditions under which they will qualify for the displacement allowance whose formula is provided by Section 6(c).

That formula is to be applied to the twelve month period (the "test period") preceding the time when an employee is adversely affected by the coordination. The formula guarantees that he shall receive at least the average monthly compensation of the "test period". This is so even if after the coordination he works less than the "average monthly time paid for" during the test period. If the employee works more than the "average monthly time paid for" he is to receive the full benefit of that additional work at his then present rate in addition to the guarantee.

Clearly the function of the Section 6(c) test is to insure to the employee both the "compensation" guaranteed by Section 6(a) and whatever he earns in hours worked in excess of "average monthly time paid for". This "compensation" is the product of this rate of pay, any arbitraries and the amount of time that he worked. It is a commonplace of this industry that certain jobs normally involve overtime, e. g. for a sixth day's work when an unassigned employee is not available or for usual and recurrent, or at least frequent, overtime on given days. Such overtime at premium pay is desired and considered a prerequisite of the position. It seems quite clear that in determining whether an employee is in no "worse position with respect to compensation" after a coordination, the formula is to reflect elements of compensation in addition to the "rate of pay".

The device employed is an "average" of the "last twelve months in which (the employee) performed service" preceding the adverse effect upon him -- thereby reflecting the fluctuations in such compensation that normally occur in the course of a year, e. g. seasonal variations. Obviously, the average will serve only to approximate an equivalence in compensation "before" and "after" coordination. Generally the device is for the protection of the employee. In the normal and usual case, applying the formula of Section 6(c) will show whether an employee is "in a worse position with respect to compensation". In other words, if an employee drops below the "average compensation" (all earnings) for a period equal to or less than the "average monthly time paid for" he makes out a prima facie case that he is in a worse position than before the coordination. Because of the many variables -- new schedules, possible differences in size of work force, probable differences in volume of work, and a host of other factors -- the drop in average compensation is inferentially caused by the coordination.

The inference is rebuttable. Section 6(a) is quite explicit that the "worse(ned) position" must be "as a result of such coordination". If it can be shown that the difference in "compensation" is due to some cause unrelated to the coordination, the allowance would not be due. For this reason clearly demonstrable abnormalities in the test period which are absent after the coordination would negate the coordination as the causative factor.

From this discussion it may be seen that neither "rate of pay" nor the "test period" average earnings is dispositive. The Agreement makes "compensation" the test of "worse(ned) position" and the test period formula provides the normal and usual yardstick of compensation. But, the eligibility of an employee for an allowance depends upon whether any of the difference in compensation is a result of the coordination. Once the eligibility is shown all the difference between a month's compensation after the coordination and the "test period" average is due the employee. By adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur.

In Mr. Sana's case it is undisputed that he had abnormally high earnings in the test period due to the fact that he frequently worked more than one position.

Doubling up may be a normal incident of a position -- but the situation must be a rarity. Here it was due to the prospect of the coordination and the Carriers understandable desire not to hire new employees before the coordination. Where such a clear showing of abnormal earnings is made, the prima facie showing is overcome. There may be complicated situations in which the lower compensation is the result of both an abnormal situation before a coordination and the coordination itself. It is sufficient for Section 6(a) to show that any part of the decrease in compensation is caused by the coordination for an employee to qualify for the full difference between the test period average and actual compensation under the formula.

The tests for "worse(ned) position" are applicable only to the first adverse effect of a coordination. Once the employee is shown to be within the area of employment adversely affected by a coordination he is entitled to the benefits of the five year protective period provided by Section 6(a). This subject is more fully discussed in Docket No. 67, which is to be read in conjunction with this decision in order to ascertain the rights of employees under Section 6.

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

(b) Frank John Sana is not entitled to a displacement allowance because there is no proof that his post-coordination compensation was lower than the "average monthly compensation" (for the number of hours equal to "average time paid for") as a result of the coordination.

DOCKET NO. 63 -- Decision by Referee Bernstein

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees	)	
vs.	)	PARTIES TO DISPUTE
The Chesapeake and Ohio Railway Company	)	

QUESTION: (a) That the Chesapeake and Ohio Railway Company violated and continues to violate applicable terms of its Agreement of April 1, 1958, with its Clerical Employees, provisions of Washington Agreement of May 21, 1936, and stipulations set forth in Interstate Commerce Commission Docket No. 15228 when beginning April 1, 1958, it refused and continues to refuse to apply to its employees the beneficial provisions of documents above referred to as a result of displacement of its employees, or where employees are deprived of employment as a result of coordination of its facilities with those of the Pere Marquette Railway Company, and

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The Organization suggested that even if the coordination did not cause the job loss (a conclusion it did not concede), nonetheless the telegraphers were adversely affected by the coordination because it contracted the number of positions to which they could move.

Under the agreement under the ICC Conditions, the telegraphers had flow back rights to the Erie and had seniority for the D&H area covered by the branch. The number of jobs subject to their seniority rights were not diminished by the coordination, so that this contention fails.

DECISION: The Erie Telegraphers who transferred to the D&H who subsequently lost their positions due to installation of CTC on the division sold by the Erie to the D&H are not entitled to the benefits of the Washington Agreement as their worsened position has not been shown to be a result of coordination.

DOCKET NO. 65 -- Decision by Referee Bernstein

Brotherhood of Railway and Steamship Clerks,)
Freight Handlers, Express and Station Employees)
vs.) PARTIES TO DISPUTE
The Chesapeake and Ohio Railway Company)

QUESTION: (a) The Carrier violated and continues to violate the Agreement between the parties when it failed and continues to fail to pay to all employees entitled thereto, a "Displacement Allowance" as provided in the Washington Agreement of May 1936.

(b) The Carrier shall pay to all employees who have been in the past, or may be in the future, entitled to a displacement allowance under implementing agreements and the Washington Agreement of May 1936.

(Note: The individuals involved in the claim and amounts due each to be determined by means of a joint check of the Carrier's records).

FINDINGS: The Major issue in this dispute is the same as that in Docket No. 62 between the same parties. The Findings and Award of that case apply equally to the question of eligibility for a displacement allowance in this case.

In addition there is a controversy over the appropriate method for computing the allowance under Section 6(c). It is a little hard to believe that after a quarter century of application of this Agreement there is not a standard or generally accepted formula for applying the Section 6(c) formula. But the record does not contain evidence of such a practice so that it is necessary, apparently, to treat the issue as a novel one.

There is no dispute as to the method of applying the formula in cases in which employees earn less than the average monthly amount of the "test period".

The question is how to compute the "compensation" attributable to the "average monthly time paid for" and for hours worked in excess of the average for the period after coordination. Boiled down to essentials, the employees would treat all hours of the "average monthly time paid for" as if they were only straight time work and would allocate any overtime hours to those in excess of the number of hours for which there is a guarantee. The Carrier would treat any hours in excess of the "average monthly time paid for" as if they were only straight time. The difference in method, and hence interpretation of Section 6(c), becomes somewhat more clear from the following comparison.

Example: Mr. Smith had a position rated at $16.15 per day before coordination and $16.16 after coordination. His "test period" average compensation was $360.48 a month; the "average monthly time paid for" was 152.83 hours a month. In a month after coordination, Mr. Smith worked and was paid as follows:

22 days pro rata @ $17.36 per day		$381.92
1 holiday pay pro rata @ $17.36 per day		17.36
1 day at punitive rate @ $17.36 per day		26.08
Total, 192 hours	Earnings	$425.36

The employees would apply the Section 6(c) formula as follows:

184 hours actually worked (23 days x 8 hrs. per day) less
152.83 test period hours = 31.17 hours.

31.17 hours x 2.17 per hour	$ 67.64
8 hours at punitive rate of $3.26 per hour	26.08
Average monthly compensation (for 152.83 hrs)	360.48
Guaranteed amount	$454.20
Compensation allowed	425.36
Amount Employees contend Smith still due	$ 28.84

The Carrier would apply the Section 6(c) formula as follows:

Guarantee for 152.83 hours	$360.48
Hours worked in excess of average test period hours: 31.17 @ $2.17 per hour	67.64
Total	$428.12
Amount paid by Carrier	425.36
Difference Carrier says would be due if Smith were entitled to a displacement allowance (which Carrier says he was not entitled to)	$ 2.76

The Carrier position has some support in the latter part of the section providing "he shall be compensated in addition (to the guarantee) at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period." Under one reading "at the rate of the position" would mean straight time. But this is not the only nor the most reasonable interpretation. This part of the provision can be read as merely stating what rate shall be used, leaving to ordinary practice the computation of the earnings. This latter reading recommends itself as in harmony with the scheme of Section 6 (c).

As the discussion in Docket No. 62 indicates, the "test period" formula was designed to reflect the influence of arbitraries and overtime in the computation of "average monthly compensation." To this pre-coordination average is to be compared the post-coordination earnings for an equal number of hours worked. In

order for the amounts to be comparable both should include the same elements and in proportions which resemble each other as much as possible. Overtime is included in arriving at the "average monthly compensation"; overtime should also be included in that with which the average is to be compared. But it does not follow that all overtime should be put into that part of the post-coordination earnings with which the average is to be compared nor wholly excluded from the excess.

The touchstone is comparability - comparability with the period for which there is a minimum guarantee. The guarantee in the example is for an amount for 152.83 hours most of which were worked straight time and some possibly at overtime. So, the proper post-coordination period, the comparable period, should be the first 152.83 hours worked in a month. This will reflect the average amount of straight time and the amount of overtime in the comparable period. Whatever overtime is worked in the excess hours should be computed at overtime rates.

In the absence of an agreed-upon method of computation, this is the application of Section 6(c) which, it seems to me, best accords with its language and purpose.

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

(b) In applying the guarantee of Section 6(c), the hours upon which the guarantee is based, i. e., the hours whose earnings are to be compared with the "average monthly time paid for", shall be those first occurring in the month being compared. The overtime occurring in those hours are to be included in the computation of the guarantee. Any overtime hours worked subsequent to the hours for which the guarantee applies are to be computed at the overtime rate.

DOCKET NO. 66 -- Decision by Referee Bernstein

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
vs.
Pacific Electric Railway Company

PARTIES TO DISPUTE

QUESTION: 1. E. B. Scoggins is entitled to allowance prescribed in Section 9 of the Agreement of May, 1936, Washington, D. C.

2. Allowance prescribed in Section 9 of the Agreement of May, 1936, Washington, D. C. shall now be accorded E. B. Scoggins by the Pacific Electric Railway Company.

11

In the Matter of Arbitration Between BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES And CSX TRANSPORTATION, INC.	OPINION AND AWARD Before an Article I, Section 11, Arbitration Committee Nicholas H. Zumas, Neutral

BACKGROUND

The undersigned Neutral was selected as Chairman of an Arbitration Committee established pursuant to Article I, Section 11 of Appendix I of I.C.C. Finance Docket No. 28250 (hereinafter "New York Dock" or "NYD.") Hearing was held on October 17, 1990 in Washington, D.C. at which time exhibits were offered and received into evidence and oral argument was heard. The parties presented pre-hearing submissions. The Brotherhood of Maintenance of Way Employees (hereinafter "BMWE" or "Organization") was represented by L. Pat Wynn, Esquire with John O'B. Clarke, Jr., Esquire on brief, and the CSX Transportation, Inc. (hereinafter "CSX" or "Carrier") was represented by Robert Kirk with J. T. Williams on brief.

STATEMENT OF THE FACTS

On or about October 5, 1988, CSX served notice on the BMWE that it intended to sell its line between Bad Axe and Saginaw, Michigan to the Huron and Eastern Railway Company, Inc. The I.C.C. imposed NYD labor protective

conditions on the Carrier in its order dated December 19, 1988. CSX and the BMWE entered into an Implementing Agreement dated December 14, 1988 that provided NYD labor protection benefits for employees adversely affected as a result of the sale of the line. The sale was effective December 23, 1988.

Both parties agree that effective December 28, 1988, three BMWE-represented positions were abolished as a result of the line sale. The incumbents in the positions were Frank Huron, Sr., Robert Foster, and Kenneth Nowiski. These three employees displaced into other positions, which precipitated a series of displacements set forth in the record. The balance of the 14 Claimants in this case are those employees in the displacement chain.

The Carrier concedes that J. A. Brasfield, N. Rivera and J.C. Roscoe were furloughed and C. Kimble was forced to a lower rated position as a result of the displacements. CSX submitted test period averages ("TPA") to the BMWE in order to form the basis of NYD protection benefits. By letter of December 14, 1989, the Carrier took the position that the other Claimants had exercised their seniority to an identical position and therefore did not meet the criteria for certification as displaced employees under NYD. The Carrier further stated that the remaining Claimants had worked in the same foreman or trackman positions, at the same rate of pay and in the same seniority district both before and after the line sale and were therefore not entitled to NYD benefits.

In commenting on the TPAs of the 10 Claimants in dispute, the BMWE notes:

> Although a number of the Claimants have furnished their payroll statements for a number of the months of the protective period, it is impossible to precisely calculate their monthly earnings because the payroll statements do not necessarily coincide with the end of the calendar month. Also, the payroll statements do not permit comparison based on test period hours.

NYD Appendix I provides as follows:

> 1. Definitions. -(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
>
> (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.
>
> (d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.
>
> 5. Displacement allowances.-(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, obtain a position producing compensation equal to or exceeding the compensation he received in the position from which

he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinenet facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

ISSUE

The question to be resolved is whether Claimants are "displaced" or "dismissed" employees within the meaning of the NYD conditions. If so, then the labor protection benefits claimed should be awarded.

POSITION OF THE BMWE

The BMWE maintains Claimants are entitled to labor protection benefits according to the NYD conditions.

The BMWE contends that there is no dispute that Claimants changed positions as a direct result of an I.C.C.-approved transaction.

The BMWE rejects CSX's position that an employee is not placed in a "worse position" under NYD so long as the employee obtains a position with the same rate of pay and in the same seniority district as the position from which the employee was displaced. Moreover, the BMWE rejects CSX's position that there is not necessarily an "adverse affect" as a result of a "transaction" in a situation where an employee who has been displaced earns less money per month because many factors unrelated to the transaction affect the amount of compensation in any given month.

The BMWE relies heavily on the so-called Bernstein decisions between the BRAC and the Chesapeake and Ohio Railway Company, which appear in the record. Particular reliance is placed on Docket No. 62, in which Referee Bernstein rejected the carrier's argument that, "...so long as an employee has a position -- full time position -- with a rate of pay equal to or greater than that he received at the time of the coordination, he cannot be eligible for a displacement allowance."

The BMWE further maintains that the computation referred to in NYD Article I, Section 5 for determining loss of compensation is the TPA and any month's earnings below the TPA makes an affected employee eligible for NYD benefits. The BMWE contends that this interpretation represents the literal meaning of the language of NYD. The BMWE, again relying on the Bernstein reasoning, urges that the focus of the inquiry as to eligibility for NYD benefits should be loss of compensation, not a negative change in the rate of pay.

POSITION OF CSX

CSX contends that Claimants, hereinafter excepting the four specifically admitted and cited, are not entitled to labor protection benefits under NYD because they were not adversely affected by any I.C.C.-approved transaction.

Citing Article I, Section 11(e), the Carrier argues that the burden of proving that Claimants are in a worse position as to compensation as a result of a transaction is on the Organization and it has failed to sustain its burden of proof. CSX rejects the BMWE's position that Claimants were placed in a worse position as a result of the transaction, and therefore rejects the Organization's contention that they are "displaced" or "dismissed" employees under NYD. CSX maintains that Claimants continued to hold positions after the transaction with "comparable earnings" to those held before the transaction.

CSX contends that Claimants have not suffered any "adverse effect" as a result of a transaction and that the burden has not shifted to CSX to prove that causes other than a transaction negatively affected Claimants' earnings. CSX further maintains that the BMWE has not proved that Claimants' "overall earnings potential was reduced following the transaction..." therefore rendering moot the question of causation. The Carrier argues that the BMWE is seeking "automatic certification for a displacement allowance and/or test period averages to certain employees merely because an abandonment occurred."

Finally, the Carrier contends that even if Claimants are found to have lost earnings, that loss of earnings was caused by an intervening factor, not the transaction at issue. Therefore, Claimants are still not entitled to NYD labor protection benefits. The Carrier maintains that the BMWE has not sustained its burden of proving a causal nexus between any presumed adverse affect and the transaction. CSX argues that an employee's earnings fluctuate for many reasons not related to a transaction. CSX maintains that if there was any fluctuation in the earnings of Claimants, it was due to "factors such as the number [of] work days in the month, the amount of overtime required and the overall level of business." The Carrier also notes that routine business fluctuations occur regularly and these would have occurred whether or not the transaction occurred. Nonetheless, these fluctuations do not give rise to the payment of NYD labor protection benefits.

FINDINGS AND CONCLUSIONS

It is clearly settled that the Organization carries the burden for proving the entitlement to NYD benefits. Here, the BMWE must show that Claimants were placed in a worse position by the actions of the Carrier and that those actions were related to an identified I.C.C.-approved transaction. Actual harm to Claimants must be shown as well. On the facts presented in the record, the Organization has sustained its burden of proof.

Although there is arbitral authority for the Carrier's position that rate of pay is a valid factor to examine in considering the potential harm to a claimant and whether or not he is in a worse position as to compensation, the more appropriate analysis was enunciated by Referee Bernstein. In Docket No. 62, Bernstein found:

> "From this discussion it may be seen that neither 'rate of pay' nor the 'test period' average earnings is dispositive. The Agreement makes 'compensation' the test of 'worse(ned) position' and the test period formula provides the normal and usual yardstick of compensation. But, the eligibility of an employee for an allowance depends upon whether any of the difference in compensation is a result of the coordination. Once the eligibility is shown all the difference between a month's compensation after the coordination and the 'test period' average is due the employee. By adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur."

Even the fluctuations inherent in the ordinary course of business, make the rate of pay only a useful but not determinative criterion to examine.

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

The decline in Claimants' compensations coincided in time and place with the transaction in question which was approved by the I.C.C. This proximity, and the absence of proof of an intervening factor, establishes the causal nexus between the transaction and the loss of compensation to Claimants. The change in compensation clearly constitutes a harm to Claimants, thus satisfying all the elements necessary for applying the NYD benefits.

AWARD

This Board finds that the employee protective conditions of NYD are applicable to Claimants herein and directs that Claimants be paid the difference between the TPA and their actual compensation, where applicable. If an exact correlation cannot be established, the Board directs that the parties make their best efforts to establish in good faith the amount of compensation owing within 30 days.

Nicholas H. Zumas
Chairman and Neutral

Date: 2-21-91

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SPECIAL BOARD OF ARBITRATION

Established Pursuant to Article 1 Section II
of the New York Dock II Conditions

CASE NO. 1
AWARD NO. 1

PARTIES TO THE DISPUTE

Transportation-Communications International Union (BRAC)

and

Norfolk Southern Corporation

Hearing Held: September 29, 1988, Room 320, City Centre Building 223 East City Hall Avenue, Norfolk, Virginia

QUESTION AT ISSUE:

Organization's Question

"Are D.G. Kendrick and F.D. Scott, Jr., displaced employees pursuant to New York Dock?"

'Shall Carrier now be required to determine Claimants' (Kendrick and Scott) test period averages as of the date affected and allow their claim for New York Dock benefits?"

Carrier's Question

"Do D.G. Kendrick and F.D. Scott, Jr., meet the definition of a "displaced employee" under the terms of the New York Dock protective conditions?"

OPINION OF BOARD

By way of background, the Interstate Commerce Commission approved the application of the Norfolk Southern Corporation to obtain control of the separate railroad systems of Norfolk and Western and Southern under Finance Docket No. 29430. The approval order dated March 19, 1982 included the requirement that New York Dock II conditons apply. Pursuant to Article 1, Section 4 of the New York Dock conditions the parties reached a general implementing agreement, dated May 19, 1982, which was applicable to future transactions covered by the New York Dock Conditions.[1] On September 5, 1986, Carrier served notice consistent with Article II, Section 1 of the Implementing Agreement of its intention to coordinate certain clerical work performed in the Norfolk Western Medical Department, Roanoke, Virginia into Norfolk Southern Casualty Claims Department offices at various locations on or about October 20, 1986. This coordination necessitated the abolition of three clerical positions in the Norfolk Western Medical Department, General Office Seniority District No. 01. As a result of this action, Claimants Kendrick and Scott were displaced by senior employees and accordingly, said employees were provided Election Notification Forms dated December 10, 1986 apprising them of the

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[1]The ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F. 2d 83 (2nd cir. 1979) ("New York Dock Conditions") on the Carrier pursuant to the relevant enabling statute, 49 U.S.C. Sec. 11343, 11347.

protective agreements to which they were entitled. At the time of this coordination, Clerks D.G. Kendrick and F.D. Scott were both assigned to positions on Roanoke Terminal Seniority District No. 45 with a seniority date of August 16, 1974 and July 16, 1974, respectively. Claimants elected for coverage under New York Dock conditions and filed appropriate documentation for benefits. However, by letters dated March 2, 1987, Carrier declined their claims for protective benefits on the grounds that Claimants did not meet the essential threshold criteria defining a displaced or dismissed employee under New York Dock conditions. Carrier's letter of declination dated July 2, 1987 fully sets forth the Employer's interpretative position. It reads, in part,:

"We find that claimants in this instance are ineligible for protective benefits under New York Dock protective conditions inasmuch as they do not meet the necessary criteria in order to be recognized as a displaced or dismissed employee under New York Dock conditions. Under Section 1(b) of New York Dock, a displaced employee is defined as follows:

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

In these instances claimants obtained or could have obtained in the normal exercise of their seniority rights a position carrying a rate of pay equal to or exceeding the rate of pay of the position from which displaced. Thus, these claimants did not fulfill the threshold burden to be recognized as a displaced employee under the definition of that term in New York Dock."

Simply put, Carrier contended that Claimants were not affected by the coordination of work, since they secured or could have secured an equal or higher paying position in the exercise of their seniority rights.

The Organization, in rebuttal, maintained that Carrier misconstrued the word "position" as contained in Section 1 (b) and Section 5 (a) of New York Dock to mean "assignment" and the term "compensation" to mean "rate of payment." Consequently, Carrier's language construction, according to the Organization is patently inconsistent with several arbitration awards defining the position. In essence, the Organization asserted that the word position was not synonymous with job or assignment but rather clearly connoted status, situation or posture. (See for example, Arbitration Board No. 284, Oklahoma Conditions, Western Maryland v. BRAC, September 9, 1964 and Arbitration Board No. 279 Burlington Conditions, Southern Pacific v. Order of Railroad Telegraphers October 2, 1963.) More pointedly, the Organization observed that a careful analysis of Claimants average earnings during the twelve (12) months preceding their displacement shows that they were placed in a worse position with respect to compensation. For example, for the twelve (12) month period prior to the displacement, Claimant D.G. Kendrick earned $38,427.67 or $3,202.31 average per month as compared to $2,9201.10 for the month of November, 1986, $3,093.65 for the month of December, 1986 and $2,255.61 for the month of January, 1987. In Clerk F.D. Scott's case, the Organization noted that he earned $39,478.98 for the previous twelve (12) months period or $3,289.91 average per month as compared to $2,400.63 for the month of November, 1986, $2,925.13 for the month of December, 1986 and $3,242.90 for the month of January, 1987. The Organization argued that Carrier was confusing rates of pay of positions with compensation earned during the test period, and misapplying the application of Article I, Section II New York Dock, when it (Carrier) concluded that

an employee's worsening condition must be immediately related to the transaction. It cited several arbitral awards under New York Dock Conditions to support its position. (See Union Pacific Railroad Company, Missouri Pacific Railroad Company v. United Transportation Union, (C & T Case No. 3) June 24, 1986 and The Chesapeake & Ohio Railway Company, The Baltimore & Ohio Railroad Company, The Toledo Terminal Railroad Company v. United Transportation Union, May,18, 1987). In sum and substance, the Organization asserted that adversely affected employees are due displacement allowances even if at the time of displacement they displaced to a position producing compensation equal to or exceeding the position from which displaced. In other words, the qualifying litmus test is that the employee has suffered a worsening of compensation when measured against test period average earnings. It contended that a worker may still satisfy the definition of a displaced employee, notwithstanding, the materialization of the adverse effect until well after the implementation of the transaction. As to Carrier's additional contention that Claimant Scott could have displaced to a position which paid a higher rate of pay, the Organization argued that Clerk Scott was effectively a displaced employee and thus Carrier could have offset the earnings he would have earned if he displaced to a position with a higher rate of pay against his test period average. On this point, it referenced Transportation-Communications International Union (BRAC) v. Missouri Pacific Railroad Company, Union Pacific Railroad Company (BRAC) which held in part,

"Should an employee fail to exercise his seniority to an available positic producing compensation greater than the position he elects to retain, Section 5(b) of the New York Conditions allows the Carriers to offset the employee's protective guarantee."

It concluded that Carrier could not eschew its responsibility under the law and minimize its compensatory obligations to employees, since

Congress specifically established a legislative public policy to protect affected employees' interests in the context of railroad mergers during a limited protective period.

Carrier, by contrast, asserted that Claimants did not meet the definition of a "displaced employee" under the New York Dock Conditions, since they were not placed in a worse position with respect to their compensation as a result of the transaction. It pointed out that Clerk Kendrick, in the first instance went from a position carrying a rate of pay of $2245.22 per month to a position carrying a rate of pay of $2257.87 per month. In the second instance, when Clerk Kendrick was again displaced, he went from a position with a rate of pay of $2308.16 per month to an equal paying position. In the latter case, Clerk Kendrick displaced from the position of Westbound Booking-Out Clerk to the position of Relief Clerk No. 3. Clerk Scott was displaced from a position carrying a rate of pay of $2257.87 per month to a position with a rate of pay of $2245.22 per month. In Clerk Scott's case, Carrier observed that he could have obtained readily available positions paying the same or higher rates of pay. It argued that its interpretative position was fully supported by numerous arbitration awards under New York Dock protective conditions and similar protective arrangements, which have consistently denied protection to employees involved in a transaction, who obtained a position carrying a rate of pay equal to or greater than the rate of pay of the positions they occupied prior to the transaction and who sustain no material change, in their objective working conditions. In Award No. 4 United Transportation Union v. Illinois Central Gulf Railroad April 11, 1985, Carrier noted that the Board therein arbitrating under the Oregon Short

Line Conditions held in effect that an employee who was able to obtain a position where his compensation was equal to or greater than his compensation prior to the transaction was not in a worse position with regards to his compensation, and, as such, did not qualify as a "displaced employee". In further support of this position, Carrier referenced Award No. 3 of Special Board of Adjustment involving the United Transportation Union and the Norfolk & Western Railway Company (March 29, 1985), The Board in that case, arbitrating under New York Dock II Conditions, held that the petitioning employee was not adversely affected by the transaction, since he neither lost a regular job, nor was involved in a chain of displacements that resulted in a loss of earnings or compensation. The Board emphasized that an employee must show that he has been placed in a worse position with respect to compensation and rules governing working conditions as a result of a transaction. In addition, see Brotherhood of Maintenance of Way Employees v. Maine Central Railroad Company September 27, 1987 - Mendocino Coast Labor Protection. It was also Carrier's position that the Organization's application of the Section 5 mathematical formula was too rigid and not a proper test for determining if an employee is a "displaced employee" under New York Dock Conditions. It asserted that including overtime in the twelve (12) months test period will inevitably produce average monthly compensation which in some months exceeds the earnings of the employee. It maintained that overtime work which was available to employees on Roanoke Terminal was not related to the instant transaction, since the operational needs of Roanoke Terminal necessitated constant overtime usage. The coordination did not affect

the availability of overtime work on Roanoke Terminal. It pointed out that in the New York Dock Conditions case involving The International Brotherhood of Electrical Workers, System Council No. 6 and the Southern Railway Company, the Board (majority) held that where the reduction of overtime was unrelated to the transaction, the petitioning claimants were not placed in a worse position. (October 8, 1987). It observed, that in the case of Clerk Scott, he occupied four (4) different positions during the twelve (12) month period preceding the transaction and he worked overtime in each position. It argued that since the availability of overtime was contingent upon varying service requirements and the added willingness of the employee to perform overtime work, these variable factors created circumstances that were unrelated to the transaction. In this connection, it noted that in the award of a New York Dock Arbitration Committee United Transportation Union v. Norfolk & Western Railway Company, the Board held in pertinent part, that the New York Dock Conditions did not mention an employee being placed in a worse position with respect to circumstances unrelated to the transaction. The Committee therein also stated:

"It therefore seems evident that the purpose of the New York Dock Conditions was to protect employees against the adverse effects of a transaction, not to insulate all employees against all consequences of an employment relationship." (August 29, 1986)

Carrier also referenced Award No. 1 Special Board of Adjustment No. 927 involving the Brotherhood of Locomotive Engineers and the Norfolk & Western Railway Company. In that Award, the Board held, in part,:

"The fundamental purpose of most, if not all, employee protective arrangements is, or was, to provide protection to employees against adverse effects flowing from the transaction involved and not, as here, from adverse effects arising from other unrelated causes." (January 30, 1984)

In considering this case, the basic question before this Board is whether Claimants were "displaced employees", as that term is defined in Article 1, Section 11(b) of the New York Dock Conditions. Section 1 b states:

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

There is no dispute regarding the consummation of a transaction as that term is defined under Section 1(a) of the New York Dock Conditions, but the parties differ as to whether Clerks Kendrick and Scott were placed in a worse position with respect to compensation and rules governing their working conditions. In Award No. 5 of the New York Dock Conditions case involving Transportation-Communications International Union (BRAC) and Missouri Pacific Railroad Company and Union Pacific Railroad Company, March 1, 1988 the Arbitration Committee considering the same essential issue as before us ruled that regular overtime, recurring overtime or casual overtime attached to any assignment was properly included within the test period average earnings. The Committee, in that dispute, also interpretatively concluded that the ICC would not have used the terms "monthly compensation" and "total compensation," if the manifest intention was to restrict the test period average to an amount less than aggregate earnings. It also concluded that excessive overtime performed directly in anticipation of an immiment transaction was a distinguishable exception to the normative overtime inclusions, since this earnings opportunity would not have accrued to the employee if the affected Carrier did not implement a transaction. The Organization relied upon this Award to support its position.

On the other hand, counterpoised to this position, Carrier argued that Claimants were not placed in a worse position with respect to compensation, since the availability of overtime at Roanoke Terminal reflected circumstances unrelated to the transaction and moreover, the coordination of certain work between the Norfolk & Western Medical Department and the Norfolk Southern Casualty Claim Department did not affect the availability of overtime work at Roanoke Terminal. In effect, Carrier maintained that since the New York Conditions did not specifically mention or indicate that circumstances unrelated to a transaction were acceptable as qualifying an employee who has suffered a diminution in earnings for displacement allowance, then Claimants could not logically be considered as definably eligible "displaced employees."

In reviewing these arguments, the Board concurs with the Organization's interpretation that the word "position" as contained in Section 1(b) of the New York Conditions connotes status, situation or posture rather than a specific job or assignment. The pervasive arbitral authority cited by the Organization supports our determination. Further, in a practical sense, the vagaries and uncertainties stemming from a dynamic displacement chain cannot also presuppose stability of employment in a specific job or assignment. We agree with Carrier that an employee affected by a transaction must be placed in a worse position with respect to compensation and rules governing working conditions, but we do not agree that overtime compensation earned in the preceding twelve (12) month test period is precluded from the prescribed computational formula set forth in Article 1 Section 5(a) of The New York Dock Conditions.

Section 5(a) reads:

"5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

"Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further that such allowance shall also be adjusted to reflect subsequent general wage increases.

"If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position."

Analysis of the aforesaid computational language within the context of cited decisional authority and the intended application of Article 1 Section 1(b) compels us to conclude that using a dispositive standard herein, rate(s) of pay is too restrictive and inconsistent with the contemplated purposes of The New York Dock Conditions. Prior overtime earnings cannot be excluded from the ascertainment of the twelve (12) month test period, unless said overtime was excessive and performed directly in anticipation of an imminent transaction or palpably unrelated to the transaction. Since overtime was not performed

in anticipation of an imminent transaction, it is permissible to include such overtime earnings in the computation of the twelve (12) month test period average. Article 1, Section 5 speaks of total compensation, average monthly compensation and average monthly time paid which reflect compensatory magnitudes greater than straight-time earnings. Based on this formula, Claimants were able to establish a decrease in earnings for the months of November, 1986, December 1986 and January, 1987, but whether such income diminution was directly attributable to the transaction must now be determined. Carrier has argued that the loss of overtime earnings was unrelated to the transaction, since the coordination of work at Roanoke, Virginia did not affect the availability of overtime at that location. Instead, business fluctuations accounted for the reduced overtime opportunities. As to the facts herein, Claimants displaced to positions carrying equivalent rates of pay. In the case of Clerk Kendrick, he was able to exercise his seniority to obtain the same rate of pay on one position $2257.87 and a slightly higher rate $2308.16 on another position. In the case of Clerk Scott, he displaced from a position paying $2257.87 to $2245.22. In both cases, their monthly earnings for November 1986, December 1986, and January 1987 were less than monthly test period average of $3,202.31 for Clerk Kendrick and $3,289.31 for Clerk Scott. Pursuant to Article 1, Section 5 (a), an employee displaced by a transaction who is unable to secure a position producing <u>compensation</u> not rate of pay, equal to or exceeding the compensation he received in the position from which he is displaced shall be paid a monthly displacement allowance during the protective period. Said allowance shall equal the difference between the monthly compensation in the retained position and the

average monthly compensation of the position from which displaced. Further the allowance is determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months immediately preceeding the transaction. Since this methodology as indicated before includes overtime compensation, the Claimant's prior straight time rate of pay is not the benchmark measurement criterion. As to the correlative question, as to whether the reduction in total monthly compensation for the three (3) months cited was caused by circumstances unrelated to the transaction, the Board cannot conclude that said asserted monthly reductions were unrelated to the transaction. It was the displacement effect of the coordination of work at Roanoke, Virginia, which resulted in the monthly earnings differential herein. Consequently, and in accordance with Article 1 Section 1(b) of the New York Dock Conditions, Claimants were definably displaced employees. Finally, considering the ancillary question as to whether Clerk Scott could have secured an equal or higher paying position in the exercise of his seniority rights, Carrier is correct as to the application of this possibility, but the record is bereft of evidence identifying particular available positions.

AWARD AND ORDER

1. The Answer the First Question at Issue submitted by the Organization is Yes.
2. The Answer to the Second Question at Issue submitted by the Organization is Yes.
3. The Answer to the Question at Issue submitted by the Carrier is Yes.

George S. Roukis, Chairman and
Neutral Member

G.C. Edwards, Carrier Member

J.C. Campbell, Employee Member

Dated: April 19, 1989

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#173 Stallworth

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In the Matter of Arbitration Between:

Transportation-Communications International Union -- BRAC

and

Union Pacific Railroad Company.

Pursuant to Article I, Section 11 of the New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000

Case No. 2

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Before Arbitration Committee Members:

Richard D. Meredith	Carrier Member
William R. Miller	Employe Organization Member
Lamont E. Stallworth Labor Arbitrator	Neutral Member
Hearings Held	Chicago, Illinois August 18, 1988 December 19, 1988

ISSUE IN DISPUTE:

The Parties have submitted the following issue to the Committee:

1. What is the proper method for computing test period averages when the test period includes both agreement and nonagreement earnings?

BACKGROUND:

This case involves the level of benefits to be paid to certain Claimants under the New York Dock Conditions. In

September, 1982 the Interstate Commerce Commission (I.C.C.) approved the merger and consolidation of the Missouri Pacific Railroad Company (MP), the Western Pacific Railroad Company (WP) and the Union Pacific Railroad Company (UP). As a condition of that merger the I.C.C. imposed a set of labor protective conditions upon the railroads involved to afford some protection to the employees affected by the merger. Known as the New York Dock Conditions, this Agreement offers certain benefits and guarantees to employees who are affected by merger-related transactions.

On May 1, 1986, the Carrier announced a company-wide force reduction. (Employes' Exhibit B, pp. 1-2). On this date the Carrier offered non-agreement employees certain benefits under a voluntary force reduction program. (Employes' Exhibit B, pp. 3-12). In the same announcement, the Carrier also described the terms of an involuntary force reduction program, which it said it would put into effect if it did not obtain enough volunteers for the voluntary program. (Employes' Exhibit B, pp. 13-19).

The Carrier contended that the force reduction was not merger-related. However, in June, 1987, in another case before an Arbitration Committee between the same Parties, the Committee decided that the force reduction was related to the merger, at least as it affected the claimant, P. J. Kelley, who worked in the Accounting Department. Therefore, the Committee determined that the claimant was eligible for benefits under the New York Dock Conditions, which are more generous than the benefits and

protection offered by the Carrier in its two force reduction programs.

Each of the five Claimants in the instant dispute occupied non-agreement positions at the time the Carrier announced its force reduction program. Four of the Claimants received lump sum payments under the Force Reduction Program; all five exercised their seniority and moved to positions under the collective bargaining agreement. (Employes' Submission, p. 5). A few months after moving to these agreement positions each of the Claimants was affected by a merger-related transaction. Subsequently, each of them filed claims for New York Dock benefits.

Initially, the Carrier denied the claims on several grounds, e.g. that the Claimants were not affected by merger-related transactions. However, for purposes of resolving the instant case the Parties are addressing only the issue of the proper method of computing the test period earnings. The Carrier contends that for purposes of calculating a Claimant's test period earnings, the Claimants may not include compensation earned in non-agreement positions. The Organiztion argues, however, that the New York Dock Conditions require the benefits to be based upon total compensation during the preceding year, including non-agreement earnings. The Parties were unable to resolve this dispute and have submitted it to the Committee for resolution.

After the initial hearing, the Neutral Member of the

Committee sought additional information from the Parties in the form of the following questions:

> 1. Is the only transaction at issue here one which involved a displacement or dismissal from an agreement, rather than a non-agreement position?
>
> 2. If so, how is this case related to and affected by the P.J. Kelley grievance?
>
> 3. If more than one transaction is involved, how should the Committee apply the principle that an employee should be in the same position economically after a transaction as before the transaction?
>
> 4. If only one transaction is involved, how should the Committee reconcile the principle that an employee should be in the same position economically after a transaction with the language of the Agreement which states that benefits should be calculated on a 12-month basis?

The Parties responded to these questions with written submissions and oral argument held on December 19, 1988. The Parties concurred at that only one New York Dock transaction is at issue in this case, i.e. the latter displacements which ocurred after the Claimants had exercised their seniority and assumed agreement positions. The issue of whether non-agreement earnings may be included as a basis for calculating the test period earnings remains.

THE ORGANIZATION'S POSITION

The Organization contends that the Committee can resolve this dispute by simply applying the formula for test period earnings that is contained in Article I, Section 5 of the New York Dock Conditions. That formula bases the allowance on the

total compensation received by an employee during the last twelve months prior to the transaction.

According to the Organization, the Carrier's position in this case contradicts the straightforward language of the Agreement and therefore should be rejected. The Organization also argues that the Carrier's position leads to absurd results for some employees (presumably because the short time they occupied their agreement positions before the transaction occurred resulted in a very low monthly allowance).

The Organization also argues that the weakness of the Carrier's position is made clear by the fact that the Carrier made another proposal, which the Organization apparently rejected, offering another formula which produced higher test period earnings. This formula would have included one month of the employee's non-agreement earnings as part of the test period.

In addition, the Organization contends that the weakness of the Carrier's position is evident through evidence that the Carrier wants to base the monthly allowance only on the (agreement) positions held by the Claimants at the time of the transaction. Under this method the Carrier would exclude earnings even from agreement positions in which the Claimants had worked in the previous year.

The Organization asserts that this is not the intent of the New York Dock Conditions. According to the Organization, Article I, Section 5 provides the correct formula for determining test period earnings, and the Carrier cannot be permitted to make

substitute calculations. Therefore the Organization urges that the Committee answer the question in issue by holding that all compensation, earned in both agreement and non-agreement positions during the year prior to the transaction, be included in figuring test period earnings.

THE CARRIER'S POSITION

The Carrier contends that the test period earnings should not include any compensation earned in a non-agreement position. In support of its position the Carrier argues that:

1. The term "total compensation" as used in the New York Dock Conditions does not include all compensation, but only that compensation which may reasonably be included;

2. It is not reasonable to include non-agreement earnings because to do so would constitute a windfall for the Claimants.

The Carrier acknowledges that a literal reading of the language of the New York Dock Conditions appears to support the Organization's position. The Carrier cites the language of the Agreement which states that the monthly displacement allowance is based upon an employee's "total compensation" for the Carrier within the twelve months preceding the transaction.

Nevertheless, the Carrier urges that other tribunals have upheld exclusions of certain income from the concept of "total compensation" in the New York Dock Conditions. In particular, the Carrier relies upon an opinion in which a referee excluded the earnings of employees performing a one-time task paying overtime wages.

The Carrier contends that the Committee should adopt the principle that an employee awarded a monthly displacement allowance should be no better or worse off than if he continued to work in his job. Since the jobs which the Claimants held at the time of the transaction were agreement jobs, the Carrier contends, awarding them a displacement allowance based in part on their higher non-agreement wages would put them in a better position than if they had continued to work.

On rehearing the Carrier also suggested that to base the monthly allowance on non-agreement earnings could also create a hardship for employees who earned less as non-agreement employees than as agreement employees. In conclusion, the Carrier argues that in order to prevent either a windfall or a hardship for these employees, the monthly allowance should be based only upon the earnings of the position from which the employee was dismissed or displaced.

THE OPINION

This case involves the proper method of calculating test period earnings in order to determine the monthly allowances of employees affected by a New York Dock transaction. The issue is whether the allowances should be based upon compensation earned in both non-agreement and agreement positions.

The Claimants in this case all held non-agreement positions during the year prior to the transaction giving rise to this dispute. Sometime during that year each Claimant moved to an agreement position. These initial moves are not the New York Dock

transaction(s) at issue here. Rather, once the Claimants entered their agreement positions, they were subsequently displaced or dismissed by a merger-related transaction that the Parties agree entitled them to New York Dock benefits. The question then is whether the Claimants' monthly allowances authorized because of this transaction should be based in part on compensation earned in their agreement positions.

The applicable language of the New York Dock Conditions states,

> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and providing further, that such allowance shall also be adjusted to reflect subsequent general wage increases.
> (Article I, Section 5(a), emphasis added).

The Carrier also points to the language determining a dismissed employee's allowance as relevant,

> A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.
> (Article I, Section 6(a)).

The Committee concludes that the literal language of these sections should be applied, and that all of a Claimant's earnings with the Carrier during the prior year, whether from

agreement or non-agreement positions, are to be included in the test period earnings.

As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon "total compensation" in the service of the Carrier "during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction." The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the Carrier for the year prior to the transaction.

The Committee is bound to apply the literal language of the New York Dock Conditions, unless the Carrier can show a compelling reason why this straightforward interpretation does not reflect the actual intent of the Parties. The Committee concludes that the Carrier has not met this burden.

Much of the Carrier's argument concerns whether non-agreement earnings should be credited towards the calculation of the monthly allowance. However, the Committee concludes that the Carrier's full position is that the monthly allowance should be based only upon the earnings of the position held by an employee at the time of the transaction. The Committee makes this determination from the Carrier's letter quoted at p. 10 of the Employees' Submission, and from the last paragraph of the

Carrier's second written submission in this case, submitted on December 19, 1988.

This evidence suggests that the Carrier is seeking to deny credit for any compensation, even that earned in agreement positions, if a Claimant held more than one job in the applicable year. This interpretation directly contradicts the New York Dock language at issue here, which does not refer to the last job held by a Claimant prior to the transaction. In contrast, it refers to the "total compensation" earned by an affected employee in the prior year, in the service of the Carrier. This expansive language suggests that the drafters of the document contemplated that an employee might hold more than one position in the course of that year.

Furthermore, if the Parties had intended the result sought by the Carrier, there would have been no need to calculate an average compensation for the entire prior year. The Parties simply could have taken the wages of an employee at the time of his transaction, or gone back a month or two to even out any irregularities caused by calculations made on only one or two weeks' pay.

The Committee concludes therefore that nothing in the language of the New York Dock Conditions suggests that the Parties intended to exclude wages earned from a job other than the job held at the time of the transaction. Furthermore, nothing suggests that there was an intent to differentiate

between compensation earned in agreement as opposed to non-agreement jobs.

The Carrier argues, however, that to permit calculations based upon an employee's non-agreement income would provide a "windfall" to the Claimants. As the Carrier also acknowledges, however, the unusual employee who was earning more as an agreement employee than in his former non-agreement job would suffer a hardship under the Organization's formula for calculating allowances.

The assumption behind the Carrier's position is that the New York Dock agreement demands that an employee should be in the same position -- no better and no worse -- after a transaction than if he had continued to work in his job. Allied Services Division/Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes vs. Western Railroad Association, (Dennis, Ref). Although there is some logic to this argument, in fact the New York Dock Conditions state only that an employee should not be placed in a worse position as a result of a transaction.

Furthermore, even if the Carrier's interpretation were correct, the issue here may be cast as "what is a 'better or worse' position?" The Carrier urges that the Committee compare a Claimant's position on **the day before** the transaction with the day after. The Organization measures the Claimant's position on the basis of **the year before** the transaction date. The language of the Agreement supports the latter position.

In addition, the arbitration case relied upon by the Carrier contains facts which are distinguishable from those at issue here. There Referee Dennis excluded overtime earnings due as a result of a one-time job moving office furniture, files etc. to a new office. The decision was based on the view that it was unreasonable to include "casual or unassigned overtime as well as most other forms of compensation received by employees not directly related to their basic jobs." (Decision, p. 8, Carrier Exhibit A). However, the compensation at issue here was not casual or overtime earnings. Instead, it was directly related to the Claimants' basic jobs during the test period. Therefore, the rationale of that decision does not apply.

As a closing matter, the Committee has not based this decision on the Organization's position that the Carrier's own compromise position, which would have taken into account some of a Claimant's non-agreement earnings, demonstrates the Carrier's lack of confidence in the position it has brought before this Committee. The Committee views the Carrier's compromise offer as a settlement proposal offered in an attempt to resolve this dispute. To base this opinion on that offer would discourage both Parties from making similar offers to settle such disputes. Therefore as a matter of principle the Committee has not considered the offer as an indication of the strength of the Carrier's position.

In conclusion, the Committee determines that the literal language of the New York Dock Conditions applies, and the monthly

allowances must be based upon all compensation received by the Claimants for service to the Carrier in the applicable year.

AWARD

The proper method for computing test period averages is to include both agreement and non-agreement compensation earned during the test period.

Richard D. Meredith
Carrier Member

William R. Miller
Employe Organization Member

Lamont E. Stallworth,
Neutral Member

Dated this 28th day of February, 1989.

City of Chicago.
County of Cook.
State of Illinois.

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AWD260
Referee:Fletcher
Fin. Docket:28905
Carrier(s):CSX
Union(s):IBEW
Award Date:10-3-90
NYD Articles:Art. I, § 5

In the Matter of Arbitration, between:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
System Council No. 6

and

CSX TRANSPORTATION, INC.

Decision of Arbitration Committee
pursuant to Article I, Section 11
of the
New York Conditions (350 I.C.C. 60 (1979))
Imposed by the Interstate Commerce Commission
in
Finance Docket No. 28905 (Sub No. 1)

John C. Fletcher, Chairman & Neutral Member

C. A. Meredith, Employee Member
IBEW, System Council No. 6

R. D. Hiel, Carrier Member
CSX Transportation, Inc.

October 3, 1990

INTRODUCTION:

On January 26, 1987, Carrier served notice on the Organization, pursuant to the provisions of the September 25, 1964, National Agreement of its intent to transfer certain mechanical work from its Louisville, Kentucky shops to Corbin, Kentucky. Five months later, to the day, an Implementing Agreement was reached, which provided that New York Dock Conditions, (New York Dock Railway Control - Brooklyn Eastern

District Terminal, 360 I.C.C. 60 (1979)), would be applicable t the transaction.

Mr. C. T. McKeehan, the herein Claimant, retained seniority in the Electrician's Craft at Louisville, Kentucky. However, at the time of the transaction he was working as a non-agreement Supervisor at Carrier's Evansville, Indiana Locomotive Shop. In late 1987, Carrier downsized its non-agreement Supervisory work force. McKeehan, because of his relatively low ranking in this group, was released from his Supervisory position. On November 12, 1987, he exercised his Electrician's Craft seniority.

McKeehan was allowed to place himself at Corbin. He was advised that his Test Period Average, for protective pay purposes, would be computed in the following manner:

> In order to compute what your protected rate would have been if you had been an electrician at South Louisville at the time of the transfer of work to Corbin, we have requested the Test Period Averages computed at the time of the coordination for the contract employees immediately above and below you on the seniority roster. As soon as that information is available, we will take an average of those two Test Period Averages and that amount will be used as your guarantee rate. This will not be equivalent to your supervisory rate of pay.

The Organization filed a protest to this method of computation of McKeehan's Test Period. It asked that his Test Period be determined as provided in the second paragraph of Section 5(a) of the Conditions.

It is the parties disagreement on the method of establishing Mr. McKeehan's Test Period Average which is the dispute before this Arbitration.

QUESTION AT ISSUE:

The Organization fashions the Question at Issue in this matter to be:

> (1) Is Electrician C. T. McKeehan entitled to a Test Period Average under New York Dock derived from his earnings received in the twelve (12) months in which he performed services immediately preceding the date of his displacement?
>
> (2) As an employee protected under New York Dock, what is the amount of the Test Period Average for Electrician C. T. McKeehan?

While Carrier fashions it slightly different:

> Was the Test Period Average of Corbin, Kentucky, Electrician C. T. McKeehan properly arrived at by the Carrier's method of computation?

There are no procedural or jurisdictional impediments to an award on these questions.

THE POSITION OF THE PARTIES:

The Position of the Organization:

The Organization contends that the only proper method of computing Mr. McKeehan's Test Period Average is to literally follow the method set forth in Section 5 (a) of the Conditions. In doing so, it argues, Carrier must consider Claimant's earnings received in the twelve months in which he performed Carrier service immediately preceding the Date of his displacement, which must include his earnings as a non-agreement supervisor.

The Organization argues that Carrier's suggested method of establishing Claimant's Test Period Average, averaging the earnings of the individuals above and below McKeehan and averaging these results to determine his TPA is arbitrary and without basis under the Implementing Agreement or the Conditions.

In support of its position the Organization relies up a number of Awards of various tribunals, but mainly it bottoms its case on New York Dock Arbitration, TCIU v. UP, Stallworth, Arbitrator, (February 28, 1989), which concluded that:

> The proper method for computing test period averages is to include both agreement and non-agreement compensation earned during the test period.

The Organization asks that this Arbitration establish Claimant's TPA at $3,475.00 per month, (his average monthly compensation as a supervisor), plus increases.

The Position of the Carrier:

Carrier contends that Claimant, (as a promoted employe returning to the Craft subsequent to the Coordination), derives entitlement to protective benefits from language within the Implementing Agreement which only conveys:

> ... whatever rights (he) may have had if (he) had been present at the time of the coordination.

The contemplates treating McKeehan as an Electrician and not as a non-agreement Supervisor when developing his TPA.

It argues that the way it developed McKeehan's TPA was consistent with prior arbitration Awards on the subject. Carrie cites a number of decisions on the subject, with particular emphasis on Award 433, SBA 605, Eischen, Referee, (May 21, 1984), stating:

> It is unreasonable to the point of absurdity to conclude that the official position worked, irrespective of compensation, should establish the protected rate which is the quid pro quo for continued (resumed) employability under the BRAC Agreement.

Carrier disputes that the award of Arbitrator Stallworth, relied on by IBEW, is appropriate because if it is followed non-agreement Supervisory employees returning to their

Craft would receive more than:

> ... whatever rights they may have had if they had been present at the time of the coordination.

It contends that the averaging method used in determining Claimant's TPA was equitable and proper in the circumstances present in this case.

DISCUSSION:

This case involves the correct method to be used in establishing Test Period Averages of an Electrician who performed no service within his Craft in the twelve month period immediately preceding his return to his Craft and subsequent inclusion within coverage of New York Dock protection. The issue is whether his TPA should be based on compensation earned in a non-agreement Supervisory position or if it should be based on an average derived from the earnings of the two individuals immediately above and below him on the seniority roster. (Carrier indicates that it has been unable to develop any earning data on Mckeehan as an Electrician because of the length of time he has been away from Craft and the unavailability of payroll records back that far.)

It is our opinion that Mr. McKeehan's TPA must be developed in the manner prescribed in Section 5 (a) of the Conditions. Support for any other method of development, no matter how equitable it may appear to some, simply cannot be found in the language of the Implementing Agreement or in the provisions of the Conditions. Moreover, as will be discussed in more detail below, prior arbitration authority supports the contentions of the Organization on this point and not those advanced by Carrier.

The language contained in Section 5(a) has been in place since 1979. And even before that similar, if not identical, language appeared in Section 6 of the May 1936, Washington Job Protection Agreement, which, by all accounts, was the precedent establishing forerunner for the I.C.C.'s earlier, Oklahoma, New Orleans and Southern-Central of Georgia, Employee

Protective Conditions, required to be imposed in abandonment anc merger transactions by Section 5 (2) (f) of the Interstate Commerce Act. From time to time negotiators in drafting employe protective and implementing agreements have altered the formula established by WJPA Section 6 and/or sections of I.C.C. employee protective conditions, to suit their situations, but this was no done in the transaction under review here.

The fact that the parties to the Implementing Agreemen did not, intentionally or unintentionally, see fit to alter, wha others have termed "the straightforward language of Section 5(a)", as it concerns the establishment of Test Period Averages, must be given great weight and precludes subsequent alteration, on our part thru the Arbitration process, on the basis that one party now considers that a literal application of a TPA under the formula provided would be lacking in equity.

This Carrier and this Organization spent five months, from the date notice was given to the date the Implementing Agreement was signed, with the Louisville - Corbin transaction in an active negotiating status. While it is understood that in that period full time negotiations did not occur, it is clear that considerable thought, nevertheless, went into the process of drafting a suitable Implementing Agreement. The resulting product of these efforts is thoroughly detailed and contains no less than 23 side letters covering almost every imaginable subject and/or contingency. It is notable that while the negotiators saw fit to modify some provisions of New York Dock, the TPA development formula provided in Section 5 (a) was left unchanged.

IBEW Letter No. 13 to the Implementing Agreement clearly provides that non-agreement Supervisors who lose their jobs involuntarily may exercise seniority rights back into their Craft and be entitled to whatever rights they would have enjoyed if they had been present at the time the coordination occurred. When this provision was included within the Agreement it should have been apparent to all involved in the negotiations that such employees were receiving rates of pay greater than employees working exclusively within the Craft. The parties were, we are certain, also aware of the language of Section 5 (a) of NYD Conditions on development of TPA's.

However, they did not see fit to provide new and different language altering the TPA development formula in such circumstances. It would be an affront to the Arbitration process to do so for them now. Especially since we are not being asked to interpret intent of the parties or obviously ambiguous language, but, instead, are being asked to sidestep "straight forward language" because it is perceived as lacking equity.

Carrier contends that its development of Mckeehan's TPA is consistent with prior arbitration Awards on the subject. It stress adherence to the result of SBA 605, Award No. 433. We do not find Award No. 433 faulty or inappropriate in the circumstances present there. However, we have difficulty in accepting it as precedent in our case because of two critical factors.

First it should be observed that compensation guarantees in the February 7, 1965, Agreement are bifurcated. Regularly assigned employees are protected with regard to their normal rate of compensation as it existed on October 1, 1964, (plus increases). Other than regularly assigned employees are protected with a monthly displacement allowance, developed somewhat similarly to those under Section 5 (a) of NYD. However, the parties to the February 7, 1965, Agreement, the controlling instrument involved in Award No. 433, adopted several interpretative Questions and Answers which clearly expressed their intention to exclude certain non-Craft employment which may have occurred earlier. One question, for example was:

> Question No. 9: Can employment in more than one craft be counted in determining protected status?
>
> Answer to Question No. 9: Ordinarily no: however, in cases such as promotion of a telegrapher to train dispatcher, promotion of a clerk to yardmaster, etc., where the seniority in the craft from which promoted is retained, employment in the higher classificaiton will be counted.

If service in another craft would not ordinarily be credited under the February 7, 1965, Agreement, it would also seem that the earnings received in that craft would not be used

in development of TPA's. But in those instances where such other craft service was to be counted, the parties to the February 7, 1965, Agreement developed a computation procedure which met this contingency. Their solution is found in the Answer to Question No 1, reading in part:

> To the extent that an employe whose guarantee is governed by Section 2 of Article IV has compensated service in such other craft, such service will also be included in determining the base period average earnings and hours paid for. However, his base period average monthly earnings shall be computed by taking his average hourly earnings in the base period in the craft in which he is protected (adjusted to include subsequent general wage increases), multiplying by the total number of hours paid for in the base period in both crafts and dividing by 12.

It is not our purpose here to interpret the February 7, 1965 Agreement, but, it seems that the Answer to Question No. 1 established a formula where the hours worked in the other Craft are added to the hours worked in the protected employees Craft and both are used with the average hourly earnings from the Craft in which protected to develop a TPA. No such similar agreed to interpretation exists with respect to Section 5 (a) of New York Dock or the June 26, 1987, Implementing Agreement, perhaps because the Conditions and the Implementing Agreement do not specifically exclude Carrier earnings from sources outside an employees Craft, which appears to be the case, for the most part, under the February 7, 1965 Agreement.

Each of the other awards from SBA 605, submitted by Carrier as support for its contentions, have been carefully reviewed. They are determined not to be controlling because of the special interpretations placed on the February 7, 1965, Agreement, and there are no similar understandings in place for NYD and the Implementing Agreement, with regard to Section 5 (a), which we are aware of.

Carrier also has supplied Award 1, SBA 860, Seidenberg Referee, (November 20, 1976), dealing with a dispute over base period compensation and time paid for under the 1966 Penn-Centra Merger Protective Agreement. It is from the novel remedy generated in this Award that Carrier developed its peer averagin concept which it seeks to apply to Mckeehan's situation. Award 1, SBA 860 cannot stand as precedent here because language of th UTU Merger Protective Agreement, under review there, detailed which service would count and provided special considerations on periods while absent on leave for union business as well as time working as an official, supervisory or in a fully excepted position.

For example the UTU Penn-Central Merger Agreement developed train service employees test periods from:

> ... the individual's average monthly compensation for the last twelve months in which he performed service in train service, ...

A similar provisions is not present in the language of the Conditions being reviewed here.

Carrier has stressed that by using language reading:

> "... shall be entitled to whatever rights they may have had if they had been present at the time of the coordination."

in the Agreement and Side Letter 13, it is manifest that it was the parties intention to treat returning non-agreement Supervisors as if they had worked in the Craft in the 12 months preceding the coordination that they would only be protected at the level of compensation they would have received it they had worked in the Craft during that time.

Even if this argument were accepted in total as presented, which it is not, TPA's would still have to be developed in accordance with the procedures provided in the Conditions, which the parties did not modify. This procedure requires examination of the earnings and hours in the preceding 12 months and taking the "total compensation" received and divide

this number by the "total time paid for." This formula does not provide an exclusion of earnings received in higher rated servic and it does not provide for an exclusion of earnings received in lower classes of service. The formula is arbitrary - providing for no exceptions of any type, and while some may argue that it is not equitable to protect a demoted Supervisor at his higher rate others may argue that a recently promoted Journeyman Mechanic is not treated equitably when lower rated helper or apprentice service would be counted. But, regardless of which perspective of equity and fairness is considered, the formula is there, and that is what must be followed, unless the parties saw fit to alter its language. A situation not present here.

However, if a general statement indicating that returning Supervisors are to be entitled to whatever rights they may have had if they had been present at the time of the transaction, was intended to provide a different formula for developing TPA's it would have been quite simple to include this formula within the text of the Agreement. This of course was not done. This omission forces a conclusion that returning Supervisors are entitled to have their TPA's computed as provided by the language of Section 5(a) as if they had been present at the time of the coordination. This computation includes "compensation earned" in the preceding 12 months.

Many of Carrier's arguments here are similar to those considered and rejected in New York Dock Arbitration TCIU v. UP, Stallworth, Arbitrator, (February 28, 1989). In that case the contentions of the parties were stated to be:

> The Carrier contends that for purposes of calculating a Claimant's test period earnings, the Claimants may not include compensation earned in non-agreement positions. The Organization argues, however, that the New Dock Conditions require the benefits to be based upon the total compensation during the preceding year including non-agreement earnings.
>
> The decision of the Arbitrator held:
>
> The Committee concludes that the literal language of these sections [Article 1, Sections 5(a) & 6(a)] should be applied, and that all of Claimant's

> earnings with the Carrier during the prior year, whether from agreement or non-agreement positions, are to be included in the test period earnings.
>
> As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon "total compensation" in the service of the Carrier "during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction." The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the Carrier for the year prior to the transaction.

It is our view that this is a correct interpretation of the New York Dock Conditions. As such it will be applied to the matter under review here.

One additional point. TCIU v. UP, (supra), also stated that:

> The Committee is bound to apply the literal language of the New York Conditions, unless the Carrier can show a compelling reason why this straightforward interpretation does not reflect the actual intent of the Parties.

Carrier argues that in our case a "compelling reason" to use a different method of computing Claimant's TPA is that by protecting his non-contract rate of pay he would be receiving far more than whatever rights he may have had if he had been present at the time of the coordination.

This contention is found to be unpersuasive because, among other things, it operates from an assumption that it is "rate of pay" which is the factor being protected. "Rate of Pay" is not the element of protection; "compensation" is the term that is used and that is the element on which protection must be based.

Additionally, notwithstanding Carrier's contentions when this matter was being reviewed on the property and notwithstanding its arguments before this Arbitration, we have no persuasive showing that at the time the Implementing Agreement was under consideration and in negotiations the parties ever intended that Section 5 (a) ever be applied other than literally as written. Accordingly, Carrier has not shown a compelling reason why the straightforward language of Section 5(a) should not be applied to the development of Mckeehan's TPA.

Finally, it should be observed that Carrier insists that the Award in TCIU v. UP is in error. However, it does not cite a single other authority in which unaltered NYD Conditions are scrutinized and a different result is reached. As discussed above, each authority submitted by Carrier involved language which could fairly be interpreted to support the conclusion reached. These decisions, though, cannot be viewed as controlling in this matter because of the existence of significant language differences between the Agreements studied in those case and the Conditions under review here.

On the totality of the entire record we are compelled to make an Award in favor of the Organization.

IBEW v. NYD Arbitration

CSX McKeehan TPA

A W A R D

The Question at Issue posed by Carrier is answered, No.

Question 1, posed by the Organization is answered:

Electrician C. T. McKeehan is entitled to have his Test Period Average under New York Dock Conditions include all earnings received in the twelve month period in which he performed service immediately preceding the date of his displacement, including earnings he received while working as a non-agreement Supervisor.

Question 2, posed by the Organization is answered:

Electrician C. T. McKeehan shall have his Test Period Average determined by dividing separately by 12 the total compensation received and the total time for which he was paid during the last 12 months in which he performed service immediately preceding the date of his displacement.

John C. FLETCHER, Arbitrator
Chairman and Neutral Member

C. A. Meredith, General Chairman
Employee Member

R. D. Hiel, Manager Labor Relations
Carrier Member

I dissent

Dated at Mt. Prospect, IL., this 3rd Day of October, 1990.

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Arbitration Committee
Established Under Article I, § 11
of
"New York Dock" Protective Conditions

In the Matter of the Arbitration Between

CSX Transportation, Inc. (formerly Chesapeake and Ohio Railway Company)

- and -

Transportation Communication International Union

Subject: Test Period Average of Clerk G. L. Wimsatt

ARBITRATION COMMITTEE:

Cassaundra D. Anderson,
Manager Employee Relations, Carrier Member

Carl Brockett,
International Vice President, Union Member

Dana Edward Eischen, Neutral Chairman

Appearances

For the Company: James A. Bowen, Jr.,
Manager Employee Relations

For the Union: Darwin B. Kubasiewicz,
Assistant to the General Chairman

PROCEEDINGS

A dispute arose between the Transportation Communications International Union, C & O System Board of Adjustment (TCU or Union) and the CSX Transportation Company, Inc. (CSX or Carrier) concerning the interpretation and application of the second paragraph of § 5 (a) of the New York Dock Conditions (NYD), which had been incorporated by reference in a Memorandum Agreement between these Parties, effective October 24, 1987. Pursuant to § 11 of the NYD, the Parties mutually designated Dana Edward Eischen to serve as Chair and Neutral Member of an Arbitration Committee to hear and determine that dispute. By agreement of the Parties, the arbitration hearing was held at Richmond, Virginia on April 2, 1992, prior to which prehearing briefs were submitted and exchanged. At the hearing on April 2, 1992, both Parties were represented and afforded full opportunity to present oral and documentary evidence in support of their positions. The record was closed with submission of additional documentation received by the Committee in mid-April 1992. The Parties acquiesced in an extension of time to render the Award and Opinion of the Arbitration Committee.

ISSUE

The Parties were unable to stipulate to a joint framing of issue for submission to the Arbitration Committee. At the hearing the TCU framed the question as follows: "What is the proper method for computing test period averages when the test

period includes both agreement and non-agreement earnings?" For its part, CSX proposed that the following question was at issue in this case: "Was the Test Period Average of Clerk G. L. Wimsatt properly arrived at by the Carrier's method of computation?" The Chair of the Arbitration Committee observed that there was no substantial or material difference in the respective formulations of issue put forward by the Parties, but suggested that each might be embraced within a statement of issue posited in terms of whether the Carrier violated its contractual obligations in this case, as follows:

1. Did the Carrier violate § 5 (a) of the New York Dock Conditions in its computation of the Test Period Average of Clerk G. L. Wimsatt?

2. If so, what shall be the remedy?

PERTINENT CONTRACT PROVISIONS

MEMORANDUM AGREEMENT

Effective October 24, 1987

BETWEEN

CSX TRANSPORTATION, INC.
(formerly The Chesapeake and Ohio Railway Company)
(formerly Seaboard System Railroad)

AND THEIR EMPLOYEES REPRESENTED BY
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

Whereas, CSX Transportation, Inc. (CSXT) served notice July 23, 1987 pursuant to Article I, Section 4 of the "New York Dock" Labor Protective conditions of its intent to transfer, coordinate and otherwise reorganize certain clerical functions presently being performed for the CSXT (formerly Chesapeake and Ohio Railway, hereinafter referred to for convenience as C&O) by employees located on the C&O Western Division, District No. 7, at Cincinnati, Ohio, with certain

clerical functions being performed for CSXT (formerly Louisville & Nashville Railroad, referred to for convenience as L&N) by employees located on L&N Corbin Division District No. 12 at Corbin, Kentucky.

* * *

4. CSXT (former C&O) employees assigned by bulletin to positions, including guaranteed extra board positions, located on C&O District No. 7 will be afforded the opportunity to bid on advertised positions which are to be established at Corbin, Kentucky. Those employees not awarded any of positions as their jobs are abolished will exercise their seniority in accordance with the terms of the C&O Clerks' General Agreement.

* * *

10. (a) Employees adversely affected as a result of the implementation of this agreement will be entitled to the protective benefits of the New York Dock Conditions or option to elect benefits existing under other job security or protective conditions as more specifically set out in Section 3 of the New York Dock Conditions.

* * *

* * *

NEW YORK DOCK CONDITIONS

Finance Docket No. 28250

APPENDIX III

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* * *

5 Displacement allowances.-(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transition (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

* * *

10. Should the railroad rearrange or adjust its force in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

* * *

11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except Sections 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the

involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect a though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 hays, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representative so as to equal the number of labor organization representative.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

* * *

BACKGROUND

Mr. G. L. Wimsatt, (Claimant) began his career in May, 1971, as a yard clerk on a CSX predecessor line. IN 1976 he was promoted to a non-contract supervisor and in 1982, he was transferred to Corbin, Kentucky as an Assistant Trainmaster.

During the second half of 1987, CSX Transportation, Inc. implemented a systemwide force reduction of its management (non-contract) work force. The Carrier initially offered voluntary separation allowances equaling one year's salary to employees with five years or more service and one-half year's salary for employees with less time with the Company. The number separated in this fashion did not equal the target number of management employees to be reduced. Carrier then applied a system of rating and ranking, and any additional cuts deemed necessary within each department or office were made on the basis of the scores obtained during the rating and ranking process. Any employee whose position was abolished as a result of this downsizing had several options, among them exercising whatever seniority he held or accepting separation pay in the same amount that was previously offered on a voluntary basis.

As a result of his relatively low ranking (as compared to other non-contract supervisors in like job categories) Claimant's position of Assistant Trainmaster at Corbin, Kentucky was abolished on September 20, 1987. Mr. Wimsatt elected to exercise his clerical seniority at Cincinnati, Ohio, in lieu of accepting separation pay as provided in the offers made to management employees. He returned to contract status effective October 1, 1987.

In the meantime, at about the same time Mr. Wimsatt returned to the clerical craft, the Carrier coordinated certain clerical functions at its facilities at Cincinnati, Ohio, and transferred

some of those duties to its offices at Corbin, Kentucky. Following extended negotiations, on October 24, 1987 CXS and TCU executed the Implementing Agreement in connection with this coordination of work. That Agreement read in pertinent part as follow:

* * *

> 4. CSXT (former C&O) employees assigned by bulletin to positions, including guaranteed extra board position, located on C&O District NO. 7 will be afforded the opportunity to bid on advertised positions which ar to be established at Corbin, Kentucky. those employees not awarded any of the positions as their jobs are abolished will exercise their seniority in accordance with the terms of the C&O Clerks' Agreement.

* * *

> 10. (a) Employees adversely affected as a result of the implementation of this agreement will be entitled to the protective benefits of the New York Dock Conditions or option to elect benefits existing under other job security or protective conditions as more specifically set out in Section 3 of the New York Dock conditions.
>
> (b) Each employee entitled to the protective benefits and conditions referred to in subsection (a) above and who is also otherwise eligible for protective benefits and conditions under other protective agreements or arrangements shall within thirty (30) days from date affected be notified of his monetary protective entitlement under this agreement. Within fifteen (15) days of being advised of their monetary protective entitlement under the provisions of the attached Protective Benefits, such employee(s) will elect between the Protective Benefits and conditions attached hereto and the protective benefits and conditions under such other arrangement. Should any employee fail to make an election of benefits during the period set forth in this subsection (b), such employee shall be considered as electing the protective benefits and conditions attached hereto.

* * *

As a result of the exercise of seniority rights and

progressive displacements ensuing after the implementation of this Agreement, Claimant Wimsatt was displaced form his assignment of Relief clerk at the Piggyback Ramp at Cincinnati, Ohio by Clerk K. A. White on December 9, 1987. As Ms. White was a "displaced employee" as defined in Article I, Section 1 (b) of the conditions of New York Dock Labor Protection Conditions, Claimant Wimsatt was extended an election of benefits as reflected in Section 10 of the Memorandum Agreement, effective October 24, 1987 (*supra*).

The following letter of March 9, 1988 from Carrier, extending NYD benefits to Mr. Wimsatt, set forth a method of calculating his Test Period Average (TPA) which generated the present dispute:

> It has been determined the you [were} affected on December 21, 1987 and are therefore entitled to the protective conditions provided for in Section 10 of the aforementioned agreement [October 24, 1978 Implementing Agreement]. In order to compute a Test Period Average (TPA) under the New York Dock Protective Agreement it would be necessary to average your clerical earnings for the twelve (12) months prior to December 21, 1987. However, it has been determined that you were working as a non-contract official until October 1987. Therefore, in order to properly compute your TPA, TPA's were computed for the clerical employees immediately above you and below you on the seniority roster for the ten (10) months you had no clerical earnings. These two figures were then averaged and your actual earnings were added to determine the NYD benefits shown on the attached option sheet.

On March 9, 1988, Carrier also advised Claimant that, by its method of calculation, he was entitled to a monthly guarantee of $2,425.43. Claimant and the Organization took exception to Carrier's calculation and, by letter of June 7,

1988, the TCU Local Chairman/Vice General Chairman filed a claim reading in pertinent part as follows:

> The Carrier figured Mr. Wimsatt's base period average compensation by averaging the employee salary ahead of him on the roster and the employee behind him, This procedure is not mentioned in the Finance docket No. 28250. They arrived with a monthly compensation of $2,425.43. Mr. Wimsatt's guarantee by Section 5 of the New York Dock Conditions should be $3,503.97 per month.
>
> It is our position that the Carrier violated the New York Dock Conditions and continues to do so by the way they computed Mr. Wimsatt's average monthly compensation. It is our further contention that the Carrier should figure Mr. Wimsatt's average monthly compensation as stated in Section 5 of Finance Docket No. 28250.

The issue thus was joined on the property and remained unresolved through all levels of appeal until eventually the Organization invoked the arbitration provisions of Article I, § 11 of NYD. Subsequently, the Parties mutually created this Arbitration Committee to resolve the questions at issue in final and binding arbitration.

POSITIONS OF THE PARTIES

The following statements are extrapolated and edited from the respective prehearing submissions of the Parties.

Union

Briefly stated, Article I, § 5 (a) of the New York Dock (NYD) conditions was modeled by the ICC After Section 6 (c) of the Washington Job Protection Agreement of May 1936 (WJPA). Numerous awards of the WJPA Section 13 Committee have decided what constitutes the basis of the TPA of the displaced employee. See Dockets No. 62 and 63.

The Carrier, in its placement of Claimant Wimsatt in an arbitrary status in regard to position and compensation utilizing this as the basis of his TPA, has attempted to add exceptions to the conditions under which he gained protection where no such exceptions were expressly stated. The implementing agreement concerning the coordination created no exception, nor modifications, to the method and procedures provided in NYD for the calculation of the protected individual's TPA. Further, the accepted mode and method was, and still is, fundamentally set-forth in the conditions of New York Dock Labor Protection Conditions - Article 1, Section 5 (a).

Of concern to the Carrier, as reflected in its declination of this claim dated May 11, 1989 is that Claimant Wimsatt might gain a "windfall" in monetary protective benefits by his being affected by the coordination and the subsequent loss of his position. A universal accepted meaning of the term "windfall" is that of an unexpected piece of good fortune, or a sudden and large increase. In the Claimant's case, the elements made the basis of the calculation of his TPA do not fall within the accepted meaning of such a term as they correctly reflect his compensation received during his measurement period. It is also not an unexpected piece of good fortune but a benefit mandated by the provisions of the ICC imposed conditions of NYD in response to the Carrier's contemplated changes in operations. Additionally, it is not a sudden and large increase as it is the normal compensation that the Claimant received in his various positions held during the measurement period. There can be no question that the benefits described in Article I, Section 5 of New York Dock are the price to be paid (shared jointly by the employee in his loss of employment opportunities, as well as the employer in the mandated level of monetary protection), even if only borne by the employer for a limited period of time, for the meditated actions of management - actions that go on forever.

Clearly, the conditions of NYD are now, in the present, the extension of the WJPA and the basis of the elements to be included in the formula and subsequent figures arrived at in the individual's Test Period Average are historically well settled. Any support cited should address those specific provisions and benefits, not other provisions and benefits arising from disputes not associated with the matter at hand.

The salient fact of the dispute before you now is that the Claimant was affected by the transaction and there should not be a dispute in regard to the calculation of his monthly displacement allowance. The method and elements to be used are well defined in Article I, Section 5 of NYD and have long been applied uniformly throughout the rail industry. To rewrite the conditions of NYD, as the Carrier has attempted to accomplish by the stoke of its compensation pen, is well outside the jurisdictional parameters and managerial prerogative that any

Carrier might dope to enjoy.

Turning to supportive NYD arbitration awards, reference is made to Arbitrator John B. LaRocco's decision in Case No. 4, Award No. 5 of the Arbitration Committee between TCU and the MP railroad (March 1, 1988).

Finally TCU relies heavily upon the decision of Arbitrator Lamont E. Stallworth in the Arbitration Committee TCU and the UP Railroad (February 28, 1988).

> As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon 'total compensation' in the service of the Carrier 'during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction.' The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the carrier for the year prior to the transaction. [Underscoring added]

Arbitrator Stallworth, based upon the literal language of Article I, Section 5 of NYD and the intended wishes of the ICC, found in his award that: "The proper method for computing test period averages is to include both agreement and non-agreement compensation earned during the test period." The Organization fully supports this decision and has continually expressed its direct and logical application to the Carrier in relationship to the case before you. However, the Carrier has chosen to disregard the pure logic and application of this and all the other historically applicable awards entwined within this dispute.

TCU respectfully submits that the proper method as found in the arbitration awards cited and with the historic perspective couched therein - there exists but one correct method for the calculation of Claimant Wimsatt's TPA. That method is to apply the literal language of Article I, Section 5 of the New York Dock Protective Conditions and allow all railroad earnings by Claimant Wimsatt as a CSXT employee, whether it be on agreement or non-agreement positions, to become equally weighted elements in the proper calculation in arriving at the Claimant's entitlement. This calculation is literally described and prescribed in the Conditions of NYD as it relates to the transaction that affected the Claimant on December 8, 1987. Further, the Carrier should now retroactively pay Claimant Wimsatt that past due allowance since the December 21, 1987 inception of the erroneous calculations to which the Claimant has been subjected.

Carrier

Ideally, the Claimant's TPA should have been drawn from earnings made as a clerk at Cincinnati for the test period December 22, 1986, to December 21, 1987; however, the Claimant was working in a non-contract capacity during most of that time. In such situations, most awards on the subject have advocated going back to an employee's time in the craft to determine his TPA. In this regard, we direct the Board's attention to Special Board of Adjustment No. 605 Award No. 433 (Eischen). See also Award No 434 (Eischen). However, since it had been many years since Mr. Wimsatt had worked as a clerk, the necessary payroll records to calculate his TPA in that manner were no longer available.

The Carrier has faced this situation at other times in the past and has developed such TPA's by averaging the TPA's of employees above and employees below the individual on the seniority roster. As was explained in Carrier's letter dated March 9, 1988, the earnings of the clerical employees directly above him and below him on the seniority roster for the period of December 22, 1986, to October 1, 1987 were averaged to calculate a portion of the Claimant's TPA.

The way in which Mr. Wimsatt's TPA was developed is consistent with prior arbitration awards on the subject. See Award No. 1 of Special Board of Adjustment No 860 Conrail/TCU (J. Seidenberg, November 20, 1976), as follows

> In light of the existing payroll record, the Board concludes that the fairest and most reasonable resolution of the issue is to construct a base period earnings figure from date that should reasonably approximate the Claimant's earnings during the base period.
>
> The Carrier's Post Hearing Brief contains average monthly guarantee figures for six passenger conductors as of January 1, 1975 on the same seniority roster as the Claimant. Even though the Claimant had no test period earnings as a passenger conductor, the Board finds that it would be it would be appropriate to use the average monthly guarantee of the two conductors immediately receding the Claimant and the two conductors immediately following the Claimant on the roster, and thus construct both an average monthly guarantee and the average time paid as the protected hours during the base period, based on this data.
>
> * * *
>
> The Board finds that this is an appropriate resolution of the matter in dispute in view of the lack of substantial conclusive and probative evidence to

sustain the position of either party.

Arbitrator Seidenberg also found in a New York Dock arbitration between this Carrier and the IAMAW on October 3, 1990 as follows:

> In light of the aforestated Findings, the Committee finds that the Carrier could properly construct the Claimant's protected rate based on the earnings of those Machinists who occupied positions immediately above and below him on the Machinist Seniority roster at Louisville at the time of the coordination since the Carrier had no record of his machinist earnings when he worked as a machinist.

Given the limitations in the instant case, i.e., that the Claimant had not worked as a clerk for several years and records of his earnings were no longer available, The Carrier took the most reasonable and fair course of action by developing his TPA using the average of the TPA's of the employees above and below the Claimant on the seniority roster.

It is clearly stated in the New York Dock Conditions that the protection afforded therein is meant to guard against the adverse effects resulting from covered transactions only. See Article I, Section 1 (b), which provides:

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

It is the Carrier's position that for the displacement allowance to cover more than an adverse effect resulting from the transaction would clearly violate the intent of the protective conditions.

The Carrier has shown that the Claimant's entitlement to protection derives from protective conditions executed in connection with the transfer of work from Cincinnati to Corbin. On this basis, the Carrier acted correctly in developing Mr. Wimsatt's test period average hours and compensation based on the approximate amount of work he would have had as a clerk in the twelve months prior to the transfer of work using the wages of the clerks just senior and junior to him on the seniority roster.

OPINION OF THE CHAIRMAN

Both Parties recognized that the fundamental issues which are presented for determination in this case are not questions of

first impression by Boards of Arbitration in the railroad industry. Related, if not similar, disputes have arisen in the past under various protective conditions and have been arbitrated before various tribunals. Accordingly, the Parties to the present dispute each have presented the Committee with voluminous citations of authority which, they argue, support the countervailing positions they advance in this matter. In pursuing their "battle of awards", one or sometimes both of the Parties has cited as "authoritative precedent" one or more of the following interpretations of protective conditions by arbitration tribunals: **Washington Job Protection Agreement of May 1936** (WJPA § 13 Committee Dockets 62 and 63); **February 7, 1965 National Preservation of Employment Agreement** (SBA No. 605, Award Nos. 130, 195, 433 and 434); **1966 Merger Protection Agreement between the former Pennsylvania Railroad Company and the New York Central Railroad** (SBA No. 860, Award No. 1); **New York Dock Conditions** (UP Railroad/Bond, Topolasky, et. al., ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, September 25, 1985), (Norfolk & Western Rwy./Huggins, et. al., ICC Fin. Doc. 29455, Arbitration Committee Chair Robert O. Harris, November 24, 1985), (Delaware & Hudson Rwy./Gilchrist, ICC Fin. Doc. No. 29772, Arbitration Committee Chair Jacob Seidenberg, December 2, 1985), (Missouri Pacific Railroad/Currley, et. al., ICC Fin. Doc. No. 30,000, Arbitration Committee Chair David H. Brown, May 11, 1987), (UP Railway/BRAC Kelly, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, June 15, 1987),

(Delaware & Hudson Railway/Adams, et. al., ICC Fin. Doc. No. 29720, Arbitration Committee Chair Robert M. O'Brien, November 27, 1987), (UP Railroad/Maeser, et. al., ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Jacob Seidenberg, December 17, 1987), (Missouri Pacific Railroad and UP Railroad/TCU, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair John B. LaRocco, March 1, 1988), (UP Railroad/BLE, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, April 5, 1988), (UP/TCU, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, February 28, 1989), (Norfolk and Southern Corporation/TCU, ICC Fin. Doc. No. 29430, Arbitration Committee Chair George S. Roukis, April 19, 1989), (CSX/IAMAW, ICC Fin. Doc. Nos. 28905 and 30053, Arbitration Committee Chair Jacob Seidenberg, October 3, 1990); **Mendocino Coast Line Protective Conditions** (Boston & Maine Railroad/UTU, ICC Fin. Doc. No. 30965, Arbitration Committee Chair Robert E. Peterson, August 30, 1990).

Each of the Parties argues that one or more of the above cited antecedent cases requires an outcome favorable to their respective position, asserting the legal principles of *stare decisis* and/or *res judicata*.

Strictly speaking, the court-developed doctrines of *stare decisis* and *res judicata* do not apply in labor-management arbitration. No later arbitrator is bound in any legal or technical sense to follow the decision of a predecessor. Yet although prior arbitration awards are not binding in exactly the

same way that authoritative legal decisions are, as a practical matter they do have considerable authoritative force. In that connection, a leading commentator on the arbitration process makes the following important distinction: Giving authoritative force to prior awards when the same issue subsequently arises (stare decisis) is to be distinguished from refusing to permit the merits of the same event or incident to be relegated (res judicata). Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award. See Elkouri & Elkouri, How Arbitration Works, pp. 421-22, 4th edition (BNA, Washington, DC., 1985). See also Timkin Roller Bearing Company, 32 LA 595, 597-599 (Boehm, 1958).

Where a prior decision covers the same parties, issues, facts and contract language, a subsequent arbitrator often will consider that earlier award a binding part of the agreement. Even those who refuse to hold prior awards binding would give them serious and weighty consideration. One of the pioneer labor-management arbitrators stated the majority view to be: "Where a prior decision involves the interpretation of the identical contact provision, between the same company and union, every principle of common sense, policy and labor relations demands that it stand until the parties annul it by a newly worded contract provision." Pan American Refining Corp., 2 ALAA ¶ 67,937, ¶ 69,464 (Whitley McCoy, 1948). Time and again reported decisions by respected arbitrators have reaffirmed the

notion that an arbitrator with a proper regard for the arbitration process and for stability in collective bargaining, even though not technically bound, should accept an interpretation by a prior arbitration, if in point and if based in the same agreement, as binding. O & S Bearing Company, 12 LA 132, 125 (Russell Smith, 1949); Brewers Board of Trade, Inc., 38 LA 679, 680 (Burton Turkus, 1962). It is not necessary that the subsequent arbitrator endorse all of the reasoning expressed in the earlier opinion. What is important is that the earlier award contains a holding which is not erroneous. Lehigh Portland Cement Co., 46 LA 133, 137 (Clair Duff, 1965). In such circumstances, arbitrators generally conclude that it would be a disservice to the parties to subject them to the unsettling effects of conflicting and inconsistent interpretations of the same contract language in the same set of circumstances.

This Arbitration Committee has scrutinized the entire voluminous record, including hundreds of pages of antecedent decisions cited by the Parties and described above. Careful analysis reveals that most of these cases are distinguishable from the present case on the basis of fact, questions at issue, contract language and/or protective condition language. Of the many precedents cited, only two (2) directly address the interpretation and application of NYD § 5 (a) in circumstances like those presented by Mr. Wimsatt's situation.

One of these colorably authoritative precedents, upon which TCU chiefly relies, is the decision of Arbitrator Lamont E.

Stallworth and UP Railroad/TCU, ICC Fin. Doc. No. 30,000, Award No. 2, February 28, 1989) ("Stallworth Decision"). In the Stallworth Decision the Arbitration Committee was presented with the question: "What is the proper method for computing Test Period Averages when the test period includes both agreement and nonagreement earnings?". The Stallworth Decision considered and discussed the identical arguments raised by the Parties in the present case before answering that question as follows: "The proper method for computing test period averages is to include both agreement and nonagreement compensation earned during the test period". On the other hand, the other colorably authoritative precedent, upon which CSX chiefly relies, is the decision of Arbitrator Jacob Seidenberg in the CSX/IAMAW, ICC Fin. Doc. Nos. 28905 and 30093, October 3, 1990 ("Seidenberg Decision"). In the Seidenberg Decision the Arbitration Committee was faced with the following question: "Should the literal language of Article I, § 5 (a) of the New York Dock Conditions be applied in determining Claimant's Test Period Average earnings?". In the Seidenberg Decision the Arbitration Committee answered that question as follows: "The literal language of Article I, § 5 (a) of the New York Dock Conditions may not be applied in determining this Claimant's Test Period Average earnings." (Emphasis added) It is not surprising that each of the Parties to the present dispute takes comfort in their respective colorably authoritative precedent. They have presented this Arbitration Committee with the task of choosing which is

appropriate and controlling in the facts and circumstances presented by Mr. Wimsatt's situation.

A careful reading of the Stallworth Decision and the Seidenberg Decision, however, readily reveals that only the former stands as an authoritative interpretation and application of NYD § 5 (a) in circumstances identical to those presented by Mr. Wimsatt's situation. In short, a careful reading shows that the Seidenberg Decision is not authoritative precedent on the issue presented in the present case. In the Seidenberg Decision the Arbitration Committee did not even apply NYD § 5 (a) at all, because it held that the New York Dock Conditions did not apply in that case, as shown in the following excerpt from pages 14-15 of the Seidenberg Decision:

> The Committee finds that the New York Dock Conditions are not applicable to the Claimant because he was not disadvantaged or adversely affected as a result of a "transaction" as defined in New York Dock nor was he an "employee" within the meaning and purport of NY Dock. On the contrary, the Committee finds that whatever protection benefits the Claimant derived, he derived them from the provisions of the May 29, 1987 Implementing Agreement. While this Implementing Agreement may have granted a form or type of NY Dock protection, nevertheless it was not the New York Dock protection that was prescribed by the ICC in 1980 and 1982 when it approved the several mergers that culminated in the establishment of the CSX Transportation, Inc.

There are other significant factual differences between the case decided by the Seidenberg Decision and that with which this Arbitration Committee is now presented. But the above-quoted distinction makes it absolutely clear that the Seidenberg Decision is of no authoritative value whatsoever in deciding the

proper interpretation and application of NYD § 5. (a) in this matter now before us.

Unlike the Seidenberg Decision, in the present case there is no question and no dispute between the Parties that Claimant Wimsatt was entitled to New York Dock protection benefits. The only dispute is whether, in computing the TPA under NYD § 5 (a), nonagreement earnings as well as agreement earnings during the past twelve-month period must be counted. That is precisely the issue faced, considered fully and decided authoritatively by the Stallworth Decision. It is worth quoting extensively from the Opinion of the unanimous Arbitration Committee in the Stallworth Decision to demonstrate how it is "on all fours" with the facts, issue and circumstances now before us in Mr. Wimsatt's claim:

* * *

> THE OPINION
>
> This case involves the proper method of calculating test period earnings in order to determine the monthly allowances of employees affected by a New York Dock transaction. The issue is whether the allowances should be based upon compensation earned in both non-agreement and agreement positions.
>
> The Claimants in this case all held non-agreement positions during the year prior to the transaction giving rise to this dispute. Sometime during that year each Claimant moved to an agreement position. These initial moves are not the New York Dock transaction(s) at issue here. Rather, once the Claimants entered their agreement positions, they were subsequently displaced or dismissed by a merger-related transaction that the Parties agree entitled them to New York Dock benefits. The question then is whether the Claimants' monthly allowances authorized because of this transaction should be based in part on compensation earned in their agreement positions.

* * *

The Committee concludes that the literal language of these sections should be applied, and that all of a Claimant's earnings with the Carrier during the prior year, whether from agreement or non-agreement positions, are to be included in the test period earnings.

As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon "total compensation" in the service of the Carrier "during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction." The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the Carrier for the year prior to the transaction.

The Committee is bound to apply the literal language of the New York Dock Conditions, unless the Carrier can show a compelling reason why this straightforward interpretation does not reflect the actual intent of the Parties. The Committee concludes that the Carrier has not met this burden.

* * *

The Committee concludes therefore that nothing in the language of the New York Dock Conditions suggests that the Parties intended to exclude wages earned from a job other than the job held at the timing of the transaction. Furthermore, nothing suggests that there was an intent to differentiate between compensation earned in agreement as opposed to non-agreement jobs.

The Carrier argues, however, that to permit calculations based upon an employee's non-agreement income would provide a "windfall" to the Claimants. As the Carrier also acknowledges, however, the unusual employee who was earning more as an agreement employee than in his former non-agreement job would suffer a hardship under the Organization's formula for calculating allowances.

The assumption behind the Carrier's position is that the New York Dock agreement demands that an employee should be in the same position -- no better and no worse -- after a transaction than if he had continued to work in his job. Allied Services Division/Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

vs. Western Railroad Association, (Dennis, Ref.). Although there is some logic to this argument, in fact the New York Dock Conditions state only that an employee should not be placed in a worse position as a result of a transaction.

Furthermore, even if the Carrier's interpretation were correct, the issue here may be cast as "what is a 'better or worse' position?" The Carrier urges that the Committee compare a Claimant's position on the day before the transaction with the day after. The Organization measures the Claimant's position on the basis of the year before the transaction date. The language of the Agreement supports the latter position.

* * *

In conclusion, the Committee determines that the literal language of the New York Dock Conditions applies, and the monthly allowances must be based upon all compensation received by the Claimants for service to the Carrier in the applicable year.

* * *

We find that the above quoted Arbitration Committee decision in "on all fours" in every material aspect with the facts, contract language, protective condition language and questions at issue which are presented in the present case concerning Mr. Wimsatt's § 5 (a) calculations. Significantly, it should be noted that the Stallworth Decision was a unanimous decision by that Arbitration Committee. Whether we would have reached the same result if faced *de novo* with the question at issue is not relevant. The Stallworth Decision is carefully reasoned, fully supported by the evidence, and contains no glaring or palpable error. We are not technically bound to follow the teachings of the Stallworth Decision, but the principles enunciated above favoring stable labor management relations and predictability in contract interpretation dictate that this Arbitration Committee

follow the same course in the present case as was followed in the Stallworth Decision. On the basis of all of the foregoing, we conclude that Carrier must apply NYD § 5 (a) literally in computing Claimant Wimsatt's TPA for the twelve months in which he performed agreement or non-agreement services immediately preceding the date of his displacement.

AWARD OF THE ARBITRATION COMMITTEE

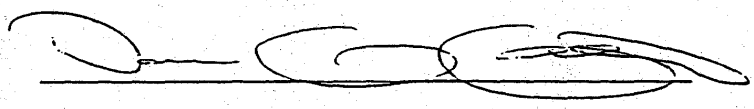
1) The Test Period Average of Clerk G. L. Wimsatt was not properly arrived at by the Carrier's method of computation.

2) Carrier violated § 5 (a) of the New York Dock Conditions in its computation of the Test Period Average of Clerk G. L. Wimsatt.

3) The remedy for the violation and the proper method of computing NYD § 5 (a) Test Period Averages, when the test period includes both agreement and non-agreement earnings, is to include both agreement and non-agreement compensation earned during the test period.

4) Carrier is directed to compute G. L. Wimsatt's Test Period Average in accordance with the directive of the Arbitration Committee set forth above.

5) Carrier shall implement this Award of the Arbitration Committee within thirty (30) days of its execution by a majority of the Committee.



Dana Edward Eischen, Chairman
Signed at Ithaca, New York on July 4, 1992

Carl Brackett
Union Member
Signed at Jacksonville, FL
on July 20, 1992

Cassaundra D. Anderson
Company Member
Signed at Jacksonville, FL
on July 20, 1992

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**ARBITRATION PURSUANT TO ARTICLE 1, SECTION 11,
OF THE MENDOCINO COAST LABOR PROTECTIVE CONDITIONS**

TRANSPORTATION - COMMUNICATIONS INTERNATIONAL UNION	
- AND -	
BOSTON AND MAINE CORPORATION (B&M), MAINE CENTRAL RAILROAD COMPANY/PORTLAND TERMINAL COMPANY (MEC), SPRINGFIELD TERMINAL RAILROAD COMPANY (ST)	Interstate Commerce Commission Finance Docket 30965

Joseph A. Sickles
Neutral Member

David F. Sibley
Carrier Member

Carl H. Brockett
Organization Member

QUESTIONS AT ISSUE

Is Claimant James M. Avjian, Jr., an affected employee as specified in Article 1, Section 1, of the Mendocino Coast Protective Conditions as imposed by the Interstate Commerce Commission when granting the control of the Maine Central Railroad by Guilford Industries?

If so, will the calculation of Claimant Avjian's Test Period Average include all earnings during the twelve-month period previous to his being affected by the transaction?

BACKGROUND

When the Interstate Commerce Commission approved the Boston & Maine Corporation (B&M) and Maine Central Railroad Company/ Portland Terminal Company (MEC) request to lease their properties to Springfield Terminal Railway Company (ST), the ICC imposed the "Mendocino Coast" labor protective provisions, which provided up to six (6) years of protection to employees adversely affected by the lease transaction, even though the ICC concluded that the transactions were not the precise equivalent of a merger, consolidation or acquisition of control.

The ICC recognized, however, that the impact of the transactions was close to that of a merger or consolidation, and that a large number of employees had been, or would be, affected by related transactions.[1]

The award referred to in Footnote No. 1 was vacated by the ICC and Arbitrator Harris was designated as a "new" Arbitrator. He issued an implementing arbitration award in March of 1990, which ultimately was affirmed by the ICC.

The Claimant started employment with MEC as a Clerk in May of 1971. In August of 1980, he accepted a Management position with MEC and, thereafter, accepted Management positions "of greater responsibility" with MEC and ST. Until April 30 of 1991, he was the Director of Manpower Utilization, but the position was

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[1]To emphasize its contentions concerning the extent of the transactions, the organization has cited Arbitrator Kasher's June 12, 1988 award regarding an implementing agreement.

abolished at that time. The Claimant exercised seniority and returned to a position covered by the Organization's bargaining unit. In anticipation of the abolishment, the Claimant, on April 26, 1991, requested that the Carrier provide him with a test period average (TPA) since was allegedly affected by the involved transaction.

On October 15, 1991, the Carrier advised that it was not possible to apply the normal procedure since calculations are based upon an individual's payroll records for the twelve (12) month period prior to being effected by a lease transaction. But, the Claimant had been a salaried employee during those twelve (12) months and, in lieu, a comparable test period average of $2,061, with 165 hours, was determined "...by reference to the applicable seniority roster". The Claimant was also advised, in the same document, that:

> In view of the fact that you were a management employee before and during the lease transaction, you should anticipate the denial of any claims on the basis that you were not effected by the lease transaction.

Nonetheless, the Claimant filed a claim stating that his regular wages during the month were $2,955.20 and, based upon his own TPA calculation of $3,125, he asserted that he was owed $169.80.

The record contains similar claims for varying amounts, depending upon the actual amounts received during each month.

In addition, the Grievant responded to the Carrier's October 15, 1991 letter on December 3, 1991, asserting the $3,125 TPA, and

disputing any anticipated denial of claims since, according to the Claimant:

> ...the fact that I was a Management employee before and during the lease transactions supports my contentions that I was definitely effected by the transactions. AFTER THE TRANSACTIONS, TWO POSITIONS WERE CONSOLIDATED INTO ONE POSITION. (Emphasis contained in original.)

The Claimant also contended that he would still be the Officer-in-Charge of the Maine Central crew operations at either of two (2) locations if the lease transactions had not occurred.

Additional correspondence was forwarded on February 20, 1993 by the Grievant concerning the matter. Since his claims were continuously denied, he forwarded additional correspondence on April 5, 1993, referring to a March 26, 1993 letter.

On August 20, 1993, a conference was held between Claims Administrator Casarano and former District Chairman Firth. The record before me contains an August 24, 1993 letter to Firth from Casarano which states:

> It was agreed that [Claimant] is not protected under Mendocino Coast, at which time I gave you a copy of my letter dated July 20, 1993 explaining why he was not protected.

The July 20, 1993 referenced letter was to the Claimant from Casarano, denying claims since the Grievant was "...before, during and subsequent to the lease transactions you were a management official. Management officials are not covered by the provisions of Mendocino labor protection. A long series of arbitration awards support this. Please be advised that your claim remains denied."

The record contains no response from Firth to Casarano.

In a September 16, 1993 letter to the Claimant, Casarano continued to deny claims because the Claimant was "...not affected by a lease transaction and are not entitled to labor protection". However, that letter makes no reference to the August 24, 1993 letter from Casarano to Firth, cited above.

In July of 1994, the Organization requested that the matter be docketed for discussion and discussion was conducted on November 6, 1994.

On May 2, 1995, the Organization requested additional information which was provided on May 18, 1995.

On July 27, 1995, the Organization invoked arbitration, pursuant to the Labor Protective Provisions.

Eventually, the undersigned was designated by the parties from a list submitted by the National Mediation Board to serve as Chairman and Neutral Member of the Committee.

An oral hearing was conducted in Boston, Massachusetts on January 26, 1998; all parties were present and represented and were afforded full opportunity to present evidence, testimony and argument.

POSITIONS OF THE PARTIES

Organization's Position

A "displaced employee" is an employee who, as a result of a transaction, is placed in a worse position with respect to his compensation and rules governing his working conditions, and a "dismissed employee" is one who is deprived of employment with the

railroads because of the abolition of his position, or the loss of a position as a result of exercise of seniority rights by another employee whose position is abolished as a result of the transaction.

The labor provisions provide for a "protected period", which extends from the date which the employee is displaced or dismissed, through the expiration of six (6) years therefrom, as long as the employee had been in the employ of the railroad for at least that period of time.

Article III of the protected provisions states that:

> Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

Through its claim presentations, the Organization has "conclusively established" a prima facie case on Claimant's behalf, since his office was abolished as a direct result "...of the massive merging of operations brought about by ICC approval of Finance Docket No. 30965".[2]

Based upon the wording of the Mendocino Coast Protected Provisions, all employees are equal and equally entitled to protection since representation by a labor organization is not a condition of coverage.

The Union argues that the language of New York Dock and other ICC-imposed employee protective provisions are identical to Mendocino Coast and, thus, awards issued interpreting those other provisions are equally applicable here.

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[2]The Organization points out "...that claimant was affected by the transaction has never been disputed by the carrier in any of the correspondence or discussions of the matter between the parties". (Emphasis included in original.)

The Union has cited a number of awards which have held that labor protective provisions apply to non-agreement employees. See for example, Kelly -and- BRAC (Stallworth - 1987), which found that the Claimant was entitled to protection under the New York Dock Conditions because of the loss of his non-agreement position, and his demotion to an agreement position.

Concerning the appropriate TPA, the Organization cites a 1989 in TCU -and- Norfolk Southern, stating that an employee displaced by a transaction who is unable to secure a position producing compensation (not rate of pay) equal to or exceeding the compensation received in the position from which displaced, is paid a monthly displacement allowance during the protective period which equals the difference between the monthly compensation in the retained position and the average monthly compensation of the position from which displaced. That is determined by dividing separately by twelve (12) the total compensation received during the last twelve (12) months immediately preceding the transaction. Consistently, the Union argues that in this case, the elements to be utilized in the calculation of the affected employee's TPA is to include all compensation, regardless of whether it was earned while working an agreement or non-agreement position. See, also, TCU -and- Union Pacific Railroad (Stallworth - 1989) and CSX -and- TCU (Eishen - 1992).

Carrier's Position

The Carrier recognizes that in the event of a dispute, it is incumbent upon a particular employee to identify the transaction, specifying the pertinent facts relied upon. It is then the railroad's burden to prove that something other than a transaction affected the employee. Because the Claimant was "...a member of the railroad's management team prior to, during, and following the leases of B&M and MEC to ST and was not affected by those leases". The Carrier argues that the return of the Claimant to a contract position was the result of a decline in business which is not a

transaction for which employee protection is imposed.[3]

Because certain benefits are available to "displaced employees", it is the Claimant's burden in this case to show that he is an "employee" of the railroad and, as a result of a transaction, he was placed in a worse position, with respect to compensation, etc.

Concerning the initial burden, the Carrier points out that "...for seven years before, and for four years after, claimant...was a railroad official." Moreover, it argues that as Director of Manpower Utilization, the Claimant was involved with the hiring of employees and could institute the process for firing employees. He could expend money by calling extra assignments and allowing overtime work, in addition to participating in the interpretation of Carrier policy and communicating that policy to employees. In short, the term "employee" as applied by the ICC includes "...only those persons in the railroad industry who are both subject to and entitled to union representation". That category includes rank-and-file employees and subordinate officials, but does not include officials with the level of responsibility which was given to the Claimant.[4]

The Carrier traces the term "employee" and "subordinate official" from its origins in the Transportation Act of 1920 through the Railway Labor Act, as enacted in 1926.

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[3]The Organization argued at the January 26, 1998 oral presentation of this case that Management had never previously raised the issue of "decline in business" and, thus, it is inappropriate to be raised for the Arbitration Committee's consideration at this level.

[4]The Carrier further defines its position concerning "subordinate officials" by stating that they are those who are entitled to Union representation but are not so represented.

On February 5, 1924, the ICC issued an order known as "Ex Parte 72" and the Carrier argues that "nowhere in the ICC's ex parte 72 decisions was the position of 'Director of Manpower Utilization', or its equivalent, been found to be that of employee or subordinate official". Further, the Carrier argues that no labor organization on the Guilford Railroads has ever attempted to bring the Claimant's position or an equivalent position within the scope of any collective bargaining agreement.

As a result, the Carrier argues that the ICC, when it imposed Mendocino Coast Protection in this case, recognized the use of the term "employee" as it has been accepted within the railroad industry and which includes only rank-and-file employees who are unionized, and those subordinate officials who are subject to and/or entitled to unionization. Further, had the ICC meant to include officials such as the Claimant, it would have done so through an imposition of "extraordinary protection".

The Carrier cites numerous cases which recognize that in order to prevail, the particular Claimant must show that there was a causal nexus between the particular action that placed the claim into operation and the Carrier action under the Finance Docket, and not every action initiated subsequent to a merger can be considered "ipso facto" pursuant to the merger. The Carrier argues that it is difficult to imagine how the loss of a Management position four (4) years after leases were completed could be directly caused by the leases.

In the event the Committee determines that the Claimant is entitled to displacement allowance payments, payments cannot be based on Management salary because "employee" is limited to rank-and-file employees and subordinate officials.

DISCUSSION

Unquestionably, the Claimant was in a non-bargaining unit position prior to, and after, the initial ICC approval action in this case. Based on the alleged nature of the Claimant's position, the Carrier argues that the Claimant was not a "employee", as contemplated by the Mendocino Coast labor protective provisions.

But, aside and apart from that argument, the Carrier has raised certain other allegations which it contends would also compel a denial of the claim. For instance, as its Exhibit F, the Carrier has included an August 24, 1993 letter from a Claims Administrator to a former District Chairman, which states, with reference to an August 20, 1993 conference, that: "It was agreed that [Claimant] is not protected under Mendocino Coast...". At the hearing, the Union advised that it had never seen such a document and that its inclusion here is "new evidence".

If, in fact, the Union (in preparation of this case) was not aware of the document, that may not necessarily be controlling since it appears to be a statement to a former District Chairman, which concedes the correctness of the Company's position. However, the record shows no further reference to the document and, in fact, as the case was further progressed on the property, the various Carrier officials who authored documentation did not rely upon an "asserted agreement" but, instead, continued to argue that the Claimant was not an employee, as defined in the labor protective provisions. Accordingly, I am not inclined to base my decision upon that letter.

The Carrier has also raised the question of "causal nexus" in this case, suggesting that there was not a sufficient showing by the Claimant that the events in 1991 were so intertwined with the ICC approval of action four (4) years before so as to make the Grievant entitled to benefits if he is otherwise entitled.

There is no need for a lengthy citation of authority in this regard since numerous arbitrators have determined that an adverse status must be the direct result of a "transaction", and not the result of "other causes", and that "not every action initiated subsequent to a merger can be considered ipso facto to be pursuant to a merger or other Carrier inter-related action. In this regard, the Carrier has cited a 1984 award by the Neutral Member of this Committee between the Portland Terminal Railway Company and the Brotherhood of Maintenance of Way Employees.

In that case, the Carrier had contended from the beginning that "...numerous employees, in all crafts, have been furloughed and there was an employee decline of thirty-one percent (31%) as a direct result of a severe recession in 1982 and increased competition by motor carrier and rail deregulation". In that case, the Neutral Member of this Committee determined that there must be a "direct connection" or a "direct result".

In a Maine Central Railroad and Brotherhood of Maintenance of Way case decided the same date, it was found that there was no "transaction", as contemplated by labor protective provisions, and, thus, no "notices" were required.

But, a recognition of the concept expressed above does not

resolve this dispute. The facts of record as asserted by the Claimant and not denied in any particular compelling manner show a series of events and an action which led to the abolishment of the Claimant's position. Based upon the factors of record, it is certainly reasonable to conclude that the abolishment of the position had a direct causal nexus with the matters discussed and authorized by ICC Finance Docket 30965.

In cases where "causal nexus" is not established, a not unusual defense deals with economics and decline in business. We agree with the Organization that, in this case, such an assertion was not raised and argued on the property, in any manner sufficient to warrant a consideration at this time. Stated differently, the "loss of business" argument was raised for the first time at this level and cannot now be considered as a defense to the failure to afford labor protective provisions to this Claimant.

Thus, we return to the basic issue argued at length by the parties, i.e., was the position held by the Claimant prior to and for four (4) years subsequent to the ICC approval such that the incumbent should be considered as an "employee", within the definitions of the provisions, or was the Claimant in such a position that he was exempted from those positions? Further, if the Claimant was not exempt, what is the proper method of TPA computation.

We are not as certain as the Carrier seems to be that the wording of the Mendocino Coast labor protective provisions, as written, defeat the claim of this individual, since the term

displaced "employee" is not defined in specific terms. Article III of the provisions states:

> Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

Based upon Article III, it may not be successfully argued that only Union members are protected. In that regard, the Carrier relies upon the Transportation Act of 1920 definition of employee and refers to the term "subordinate official", as well as "Ex Parte 72", which also utilizes that term. In essence, the Carrier argues that the provisions are applicable to "...only those rank-and-file employees who are unionized and those subordinate officials who are subject to and/or entitled to unionization". Accordingly, the Carrier argues that:

> Had the ICC meant to include officials such as Claimant...within the protection of Mendocino Coast it would have done so...

That argument, of course, may very well beg the question since it presumes that the Grievant was not a subordinate official and/or that the provisions were intended to be restricted to individuals who "...were unionized or who could have been unionized".

The Carrier has cited four (4) United States Circuit Court of Appeals decisions regarding entitlement of an "official". In the first such case, McDow v. Louisiana Southern Railway Company, 219 F.2d 650, the 5th Circuit concluded that the District Court should not have decided the merits of the question since the Carrier therein was never a party to the proceeding before the ICC, and was

not bound thereby. In any event, the Plaintiff in the case was a former Vice President of the Company.

In Edwards v. Southern Railway Company, 376 F.2d 665 (1967), the 4th Circuit considered a claim of a stockholder and chief engineer with "important administrative functions" in a small family-owned railroad. He was the son of the controlling stockholder and "not a union member nor covered by any collective bargaining agreement". The Court noted that neither the ICC nor the "Oklahoma Conditions" provided a definition of "employee", but it concluded that the term "employee", as used therein:

> ...surely does not include the principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of consolidations. Edwards occupied in the small family-owned railroad an important managerial position and, moreover, stood in a unique personal relationship to the controlling interest.

In Zinger v. Blanchette, 549 F.2d 901 the 3rd Circuit considered the claim of the general counsel for Penn Central objecting to a forced retirement. The Court determined that involuntary retirement, pursuant to a bona fide retirement plan, is not a subterfuge and is not unlawful. In fact, the Court declined to decide the question of whether the Plaintiff would be considered an "employee", within the terms of the statute or the ICC order, although it did offer (as a matter of obiter dicta) a doubt that he would so qualify on the record, because of a lack of evidence to establish the meaning which the railroad and the ICC placed upon the word. The Court found no authoritative decisions or rulings which would have given person in Zinger's capacity "employee"

entitlement.

Finally, the Carrier has cited Newbourne v. Grand Trunk Western Company, 758 F.2d 193 (1985). There, the 6th Circuit considered the case of an Administrative Vice President of the Company not covered by the collective bargaining agreement. Even though the Plaintiff therein held such a position, the Court concluded that a determination that he was an "employee", other than a part of Management, was "anything but easy". Based upon certain factors cited therein, protective provisions were denied.

Award 434 of SBA 605 dealt with an interpretation of an agreement between the parties and a question of "which 12 month" period was intended to be used. Service and compensation as an elected Union official was not the proper basis upon which to calculate the pro-rated rate when an employee returns to the bargaining unit, any more than a salary as a transportation supervisor or the President of the railroad would be controlling.

The award in Award No. 2, Case No. 2, between UTU and this Carrier (August 30, 1990) may have certain application concerning the question of appropriate compensation, but it is not pertinent to a question of entitlement.

Based upon a review of the entire record and the contentions of the parties, this Committee is inclined to determine that the test of coverage under ICC labor protective provisions imposed herein is not as simply controlled as the Carrier would suggest, and that the test is not limited to whether the employee is a member of the Union or holds a position that could be a Union

position.

Certainly, the facts of each case must be scrutinized to determine eligibility on a case-by-case basis.

The illustrations pointed out in cases cited by the Carrier are not persuasive, since they dealt with individuals in high Management positions making significantly different types of decisions and determinations than this record suggests were available to the Claimant.

Concerning the initial question at issue, we find that the Claimant was an affected employee, as specified in Mendocino Coast protective conditions.

Turning to the question of calculation of the Claimant's test period average and whether or not the calculations shall include all earnings during the twelve (12) month period previous to the Claimant's being affected by the transaction, we conclude that the question must be answered in the affirmative.

The just-cited August 30, 1990 award relied upon by the Carrier is not persuasive in this case since, there, the employee had voluntarily resigned from a Management position prior to the transaction. In this case, the Claimant's position was abolished after the transaction. We have no method of ascertaining how the prior Committee would have ruled under those circumstances.

We have no alternative but to interpret the labor protective provisions as they are written, and we have noted the 1989 award in TCIU and Norfolk Southern, which pointed out that an employee displaced by a transaction is concerned with <u>compensation</u> rather

than rate of pay equal to or exceeding the compensation received in the position from which he was displaced. Thus, in that award, it was concluded that the allowance must equal the difference between the monthly compensation in the retained position and the average monthly compensation of the position from which displaced. There is a method of dividing separately by twelve (12) the total compensation received by the employee and the total time for which he was paid during the last twelve (12) months immediately preceding the transaction. See, also, the 1989 award in TCIU -and- Union Pacific, which confirmed that the literal language of the provisions compel that all of a Claimant's prior earnings with the Carrier during the prior year, whether from agreement or non-agreement positions, are to be included in the test period earnings.

AWARD

The specific questions presented are answered as follows:

1. The Claimant is an affected employee, as specified in Article 1, Section 1, of the Mendocino Coast Protective Provisions, as imposed by the Interstate Commerce Commission when it granted control of the Maine Central Railroad to Springfield Terminal/Guilford Industries.

2. The calculation of the Claimant's test period average shall include all earnings during the twelve (12) month period previous to his being affected by the transaction.

Joseph A. Sickles
Neutral Member

David F. Sibley - Dissent
David F. Sibley
Carrier Member

Carl H. Brockett
Organization Member

Dated: June 22, 1998

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ARBITRATION OPINION AND AWARD

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

APPEARANCES

Jeffrey S. Berlin, for the Company

L. Pat Wynns, for the Union

STATEMENT OF CLAIM

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

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

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E.L. TORSKE

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

POSITION OF THE UNION

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

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

> "In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employees."

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

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

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

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

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

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

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

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

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

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

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

> "So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protection period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced."

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

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

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

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

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

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

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

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

POSITION OF THE COMPANY

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

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

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

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

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

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

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

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

The Carrier contends that the claimants herein had the right under the current Agreement to exercise their seniority throughout the Soo Line system, and therefore, electing not to do so would not allow the claimants thereafter to request a displacement allowance. In support of the above the Carrier has cited awards as referenced in Neutral Louis E. Settzer's decision of December 16, 1985 which reads as follows:

> "In United Transportation Union and San Diego and Arizona Eastern Railway Transportation Company, Chairman and Neutral Member Gil Vernon, clearly defined the meaning of cause and effect: '. . . the language of the conditions clearly sets forth that, to be considered protected, an employee must be adversely affected as a result of the transaction. Thus, it is clearly implied that factors other than a transaction which may adversely affect an employee do not turn on the protective provisions. Only adverse effect as a result of the transaction qualifies an employee for protective benefits and no benefits flow from adverse impact due to other causes. Certainly, the Neutral cannot ignore that the use of the word result requires a casual relationship between the transaction and the adverse impact . . .'"

The Carrier contends that the claimant's loss of money is obviously the direct result of his own seniority standing in that he displaced to a similarly related position "producing" equal or greater compensation and for that reason claimant Knops is estopped from carrying his "redlined" rate forward by Agreement.

The Carrier cites Arbitration Board No. 4368 between the Brotherhood of Railroad Signalmen and CSX Transportation, Inc. wherein Neutral Arthur Van Wart held:

> "Such allowances are not intended to provide a windfall to employees beyond what their earnings and work opportunities would have been had the transaction not occurred. Thus the 11(e) requirement that the Organization must identify the transaction and also show a casual connection between it and the claimant's "alleged earnings situation."

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

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

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

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

OPINION

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

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

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

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

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

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

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

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

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

Preston J. Moore
Neutral Referee

Ernest L. Torske
Union Member

Cathryn S. Frankenburg
Carrier Member

October 4, 1993

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In the Matter of the Arbitration Between BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES vs. WESTERN MARYLAND RAILWAY COMPANY	Arbitration Board No. 284

PRELIMINARY STATEMENT

This matter was referred to Arbitration pursuant to Section 8 of the Oklahoma Conditions by agreement of the parties dated November 7, 1963 and the undersigned Francis J. Robertson was duly selected by the parties as the Sole Member of the Board of Arbitration. Hearing was held at the offices of the Company in Baltimore, Maryland on February 28, 1964 at which time full opportunity was afforded both sides for the presentation of testimony, argument and submission of briefs. At the hearing both sides agreed to waive the time limitations of the Arbitration Agreement with respect to the time within which the Board was to issue its Award. The following appearances were noted:

For the Organization:

Mr. A. G. Fouche, General Chairman
Mr. Jack Fletcher, International Representative

For the Carrier:

Mr. F. B. Plummer, Manager of Labor Relations

THE ISSUE

In the Arbitration Agreement the parties stipulated that the specific question governing the claim of H. F. Snyder, Jr. submitted to arbitration is:

> "Has the Carrier correctly computed for H. F. Snyder, Jr. the average monthly compensation and average monthly time paid for during the period March 1, 1961 to February 28, 1962, within the meaning of Section 4 of Oklahoma Railway Company Trustees Abandonment, 257 ICC 177?"

OPINION AND FINDINGS

Under date of February 26, 1962 the Interstate Commerce Commission authorized the Western Maryland Railroad to acquire trackage rights over the Pennsylvania Railroad between Fulton Junction in Baltimore to Sparrows Point, Maryland, a distance of about 13 miles. The use of such trackage resulted in

the discontinuance of a car float operation between the two points. As a condition of its approval of the trackage rights acquisition the Commission imposed the so-called Oklahoma Conditions.

The section of the Oklahoma Conditions pertinent to the issue with which we are here concerned reads as follows:

> "4. If, as a result of the abandonment of operation herein permitted and the purchases, etc., herein authorized, hereinafter referred to as the transaction, any employee of Robert K. Johnston and A. C. DeBolt, trustees of the Oklahoma Railway Co.; of the Atchison, Topeka & Santa Fe Railway Co.; or of Joseph B. Fleming and Aaron Colnon, trustees of the Chicago, Rock Island and Pacific Railway Co., hereinafter respectively referred to as the Oklahoma, the Santa Fe, and the Rock Island, and collectively as the carriers, is displaced, that is placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of this transaction (thereby producing average monthly compensation and average monthly time paid for in the test period). If his compensation in his retained position in any month is less than the aforesaid average compensation in the test period, he shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his retained or current position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position: Provided, however, That nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any employee: Provided further, That if any employee elects not to exercise his seniority rights he shall be entitled to no allowance; And provided further, that no allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Okla., with the Santa Fe or Rock Island if either of said two last-named carriers

offers him a position, the duties of which he is qualified to perform. The period during which this protection is to be given, hereinafter called the protective period shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein: Provided, however, That such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order."

The claimant, H. F. Snyder, Jr. prior to the abandonment of the car float operation was a Relief Barge Clerk at Port Covington. When the position of Relief Barge Clerk was abolished he exercised seniority to a Clerk's position at Wagner's Point which carried a rate slightly higher than that which he was receiving as Relief Barge Clerk. During the last period the claimant worked a number of hours on assignments other than those included in the assignments which he was scheduled to relieve as the holder of the Relief Barge Clerk position. In calculating the claimant's "average monthly compensation" the Carrier has ignored the time worked on assignments other than those embraced within the Relief Barge Clerk assignment. Thus the carrier has arrived at a figure of $462.10 as the "protected" monthly compensation based upon 187 hours and 40 minutes average monthly time paid for. If all of the compensation which the claimant received during the twelve months test period were included in computing the protected monthly compensation it would amount to $569.17 per month based upon 217 hours and 40 minutes average monthly time paid for.

It is the Carrier view that it has correctly computed the claimant's compensation arguing that the test period included a period of abnormal earnings for Mr. Snyder. It points out that Mr. Snyder doubled through for extended periods because of lengthy periods of illness or vacation absences and the unavailability of Relief Clerks to furnish relief. The Carrier asserts that if the change had not taken place and the claimant had remained in his former position there would have been a reduction in his total earnings since the situation which prevailed during the test period was no longer in effect and therefore there could be no causative relationship between the abandonment and the loss of earnings resultant from the abnormal situation.

The Organization argues that the provisions of Section 4 of the Oklahoma conditions require that all compensation received by an employe regardless of how or when earned must be used in computing "total compensation". It points out that the Conditions are not qualified with respect to normal or abnormal earnings. It argues that "position" as used in Section 4 means relative place, situation or standing, and is not synonymous with assignment. In support of this view it cites Awards 41, 42, 43 and 44 of Special Board of Adjustment No. 226 involving an interpretation of similar language in the Burlington Conditions as well as Award in Arbitration No. 279 also involving Burlington Conditions.

The provisions of Section 4 of the Oklahoma Conditions, similar provisions in the Washington Job Protection Agreement and in the so-called

Burlington Conditions have been involved in a number of Arbitration and Special Board proceedings. The decisions on those controversies are not models of consistency and contain some irreconciliable views with respect to what was intended by similarly worded provisions in all three of the protective devices. Nor, is there a great deal of consistency with respect to the positions taken by the parties with respect to the intendment of the ICC in the phrasing of the Oklahoma and Burlington Conditions as well as with respect to the intent of the framers of the Washington Job Protection Agreement in phrasing similar provisions in the Washington Job Protection Agreement. This is not said by way of adverse criticism but merely to point up the difficulty inherent in construing the complicated and what to us appears to be the ambiguous provisions of Section 4.

The source of the ICC authority to impose protective conditions in approvals of an abandonment or other transactions subject to its jurisdiction is Section 5(2) (f) of the Interstate Commerce Act. Because we feel that the wording of that section may shed some light on the meaning to be attributed to the wording of Section 4 of the Oklahoma Conditions rather than paraphrase it we quote it below:

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of 4 years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It will be noted that the words "worse position" as they first appear in the language of the Conditions are in line with the provisions of the statute. There can be no doubt that as the word position is used in the statute it is not synonymous with job or assignment but rather connotes status, situation or posture. The provisions of Section 4 apply to all classes of employes operating and non-operating. It is common knowledge that in the operating group a large proportion of such employes work on assignments which might vary from day to day. Hence in referring to an employe's position with respect to compensation and rules governing work conditions it is apparent that in this context the word "position" cannot be intended to mean a specific job or assignment. Hence

it is clear that what the Commission was seeking to accomplish in imposing the Oklahoma Conditions was to assure an affected employe that his employment status insofar as compensation and working conditions were concerned would be preserved to him for the four years protective period.

To determine what amount of compensation would be protected it is clear that the Commission adapted a pragmatic and arbitrary formula. A formula which it must be presumed to have recognized would result in inequities at times against the employe and at times against the Carrier. For example, during the twelve months immediately preceding displacement an affected employe might have experienced a long period of illness and the amount of his "protected" compensation would be substantially affected by operation of the formula. On the other hand, perhaps in anticipation of an abandonment, the Carrier might have curtailed its hirings with the result that considerable amount of overtime would be worked during the test period. We cannot believe that the Commission was blind to these factors. Its emphasis upon "compensation received" during the test period and "compensation produced" during the protective period indicates that its concern was with the actual earnings attributable to the affected individual's employment status rather than the earnings accruing on a given assignment.

In the instant case it is clear that the earnings which Mr. Snyder accrued during the test period were attributable to his employment status as a Relief Barge Clerk prior to his displacement. His earnings on other assignments flowed from the employment status which he occupied prior to his displacement. As such it should be patent that such earnings are includible in the computation of the earnings protected. Hence, we are constrained to hold that the specific question referred to us for Arbitration must be answered in the negative.

AWARD

The answer to the question submitted to Arbitration to wit:

"Has the Carrier correctly computed for H. F. Snyder, Jr. the average monthly compensation and average monthly time paid for during the period March 1, 1961 to February 28, 1962, within the meaning of Section 4 of Oklahoma Railway Company Trustees Abandonment, 257 ICC 177"

is: No.

Arbitration Board No. 284

s/ Francis J. Robertson
Francis J. Robertson
Sole Member

Dated:

Washington, D. C.

September 9th, 1964

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DELAWARE AND HUDSON RAILWAY COMPANY n2 -- LEASE AND TRACKAGE RIGHTS EXEMPTION -- SPRINGFIELD TERMINAL RAILWAY COMPANY

Finance Docket No. 30965 (Sub-No. 1) n1

INTERSTATE COMMERCE COMMISSION

1990 ICC LEXIS 312

September 24, 1990

PANEL:
[*1]

DECISION

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley and Emmett. Commissioner Lamboley concurred in part and dissented in part with a separate expression.

OPINIONBY: SIMMONS, LAMBOLEY, EMMETT

OPINION:

In this decision, which represents a second review of an arbitral award imposing an implementing agreement upon a series of railroad line lease transactions within a corporate family, the Commission declines to vacate the decision of the arbitrator, based on findings that: (1) the arbitrator had jurisdiction to enter the award; (2) no party has shown that the arbitrator exceeded the authority vested in him by the labor conditions imposed on these transactions or otherwise acted unlawfully with respect to any of the matters raised by the appeals; and (3) the award, as a whole effects a reasonable and equitable accommodation of the various conflicting and competing interests necessary to permit the series of transactions authorized by the Commission to be carried out.

n1 This proceeding embraces Finance Docket Nos. 30925, 30951, 30966, 30967, 30972, 30981, 30993, 31002, 31003, 31015, 31023, 31086, 31103, 31115, 31125 and 31161.

n2 The Delaware and Hudson Railway Company (D&H), a subsidiary of Guilford Transportation Industries, Inc. (GTI) and a party to the Springfield Terminal proceeding, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on June 20, 1988. Since that date D&H has not joined in any of the pleadings filed on behalf of GTI by counsel nor has the trustee filed either in his own right or by way of reaffirmation or adoption of the previously filed pleadings. Since it is clear that D&H has long since abandoned participation in these proceedings, although it has never formally withdrawn, we will dismiss it as a party for non prosecution. However, for the sake of consistency, these proceedings will continue to be styled "Delaware and Hudson Railway Company. . . ." [*2]

BACKGROUND

These consolidated proceedings involve a series of lease and trackage rights transactions exempted under the provisions of 49 CFR 1180.2(d)(3) and the procedures of 49 CFR 1180.4(g). Through these transactions, all of the rail service operations previously conducted by Boston & Maine Corporation (B&M), Maine Central Railroad Company (MEC), and Portland Terminal Company (PT), all subsidiaries of Guilford Transportation Industries, Inc. (GTI), were to be performed by the Springfield Terminal Railway Company (ST). Initially we imposed standard lease and trackage rights labor protective conditions developed in Mendocino Coast Ry., Inc. -- Lease and Operate, 354 I.C.C. 732 (1978), and Norfolk and Western Ry. Co. -- Trackage Rights -- BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. -- Lease and Operate, 360 I.C.C. 653 (1980) (collectively Mendocino Coast). These conditions guarantee up to six years of income protection for employees whose jobs are lost or adversely affected by a lease or trackage rights transaction, but do not require that an implementing agreement be reached before consummation of the transactions.

When it became apparent that, through **[*3]** a series of individual transactions, GTI was undertaking what amounted to a consolidation of the operations of its various subsidiaries into a single operation to be performed by ST, we developed conditions unique to this proceeding. We did so by combining the protections usually afforded in lease and trackage rights transactions with the procedural aspects of the labor protective conditions developed for consolidation transactions set forth in New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979) (New York Dock). We ordered that, contrary to the normal situation in a single lease or trackage rights transaction, all parties to these multiple transactions be involved in the bargaining leading to an agreement implementing these transactions. We also ordered that transactions that had not already been consummated be stayed until an implementing agreement was in place. See D&H Ry. -- Lease and Trackage Rights Exempt, -- Springfield Term., 4 I.C.C.2d 322, 323-26 (1988) (Springfield Terminal). n3

n3 In October 1987, the Commission ordered the carriers not to implement any of the transactions involving the Delaware and Hudson Railway Company (D&H), nor any unimplemented B&M transactions, pending resolution of these consolidated proceedings. **[*4]**

In requiring an implementing agreement we provided for a period of negotiations to be followed by arbitration, if necessary, to be used in arriving at an implementing agreement applicable to previously consummated transactions and to transactions whose implementation the Commission had delayed. After negotiations failed the matter was submitted to an arbitrator with all parties represented.

Arbitrator Richard R. Kasher issued an award adopting an implementing agreement on June 12, 1988 (Kasher Award). n4 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.

n4 The Kasher Award proposed an implementing agreement which provided that: (1) no employee would be deemed to have forfeited any rights or benefits arising from labor protections as a result of any decision made during the period commencing with the first lease up to the time of the arbitrator's award; (2) seniority on the ST would be governed by the seniority of employees on the

leased lines over which ST sought to operate; and (3) the ST workforce, in operating the leased lines, would operate under the rates of pay, rules and working conditions required by the collective bargaining agreements between each of the four lessor carriers and their employees. [*5]

We affirmed all of the provisions of the Kasher Award except for the rates of pay, work rules and the selection of forces provisions (Sections 1, 2 and 3 of the award) that would apply to the ST's operation of the other carriers' lines. Specifically, we disapproved the Kasher Award determination that the collective bargaining agreements (CBAs) that were in place on the properties of the MEC, the D&H, the PT, and the B&M should continue to be the CBAs in force on the ST as to all "prior rights" employees. n5 We determined that preserving all of the pre-existing provisions contained in the CBAs of each of the separate entities involved would vitiate one major purpose for the underlying leases. It would eliminate any possibility of achieving the economies and efficiencies afforded by application of the more flexible ST work rules to the entire GTI system. January 10, 1989 Decision, at 7.

n5 "Prior rights" employees refers to all employees in active service of one of the four lessor carriers at the time of the lease transactions who were (or are entitled to be) offered employment on the ST.

Thus we vacated Sections 1-3 of the Kasher Award. We considered imposing ST's agreement [*6] with the United Transportation Union (UTU) upon all operations being undertaken by them over leased lines. However, there was insufficient information before the Commission to determine whether the agreement would be compatible with maintaining seniority and job entitlement for the former employees of the lessor carriers, or as to how the ST/UTU agreement was, in fact, being implemented. We returned for further negotiation and/or fact-finding arbitration the questions of: (1) the elements of the existing ST/UTU agreement and (2) the methods and practices by which it was being implemented. Id at 8.

Shortly thereafter, ST entered into negotiations with the UTU and, on February 14, 1989, ST and UTU signed a new agreement. That agreement which covered the issues which had been returned to the parties for further negotiation or, in the event of their inability to agree, arbitration, i.e., rates of pay, work rules and the selection of forces. In a decision served October 26, 1989, we held that the ST/UTU Agreement of February 14, 1989, was not an implementing agreement for the authorized lease and trackage rights transactions because all parties had not been represented in the negotiating [*7] process. However, we commented that the ST/UTU agreement did have the elements necessary so that it might serve as a starting point in the fashioning of an implementing agreement. October 26, 1989 Decision at 6. We again directed all parties to participate in negotiation or arbitration of an implementing agreement and imposed a schedule for doing so designed to arrive at an implementing agreement by January 24, 1990. October 26, 1989 Decision at Schedule A.

Immediately thereafter a dispute broke out as to whether arbitration was to continue under the auspices of arbitrator Kasher. RLEA contended that arbitration, if required, must be continued under the original arbitrator. GTI, for its part, argued that it could not obtain a fair result utilizing Kasher's services. The Commission noted GTI's argument but did not rule on it. Rather we stated (December 20, 1989 Decision at 4):

Guilford has presented nothing which gives us cause to doubt the impartiality of the original arbitrator. At the same time, we do not know whether the original arbitrator will be able or willing to undertake a complete examination of the issues remaining between the parties and arrive at an arbitrated **[*8]** agreement by January 24, 1990.

To avoid any slippage in the schedule and because of the National Mediation Board's (NMB or Board) expertise in the arbitral process the Commission referred the issue of the identity of the arbitrator and related issues concerning further arbitration to that agency. The Commission referred the matter to the NMB despite GTI's objection based on its assertion that the Board also was biased. Id. The NMB selected arbitrator Robert O. Harris to continue the proceeding in an order served December 27, 1989 and proceedings commenced before arbitrator Harris despite rail labor's assertion that Harris lacked authority to arbitrate this matter. RLEA stated that Harris could serve as a fact-finder but lacked any jurisdiction to craft an implementing agreement. Harris submitted his report (Harris Award) to the Commission on March 13, 1990. We have attached a copy of the implementing agreement adopted in the Harris Award to this decision. Each of the parties n6 to this proceeding petitioned the Commission for administrative review of the Harris Award and, by decision served May 22, 1990, we agreed to review it. This decision is the culmination of that review. **[*9]**

n6 The parties are: B&M, MEC, PT, and ST, UTU and the Railway Labor Executives' Association (RLEA).

THE HARRIS BOARD

In fashioning the Award under review, Harris first discussed his understanding of his authority to arrive at an implementing agreement. Harris Award at 44-45, 57. Harris determined that he was authorized under 49 U.S.C. 11347 and the Washington Job Protection Agreement (WJPA) to modify existing collective bargaining agreements as necessary to effectuate the transaction to the extent that the modifications concerned the selection of forces or the assignment of employees (interpreted by Harris as "questions involving scope rules and seniority rosters," Award at 45). Harris grounded his conclusion on this issue based on the vote taken in the voting conference that led to our recent decision in CSX Corp. -- Control -- Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990) ("Carmen"). Award at 43-45.

After examining the breadth of his authority, the scope of the ST/UTU agreement, and the operating practices of ST, Harris decided not to impose the ST/UTU agreement upon system wide operations but determined that certain modifications to the lessor carriers' CBAs were **[*10]** necessary to effectuate the transaction (Award at 60-61). These modifications are:

1. Agreements between the MEC and the PT and their employees would be modified so that there will be a combined single seniority district on the MEC/PT.

2. The various incidental work rules contained in the lessor carriers' CBAs would be modified to allow incidental work, regardless of the location of the work, provided that it not comprise 50% of the total work of an individual employee in any single day.

3. The lessor carriers' CBAs would be modified so that a conductor could be utilized without a brakeman in through-freight service, on local freights, and in yard work (provided that such usage complies with applicable Federal Railroad Authority safety standards).

As additional rights necessary to fashion an implementing agreement, Harris required (section 2 of the proposed implementing agreement, pp. 1-2; Award at 55) that:

1. "Prior rights" employees would be defined as all individuals listed on the lessor carriers' seniority rosters, including not only those actually employed on the dates of the leases, but also those on leave of absence for official reasons or for job-related injury. **[*11]**

2. Employees in furloughed or inactive status on the dates of the leases, who were unaffected by the transactions, would have "preferential hiring" rights to newly established ST positions. n7

n7 This additional right is one in which GTI expressly acquiesced. Neither RLEA nor UTU opposed it in their briefs to Harris. Harris Award at 51.

3. ST employees who have performed work for the ST (on or in connection with a leased line or an ST line to which they had no seniority rights prior to the leases) shall have their names added to the bottom of the appropriate [lessors'] seniority roster(s) which describes the work they primarily perform. The ST employee's seniority date shall be the date of hire. n8

n8 We asked the parties (see infra, p. 8) to address which employees should be defined as "after hired" employees, with the intent that they address who should be considered to be covered by this provision. For the sake of further discussion, we now define "after hired" employees as those employees which ST has hired after the dates of the lease transactions and up to the effective date of the implementing agreement. We also now define "new hires" as those employees hired by ST after the implementing agreement is in place. By these definitions, we construe this provision of the Harris Award as applying only to "after hired" employees. **[*12]**

Of these six provisions to the implementing agreement proposed by arbitrator Harris, five are objected to, in whole or in part, by the various parties. n9

n9 The redefinition of the "prior rights" employees in item 1, supra, does not appear to be challenged by any party.

GTI contests only the provision that "after hired" employees (which it refers to as "new hires") be placed at the bottom of the lessors' seniority rosters. UTU appeals only the crew consist requirement which eliminated the brakeman position. RLEA opposes every aspect of the Harris Award, including Harris' jurisdiction, and seeks reinstatement of the Kasher Award.

To facilitate our review of the Award, we asked the parties to address certain issues which might have a bearing on any decision. May 22, 1990 Decision at 4. These issues are as follows:

1. (a) The extent of the authority of an arbitrator, acting pursuant to conditions imposed by the Commission under 49 U.S.C. 11347, to require modifications of collective bargaining agreement[s] and

(b) Whether modifications are, in fact, necessary to implement the transaction approved by the Commission.

2. Whether and to what extent did each of the following [*13] elements of the Harris Award exceed the stated scope of an arbitrator's authority:

a) the seniority treatment of furloughed employees;

b) the merging of the PT/MEC seniority districts;

c) the 50% incidental work rule;

d) the conductor without a brakeman crew consist rule;

3. Who does GTI define as an "after hired" employee, and what effect would vacating the Harris Award decision to place "after hired" employees on the lessors' seniority rosters have on GTI's ability to assign such employees to modified seniority rosters without bargaining over such modifications under the Railway Labor Act.

4. Should the Commission address the issue of the effective date of the implementing agreement for labor protection and make whole payment purposes, even though no party has appealed this aspect of the Kasher and Harris Awards.

We will set forth the parties' responses to each of these issues and our disposition with respect to them in the order they appear here after an initial examination of our jurisdiction.

1. RLEA's and UTU's Objections To Harris Exercising Jurisdiction To Impose An Implementing Agreement

RLEA contends, as it has throughout the proceeding, that the Commission [*14] exceeded its authority and the proper scope of review in vacating Sections 1, 2 and 3 of the Kasher Award. Under this view, the Commission was obligated to permit the Kasher Award to take effect and hence there was nothing to remand.

Alternatively, RLEA contends that because arbitrator Kasher was selected by agreement between the various rail labor organizations and GTI and because the agreement was entered into under the Railway Labor Act (45 U.S.C. 151 et seq.) (RLA) all remanded arbitration proceedings must be conducted by Kasher. RLEA also contends that the Commission lacks authority to override this agreement or otherwise remove Kasher. Further, RLEA, joined by UTU, avers that since the Commission's employee protective conditions rely upon RLA processes, the Interstate Commerce Act (49 U.S.C. 10101 et seq.) (ICA) also requires that remand arbitration be held before Kasher.

Finally, RLEA argues that the Commission never purported to remove Kasher or otherwise sought appointment of another arbitrator. Harris Award at 38. n10 As support for this view, RLEA referred to the Commission's January 10, 1989 and October 26, 1989 decisions in which the Commission spoke of returning [*15] this matter to "the" arbitrator and to the "remand" of his award as demonstrating that the Commission did not remove arbitrator Kasher. Id.

n10 RLEA also contends that NMB was without authority to remove arbitrator Kasher or even to decide whether he would continue as the arbitrator for the remanded proceedings.

RLEA and UTU did not object to arbitrator Harris's finding the facts as to the "existing methods and practices by which the parties implemented that

[ST/UTU] agreement," but asked the arbitrator to rule that in all other respects he was without jurisdiction to decide the matter. Harris Award at 39.

2. Parties Positions With Respect to Authority Of Arbitrator To Modify CBAs

RLEA opposes the assertion of jurisdiction by the arbitrator to modify CBAs. RLEA contends that neither the Commission nor any arbitrator acting under the Commission's authority may modify CBAs. In its view, any resolution of conflicts between lessors' and lessees' CBAs may only be achieved through the mechanisms provided in the RLA.

RLEA also argues that the language and legislative history of section 11347 "specifically precludes" the Commission, or its arbitrator, from imposing an implementing **[*16]** agreement which abrogates existing CBAs. RLEA at 4-5. Finally, it contends that, whatever the practice was prior to 1976, the requirements of Article I, sections 2 and 3 of the Mendocino conditions that CBAs and prior protective arrangements be preserved are not in any way qualified by the relevant language of Article I, section 4, which authorizes the making of necessary changes in CBAs. RLEA at 4.

UTU contends that the Harris Award provision altering the crew consist requirements of the lessor carriers' CBAs is violative of 49 U.S.C. 11347 because it is a "deprivation of the very rights required to be protected by 11347." UTU at 4. UTU submits that, absent a voluntary agreement, the parties can only eliminate a brakeman from rules governing crew consists for various types of operations through resort to RLA procedures. UTU at 5.

3. Elements of the Implementing Agreement

In our order accepting review we asked the parties to address the four provisions of the lessors' CBAs that were modified by the Harris Award. Those provisions are: the seniority treatment of furloughed employees giving them preferential hiring rights to new ST positions; the merging of the PT/MEC seniority **[*17]** districts; the 50% incidental work rule; and the conductor and engineer only crew consist rule. The views of the parties on the necessity for these changes, and the arbitrator's authority to effect each of them, are as follows.

As to the necessity of these modifications to implementation of the transaction, rail labor argues generally that none of the provisions were necessary to the implementing agreement. Specifically, it is RLEA that presses the argument that these modifications are not required for the consummation of the transactions. UTU, while contending generally that Harris' modifications are not necessary to the transactions, does not oppose any provision except the crew consist rule. GTI supports the necessity of all of the provisions to the transaction with the exception of the portion of the award that deals with the "after hired" employees.

a. Preferential Hiring for Furloughed Employees

GTI asserts that this provision is not a modification of the lessors' CBAs (and, consequently, is not in conflict with them), but rather an additional right to which it acquiesced in order to resolve the issue. GTI at 50. Because, GTI claims, the furloughed employees were not **[*18]** adversely affected by the transaction, this provision was not legally required (i.e., not necessary to effectuate the transaction). Nevertheless, because GTI consented to it, GTI submits that there is no reason to vacate it. GTI at 60; GTI reply at 21.

Arbitrator Harris modified GTI's offer to preferentially hire furloughed employees and place them at the bottom of the ST seniority roster. He has required, instead, that preferentially hired, furloughed employees be placed at the bottom of the seniority rosters of the individual lessors. GTI does not appear to object to this modification.

RLEA counters that, although furloughed employees are not adversely affected for purposes of entitlement to compensation, the transaction adversely affected their seniority rights by giving them seniority dates on the lessor carriers' rosters later than the seniority dates of the so-called "after hired" employees. It asserts that re-employing experienced furloughed employees, with priority on the seniority rosters over after hires, would facilitate the transaction. Therefore, RLEA contends, by placing furloughed employees at the bottom of the lessors' seniority rosters, the Harris Award irrationally **[*19]** abrogates their seniority rights as embodied in the lessors' CBAs. n11 RLEA at 15; RLEA reply at 21-22.

n11 RLEA chiefly complains that the furloughed employees should have been offered work between the dates of the lease transactions and the implementing agreement's imposition, in accordance with their seniority on the lessor carriers' seniority rosters, before ST brought on "after hired" employees, who had no railroad experience. RLEA urges that the furloughed employees would have been more productive and efficient, and required no training, thus facilitating the transaction. RLEA reply at 20-21.

b. Merging of the PT/MEC Seniority Districts

GTI supports the necessity of merging the PT/MEC seniority districts, a provision which was contained in the ST/UTU agreement. It explains that the six mile radius served by PT limited employment opportunities and reduced the effectiveness of PT employees' seniority. Thus, according to GTI, by merging the districts, the employees are able to bid for job opportunities in a larger territory, and ST could expand its utilization of their job skills. Because, GTI argues, maximizing ST's managerial flexibility was a central purpose of **[*20]** the transaction, this change was necessary, and well within the arbitrator's authority. GTI suggests that it is a "common practice" for arbitrators to adjust seniority arrangements, including merging rosters, in formulating implementing agreements as part of selecting forces from different carriers for a consolidated operation. GTI at 49, 57-58; GTI reply at 20.

UTU disagrees with the merger of the rosters "since MEC and PT employees of the lessor carriers could stand for work from their rosters for work under such roster's jurisdiction on the ST." Nonetheless, UTU does not oppose this element of the Award. UTU at 5. RLEA believes that, even if the merger of rosters is beneficial, as GTI contends, it should not be upheld. RLEA at 12-13.

c. The 50% Incidental Work Rule

GTI views this element as a "critical provision of the compromise fashioned by the Arbitrator [which] substantially achieves the central objective of this transaction." GTI at 43. Permitting employees to perform "substantial ancillary work where dictated by efficiency considerations" provides ST with a more "flexible and efficient" operation. GTI at 46. GTI contends that the arbitrator's decision to include **[*21]** this rule rests on the kind of factual arbitral determination which is entitled to considerable deference by the Commission. GTI at 47. GTI offers, by analogy, a number of arbitral decisions

holding that employees who are offered work outside their traditional class or craft lines have been offered comparable employment. GTI at 55.

UTU argues that the Harris Award is not as broad as it seems because the rule only modifies the various incidental work rules already contained in existing lessor CBAs, and does not apply to all organizations or those lessor CBAs which did not contain an incidental work rule. UTU at 5-6.

RLEA submits that Harris' factual findings -- that the ST does not cross-utilize employees other than in "narrow, readily understandable assignments" -- countermands a determination that inclusion of this rule in the proposed implementing agreement is necessary. RLEA at 7-8. Moreover, RLEA questions whether ST's design to assign employees to perform any job truly enhances the flexibility and efficiency of operations. RLEA at 9-10. The incidental work rules contained in the lessors' CBAs, RLEA argues, provide sufficient flexibility to the carrier. RLEA at 11. **[*22]**

Along with UTU, RLEA believes that the 50% incidental work rule only modifies the incidental work rules contained in the lessor agreements. Because only the shop craft agreements contain incidental work rules, RLEA submits that the Harris Award does not apply to impose the 50% incidental work rule on operations as well. RLEA at 11-12.

GTI responds to rail labor's criticisms by emphasizing that arbitrator Harris did find that the compromise incidental work rule was necessary to effect the transactions. n12 GTI reply at 17. GTI explains that the cost efficiency the rule would generate, if successful, would enable GTI to "avoid financial distress" and would provide a better chance for expanding its operations, "preserving existing jobs and creating new ones." GTI reply at 18.

n12 RLEA challenges, in general, all of Harris' "necessity findings" on the ground that Harris stated first that he would impose the lessor carrier agreements without modification on the lease transactions, if the Commission had not rejected that portion of the Kasher Award, and only then said that the proposed modifications were "deemed" necessary. RLEA reply at 17.

GTI also rejects rail labor's contention **[*23]** that Harris only modified the application of the incidental work rule to shops and not to operations. It cites section 3(b) of the proposed implementing agreement to demonstrate that the work rule is modified to allow incidental work "regardless of the location of the work," i.e., regardless of whether the work is being performed at shops or at operation sites, or of the location of the particular shop or operation. GTI reply at 19.

d. The Crew Consist Rule

GTI believes that this rule provides significant operating efficiencies, an important purpose of the lease transactions. GTI explains that antiquated and obsolete work rules, carried over from the era of the steam engine (which required a five man crew generally including an engineer, fireman, conductor and two brakemen), are retained in some of the lessors' CBAs, even though use of modern diesel locomotives has made two or three of these positions unnecessary. GTI at 41. Harris found, GTI points out, that ST operates through freights with just a conductor and an engineer, while using an additional crew member, a brakeman, occasionally on local freights, without creating any operating difficulties. GTI at 42; Harris Award **[*24]** at 29, 48.

Moreover, GTI submits that this rule was well within the scope of the arbitrator's authority and is consistent with arbitral precedent. GTI at 52. GTI contends that the arbitral decisions it cites support the proposition that the ordinary meaning of "selection of forces" and "assignment of employees" should include "not only who will be assigned to fill positions, but also which and how many positions will be filled and the definition and scope of those positions." GTI at 54.

UTU vehemently opposes the crew consist rule. It summarizes the history of crew sizes on the MEC, PT, and B&M, and contends that there was no evidence adduced in the Harris arbitration to support the need for further reduction of crew consists. n13 UTU at 6-8. UTU maintains that the crew consist rules which exist on the B&M and on the MEC/PT are already a flexible arrangement, which permit for a profitable operation, and that, therefore, no change in such rules is required to implement the ICC-approved leases. n14 UTU reply at 3. UTU also claims that the ST/UTU agreement does not even contain a crew consist rule, and that it is fallacious for GTI to suggest that the Harris Award decided to incorporate **[*25]** such a rule in lieu of the lessor carriers' CBA rules on crew consist size. n15 UTU reply at 5. RLEA does not address this rule.

n13 UTU explains that the crew size on the B&M was already reduced once as a result of arbitration in 1981. UTU at 7. It apparently opposes any further reduction on the grounds that the former change created sufficient efficiency. UTU at 8.

n14 UTU explains that the MEC/PT rule calls for full train crews of an engineer, a conductor and two brakemen. The B&M rule requires an engineer, a conductor, and "in most circumstances" a single brakeman. On low density lines, the crew is further reduced to a conductor and engineer only. UTU reply at 6. GTI responds that "the essence" of Harris' crew consist rule was to "permit management to build on the success of B&M's experience with reduced crew sizes by reducing crew sizes on all the rail lines in accordance with the ST crew consist rule." GTI reply at 13.

n15 UTU asserts that, prior to the lease transactions, the carriers served section 6 notices under the RLA, 29 U.S.C. 156, to effectuate an abolishment of the crew size agreements on the B&M and the MEC/PT. UTU alleges that the parties are still in mediation on these notices, and asserts that any change in train crew size (pursuant to an implementing agreement), prior to completion of RLA procedures, would be unlawful. UTU reply at 4. **[*26]**

e. After-Hired Employees

GTI submits that this portion of the Harris Award should be vacated. GTI argues that any persons hired after the date of the lease transaction have no entitlement to labor protection. n16 Therefore, the arbitrator exceeded his authority in requiring placement of after hired employees onto the lessors' seniority rosters. Placing the after hireds on these lists, GTI claims, imposes "a significant restraint on ST's flexibility in assigning new hires." GTI at 61. By extending the implementing agreement to "future employees," GTI argues, the arbitrator imposed on the ST "his own view of the manner in which the ST should be structured and operated in the future," and "displaced entirely" the ST/UTU agreement otherwise applicable to after hired employees. Id.; GTI reply at 23-24.

n16 This argument does not recognize the distinction between what we have defined herein as "after hireds" and "new hires." See supra footnote 8. Clearly, GTI seeks to have the Commission interpret this provision as applying to both categories.

GTI believes that the term "after hired" applies to any employee hired after the lease transactions who, thus, is not entitled to **[*27]** labor protection. GTI at 62. It provides, as an example, an employee hired by ST today who had no prior railroad experience. GTI at 63. GTI believes that such employees are entitled only to those rights and benefits provided for in the ST/UTU agreement. GTI at 66. Extending to members of this group some of the terms of the lessors' CBAs vitiates their contractual relationship with ST and modifies the ST agreement without bargaining. GTI at 68, 70. Such a modification of the ST/UTU agreement is not necessary either to permit the transaction or for the protection of prior rights employees. GTI reply at 29.

GTI states that no adverse consequences would flow from vacating this portion of the Award. Under the ST/UTU agreement, after hired employees will receive an ST system seniority date based on their initial date of ST service and will have no prior rights on any part of the system. GTI at 70. GTI submits that prior rights employees can be assigned and can bid on jobs consistent with their seniority rights under the lessors' CBAs in harmony with the application of the ST/UTU agreement on behalf of after hired employees, since after hired employees would have lower priority **[*28]** than prior rights employees. Thus, there would be no conflict in the operation of both agreements. GTI at 71. Moreover, GTI asserts that no assignment of after hired employees to modified seniority rosters without bargaining over such modifications would occur, if this portion of the Harris Award is vacated. GTI reply at 24.

UTU addresses this provision briefly. It contends, without explanation, that, even if this element of the Award is vacated, such employees' names would be placed at the bottom of the lessors' seniority rosters. UTU at 8.

RLEA, on the other hand, contends that if the after hireds are not placed on the lessors' seniority rosters, then GTI cannot assign them to perform any work covered by the lessor CBAs' scope rules. RLEA at 16-17. Any such assignment would violate the scope rules, constitute a change in working conditions, and require bargaining under the RLA. RLEA at 17. In essence, RLEA maintains that "without a scope rule, seniority is 'irrelevant.'" RLEA at 18. n17

n17 RLEA complains that prior rights employees have not been able to follow their jobs because ST has, for instance, converted the scope of some jobs into managerial positions, for which the prior rights employee did not qualify, and then assigned a new hire to them. RLEA 18-20. **[*29]**

GTI responds that this argument is "tautological." GTI reply at 25. It asserts that both the ST/UTU agreement, and the earlier seniority dates of prior rights employees over after hires, will assure that all prior rights employees will have the opportunity to fill jobs within the scope of the lessor CBAs before any ST after hired employee can successfully bid on any such position. Thus, GTI claims, it is not lawful to incorporate the lessor CBA scope rules into the implementing agreement as a way to preclude ST's after hired employees from performing tasks covered by the lessors' scope rules. GTI reply at 26-27, 30.

4. The Effective Date For Labor Protective And Make Whole Conditions

a. Protective Period

GTI points out that Harris adopted the same language as Kasher in establishing when the protective period begins to run: "[it] shall not begin to run until the effective date of this implementing arrangement, or when the employee is adversely affected, whichever shall occur last." GTI at 73. GTI interprets this allegedly ambiguous determination to mean that the protective period begins to run on the date on which an employee is first adversely affected by the transaction **[*30]** and is available for service. This definition rests on the proposition that employees must accept offers of employment or lose their protective benefits. Id.

Thus, employees who initially accepted ST employment at the time of the transaction (first offer), or employees who accepted GTI's offer of employment based on the February, 1988 ST/UTU agreement (second offer), are protected from the date that they began that employment. Any employee who accepts a third offer, after the implementation agreement is in place, will be protected from that date. GTI at 76. GTI explains that it would be erroneous to allow the period to begin to run from the date that an employee's job was first abolished, even though that employee did not accept one of GTI's offers, since GTI would then be made to subsidize an employee who had voluntarily refrained from working for some period of time. GTI at 77.

GTI identifies three discrete classes of employees to whom special attention must be directed on this issue: (1) those who received and then declined job offers from ST; (2) those who accepted an ST offer, but then retired or resigned; and (3) those who participated in the work stoppage against the **[*31]** company which began November 12, 1987. n18 As to the first category, GTI submits that once the implementing agreement is in place, it will extend a new offer, and, if the employee accepts it, his protective period begins to run from that date. n19 GTI at 80.

n18 On November 12, 1987, a work stoppage occurred on the ST that lasted until June, 1988. The railroad has taken the position that the employees of ST who participated in the work stoppage resigned their positions, an action which, according to GTI, ends the employees' eligibility for labor protection under the Mendocino conditions. UTU contends that the work stoppage was a protected activity under the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. 441(c), and the failure of the carrier to take back the striking employees after the end of the work stoppage except as "new hires" was illegal. GTI resists this characterization of the work stoppage. In the carrier's view the strike was the result of its resistance to union demands wholly unrelated to safety. UTU initiated arbitration through the National Mediation Board to resolve this issue. This arbitration led to a finding that the employees were covered by the FRSA and that they were in compliance with the FRSA when they began the work stoppage (the "Quinn Award"). The Quinn Award provided reinstatement with pay for all the involved employees. GTI has initiated an action in the federal district court to have the Quinn Award set aside.

n19 GTI correctly points out that the Commission has already determined that no employee can be deemed to have forfeited entitlement to labor protection as a consequence of rejecting GTI's first or second offers of employment, since until an implementing agreement is in place, there has been no valid election of remedies. Therefore, GTI will extend a new offer to any such employees when the implementing agreement becomes effective. GTI at 79. **[*32]**

GTI contends that employees who accepted offers with ST and were then discharged for cause are not entitled to a new offer after implementation of the implementing agreement. However, it recognizes that any employee who accepted a job and then either resigned or retired is entitled to a new offer of employment. If they accept it, employees in the later category will be entitled to payments from the date of service, less any period during which they already were entitled to benefits prior to their resignation or retirement. n20 GTI at 81.

n20 GTI acknowledges that such employees would receive benefits for the period in which they worked for ST prior to retiring or resigning. GTI at 80, n.41.

As to work stoppage participants, GTI's official position is that such employees resigned as of the date they failed to report for work, and have thus forfeited any future benefits. GTI contends, however, that it is treating as prior rights employees any participants who returned to ST after the Quinn Award decision. GTI also recognizes that those participants are entitled to exercise pre-work stoppage seniority and to the selection and assignment of forces provisions of the implementing **[*33]** agreement. But, GTI states, if the Quinn Award is set aside by the court, it will treat those employees as new hires (by our definition "after hires") entitled only to ST system seniority from the date of their hire after the Quinn Award. As for employees who participated in the work stoppage, and did not return to work following the Quinn Award, GTI proposes that it will treat them in the same manner as those who did return. GTI at 82.

UTU contends that the protective period begins to run after the effective date of the implementing agreement and continues for six years. UTU at 9. RLEA maintains that the six-year period begins to run from the effective date of the implementing agreement, or when an employee is adversely affected, whichever occurs last, and that this definition presented by Kasher and Harris comports with Article I, section (d) of the Mendocino Coast conditions. RLEA at 21.

b. Make-Whole Period

GTI suggests that both the Commission and RLEA have recognized that the make-whole allowance is designed to compensate for "any loss of earnings suffered from the date when an employee is first affected until the implementing arrangement is implemented, less any time **[*34]** that employee is not available for service due to strike, job action or other cause." GTI at 74. In particular, GTI asserts that a make-whole allowance is not warranted for any period during which the employee has declined an offer of employment and has indicated thereby that he is not available for service. GTI at 75.

UTU believes that make-whole payments begin when an employee is adversely affected by a transaction and continue until the effective date of the implementing agreement. UTU at 8. It asserts that employees are entitled to this allowance in addition to receiving payments during a protective period of up to six years.

RLEA urges that it would be improper to equate a make-whole award with a displacement or dismissal allowance. It asserts that under Article I, section 4 of Mendocino Coast conditions, the make-whole allowance is in addition to the 6-year protective period, and that the employee is to be made whole for the full time during the pendency of the implementing agreement process. RLEA at 22.

GTI responds, pointing out that the Commission has already rejected rail labor's argument for make-whole provisions covering the period between the lease transaction [*35] and the implementing agreement's imposition, in addition to a 6 year protective period following resolution of the implementing agreement. GTI reply at 32 (see Oct. 26, 1989 Decision at 9-10). Citing the full language of Article I, section 4(d) of Mendocino Coast, GTI submits that, at most, the affected employees would be entitled to a 75-day period of make-whole protection tacked on to the 6 year protective period, commencing on the effective date of the implementing agreement. GTI reply at 35-36.

DISCUSSION AND CONCLUSIONS

In summary, we decline to vacate the Award of Arbitrator Harris. We conclude that the arbitrator had jurisdiction to formulate the implementing agreement. Furthermore, we conclude that no party has shown that Harris exceeded the authority vested in him or otherwise acted unlawfully with respect to any of the matters raised on appeal. Viewed individually or collectively, the matters appealed do not require us to vacate the Award. Finally, we conclude that the implementing agreement as a whole is a reasonable and equitable accommodation of the various conflicting and competing interests necessary to permit the consummation of the authorized transactions. [*36] Accordingly, we decline to vacate the Harris Award and require the parties to commence its implementation pursuant to its terms.

1. Preliminary Matters, Determination of Jurisdiction and Scope of Review

a. Preliminary Matters

Prior to addressing the issues set forth above there is one preliminary issue that must be resolved. In its reply brief RLEA raised the issue that ST and the lessor carriers are a single corporate entity and alter egos, and that the transactions were a sham to evade GTI's obligations under the lessors' CBAs (RLEA reply, p. 14). As relief RLEA asks for an order forbidding any changes in the lessors' CBAs (RLEA reply, p. 15). GTI has moved to strike this portion of RLEA's reply (and, alternatively, for an opportunity to reply further). The question of the carriers' status as a single entity was resolved when we imposed extraordinary labor conditions on the transactions in our February, 1988 decision. That decision treated all of the involved carriers as participating in a single corporate transaction for labor protection purposes. Likewise, the question of whether the transaction was a sham was previously resolved in our January 10, 1989 decision, declining [*37] to revoke the exemptions at issue. Nothing has been presented in RLEA's pleadings that warrants our reopening these questions. Although we have considered the material in RLEA's pleadings to which GTI's motion is addressed, GTI has not been prejudiced thereby. Accordingly, the motion to strike or permit further response is denied.

b. Jurisdictional Issues

RLEA has consistently argued that the Commission exceeded its jurisdiction in overturning the Kasher Award and that, therefore, the Commission and, in turn, Harris lacks jurisdiction to impose an implementing agreement. We, however, are convinced that we had jurisdiction both to review the Kasher Award (a proposition not previously contested by RLEA) and to set aside portions of it as exceeding the authority vested in the arbitrator by the ICA and the labor conditions we imposed on these transactions.

As to our jurisdiction to review and set aside portions of the Kasher Award, Arbitrator Harris correctly recognized that both his appointment and the appointment of Arbitrator Kasher in this proceeding was done under the authority of the ICA, particularly, 49 U.S.C. 11347 (Award at 39). As Harris stated (Award at 39-40):

It **[*38]** is clear that the authority for the appointment came from the ICC determination as to how to apply the direction regarding employee protection contained in Section 11347 of the . . . (ICA) . . . That determination was set forth in the Mendocino Coast conditions . . . Nothing contained in Mendocino Coast refers to, or in any way indicates that, the arbitration process involved in implementing labor protective conditions is arbitration under the Railway Labor Act. Arbitration under Mendocino Coast is neither for the settlement of "major" disputes . . . nor "minor" disputes . . . Rather, it is for the creation of an agreement which will implement the labor protective provisions which have been ordered by the ICC under authority of the ICA.

This is consistent with the case law establishing our right to review the awards of arbitrators acting pursuant to our labor conditions. See, e.g. International Brotherhood of Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) ("Lace Curtain"), and United Transportation Union v. United States, Nos. 89-1216 and 89-1662 (D.C. Cir. June 15, 1990).

Thus, our jurisdiction over transactions such as those at issue here permits us to review **[*39]** and compels us to disapprove an arbitration award imposing an implementing agreement which will defeat the very purpose of the transaction approved by this Commission. What is essential is that the implementing agreement be consistent with the essential terms of the transaction and the objectives sought to be accomplished. This was not the case with the Kasher Award. In our January 10, 1989 Decision at 8, we found the Award to be inimical to the authorized transaction:

An important objective to be achieved by the GTI restructuring is the economies 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 decision to impose the rates of pay and work rules of the lessor carriers. Id.

Thus, we reaffirm our previous decision and conclude that we did not exceed our appropriate scope of review, as described below, in setting aside those portions of the implementing agreement proposed by Arbitrator Kasher which were inimical to implementing the transaction we authorized.

With **[*40]** respect to RLEA's argument that Harris lacked jurisdiction to impose an implementing agreement because neither the Commission nor the NMB could or did properly substitute Harris for Kasher, n21 we find ourselves constrained to agree with Harris that RLEA "has failed to show why, as a matter of law, Arbitrator Kasher had to continue to decide the case . . ."

n21 We take issue with only one aspect of Harris' discussion of jurisdiction. Harris' suggestion (Award at 40) that the ICC constructively discharged Kasher from the proceedings is erroneous. As we explain above, because of disagreements among the parties as to who should undertake further arbitration,

we referred the matter of the selection of an arbitrator to the National Mediation Board and requested that they select an arbitrator to conclude the proceeding. The NMB chose Harris.

Harris Award at 42. In Harris' view Kasher's function ceased when he rendered his award. Id. "Arbitrators, unlike judges, do not have continuing jurisdiction after rendering an award." Id.

At common law, an arbitrator did not have authority to modify or correct an award once it had been rendered, because of the doctrine of functus officio; **[*41]** i.e., having rendered the award, the arbitrator's task has been fulfilled. Similarly, an arbitrator had no authority to commence a subsequent hearing.

Harris Award at 41, quoting Fairweather, Practice and Procedure in Labor Arbitration, 2nd Ed. (1983), at 579-580. Harris noted that, while this rule has been modified to allow for technical corrections, that was not the case with the Kasher Award.

. . . There is nothing in the record which indicates that Arbitrator Kasher wishes to correct his award. Rather, it is the ICC which has set aside the award as not being consistent with its view of the transaction which it authorized. When Arbitrator Kasher rendered his award, his functions ceased. They can only be revived by the joint consent of the parties or the reappointment by the authorizing body. In this case, the original award has been set aside in part. The parties were asked to concur in an Implementing Agreement under more definitive guidelines than had been earlier set forth by the Commission. They were unable to do so and the provision requiring the appointment of a neutral referee went into effect. When the parties were unable to agree on a referee, in accordance **[*42]** with Mendocino Coast, the ICC requested the NMB to appoint an arbitrator. That was done.

Harris Award at 41-42. We agree with Harris' view of the functions and limits of an arbitrator's authority. Nothing in RLEA's submission convinces us that the Commission was required as a matter of law to continue with one arbitrator. We also note that the NMB, our sister agency with extensive expertise in arbitrations under our labor protective conditions, knowing that we had no objection to the matter continuing before arbitrator Kasher, and being apprised of all the arguments presented to us by the parties, selected Harris to conclude this proceeding. Thus, we conclude that Harris had authority to arbitrate the remanded issues and to impose an implementing agreement as a result of the failure of the parties to voluntarily agree to one pursuant to our order of October 26, 1989.

c. Scope of Review

This contentious and hard fought proceeding has presented several issues for resolution on appeal from the Harris Award. However, in resolving them we are mindful of the standard of review by which we are bound in arbitral review cases. The Commission has determined to give arbitrators **[*43]** the prime responsibility for achieving a balance between collective bargaining rights and consolidation efficiencies. In so doing, the Commission limits its review of arbitral decisions under its labor conditions to recurring or otherwise

significant issues of general importance regarding the interpretation of our labor conditions. Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. Carmen, supra, 6 I.C.C. 2d at 753 n.31, (citing Loveless v. Eastern Airlines, Inc., 681 F.2d 1272, 1276 (11th Cir. 1982)). This standard of review has been upheld by the D.C. Circuit. See, International Brotherhood of Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

We will review each of the matters appealed to assure that none raise issues of sufficient import as to compel vacation of the Award as a whole. If any one element is found wanting we believe that the entire Award would have to be vacated because of the intricate relationships between the Award's components. We view this **[*44]** Award as one which must be examined as a whole, however, for the reasonableness and fairness of its overall effect. Cf. Permian Rate Basin Cases, 390 U.S. 747, 767 (1968); accord, ICC v. American Trucking Associations, Inc., 467 U.S. 354, 365 (1984). Our review, as set forth below, convinces us that no issue or combination of issues raised requires vacation of the Award, that the Award presents a fair and equitable resolution of complex problems and is necessary to permit going forward with the transaction we authorized.

2. Commission Authority To Modify CBAs

RLEA continues to assert that the Commission is precluded from authorizing an implementing agreement that "abrogates existing CBAs." RLEA at 3. RLEA's argument is premised on its view that Article I, Sections 2 and 3 of the Commission's labor conditions, which requires the "preservation" of rights under existing CBAs, requires the modification of CBAs only by resort to the procedures in the Railway Labor Act, 45 U.S.C. 101, et seq. Absent the use of the RLA, notably Section 6 (45 U.S.C. 156), such modifications are illegal.

This view leads inexorably to the conclusion that Sections 2 and 3 may be used to frustrate any **[*45]** consolidation or other transaction approved by the Commission, despite the Commission's mandate to approve such transactions found to be in the public interest and to impose conditions for the protection of employees affected by the transaction. See, 49 U.S.C. 11347. Thus, in RLEA's view, where there is a conflict between the terms in the CBA and the transaction, the terms of the CBA can serve to override the transaction. RLEA at 3.

The Commission has rejected RLEA's formulation of the agency's ability to modify CBAs. As the Commission has determined in the past, Section 11347 permits arbitrators, appointed under Section 4 of its labor conditions, to modify provisions of CBAs where necessary to permit mergers. Carmen, supra, 6 I.C.C. 2d at 752; Brandywine Valley R.R. - Purchase, 5 I.C.C.2d 764 (1989). Such modifications have, in the past, been generally limited to issues regarding the selection of forces and assignment of employees. Carmen, supra, 6 I.C.C.2d at 720-21, 742-43. n22

n22 As the Commission has noted previously, its ability to modify CBAs may be traced to Sections 4 and 5 of the Washington Job Protection Agreement of 1936 (WJPA), a voluntary national collective bargaining agreement that provided bargaining and compensation protection to employees but left employers free to alter the size of their work force. The WJPA is generally conceded to be the

blueprint for all subsequent job protection arrangements. See, Carmen, supra at 733. **[*46]**

This attempt to balance the right of the railroads to carry out approved mergers (under the Interstate Commerce Act) with the right of employees to bargain collectively over their conditions of employment (derived from the Railway Labor Act) is in accordance with the Supreme Court's admonition in Pittsburgh and Lake Erie R.R. Co. v. RLEA, 109 S.Ct. 2584 (1989) to avoid conflicts between the two statutory regimes. Carmen, supra at 721, 753. In this way, the Commission may give effect to the statutes and carry out the will of the Congress by promoting the consolidation of the railroads and preserving employees' opportunities to bargain collectively.

Based on our decisions we conclude that an arbitrator, acting under the Commission's authority, may modify existing CBAs if such modifications are "necessary" to the transaction and generally may be said to concern the selection and assignment of forces. Harris correctly stated the scope of an arbitrator's authority to modify CBAs under Carmen. Harris Award at 45. After examining the Commission's statements in Carmen, Harris concluded (id.):

This arbitrator finds that he effectively has been directed by the ICC not to modify collective **[*47]** bargaining agreements in making an Implementing Agreement arbitration award except as such award effects the selection of forces or the assignment of employees; that is, questions involving scope rules and seniority rosters.

We expressly approve that statement. n23

n23 We indicated in Carmen (6 I.C.C.2d at 721) that we were relying heavily on the experience of arbitrators (as well as management and labor) to determine "the nature of the CBA provisions that can be modified under our conditions to permit a merger to be carried out," anticipating that they would call upon their "institutional memories" (6 I.C.C.2d at 722) in exercising their powers to "[permit] the carrying out of the transaction while maintaining labor peace." Id.

3. The Necessity Finding

RLEA and UTU challenge the individual components of the Harris Award on the grounds that the modifications sanctioned by Harris have not been shown to be necessary n24 to the carrying out of the transaction. This attack is premised largely on Harris' statement (Harris Award at 60) that if left to his own devices he would have imposed the lessor carriers' CBAs on the transactions as Kasher had done. From this, RLEA contends **[*48]** that no "necessary" finding was made by the arbitrator. UTU confines its attack largely to general statements that the Harris modifications were not necessary to the transactions.

n24 GTI suggests that the Commission can rely on Section 11341(a) in addition to our authority under Section 11347 to modify CBAs to effect such a modification. RLEA's argument here contends that the "necessary" requirement of 49 U.S.C. 11341(a) has not been met. As Section 11341(a) is not relied on in this decision we see no need to discuss the necessity requirement of section 11341(a).

We disagree. Harris accepted the Commission's determination that the implementation of sections 1, 2 and 3 of the Kasher Award exceeded Kasher's

authority under our conditions because implementation of those provisions, which freeze existing operating patterns and procedures, would eviscerate the approved transaction.

In light of this determination, which binds the arbitrator, and despite the Commission's suggestion in its October 26, 1989 decision that the ST/UTU agreement would be an appropriate vehicle upon which to base an implementing agreement, Harris declined to impose the ST/UTU agreement upon all employees **[*49]** accepting offers of employment with ST. Rather, he made extensive findings as to the manner in which ST was, in fact, operating. He then "deemed" as necessary to the consummation of the transaction certain modifications to both the lessors' and the ST's existing CBAs to obtain the flexibility and systemwide uniformity of operations, which he correctly recognized were required to achieve the improved service that the Commission found to be in the public interest in authorizing these transactions. n25 Accordingly, his proposed implementing agreement contains provisions overriding certain elements of the existing CBAs of both the lessor carriers and ST. In this context, we do not construe the use of the word "deemed" to undermine Harris' findings that the proposed modifications were necessary, as rail labor suggests. We thus reject this argument.

n25 Throughout its submissions to the Commission, RLEA argues that only the lessor carriers' collective bargaining agreements are relevant or are the only CBAs that should concern the Arbitrator and the Commission. We agree with the view expressed by GTI that under our decision of October 26, 1989 the ST/UTU CBA is applicable to this transaction, and Harris was compelled to consider the provisions of this CBA, and ST operating procedures thereunder, as well as the other CBAs. It, as well as the other CBAs, had to be preserved as much as possible to be true to the restrictions of Sections 2 and 3 on the Commission's labor protections. **[*50]**

4. The Provisions of the Award

Five of the Harris Award modifications to the implementing agreement proposed in the Kasher Award are contested by the parties. n26 They are:

a. Employees furloughed from the lessor carriers will be given preferential hiring for newly created positions on ST, and will be placed on the lessors' seniority rosters, once hired. Harris Award, Implementing Agreement, Section 2.

n26 The sixth provision, which expands the category of prior rights employees to include those on authorized leaves of absence at the time of consummation of the transaction, does not appear to be challenged. See fn. 9, supra.

b. Agreements between the MEC/PT and its employees are modified so that there will be a single seniority district on the MEC/PT. Harris Award at 60.

c. The incidental work rules contained in all of the applicable CBAs are modified to allow incidental work regardless of the location of the work as long as it shall not comprise fifty percent of the total work of an individual employee in any single day. Harris Award at 60.

d. The applicable CBAs are modified so that a conductor may be utilized without a brakeman in through freight service; and **[*51]** a conductor may be utilized with or without a brakeman on local freight and in yard work, if such usage complies with applicable Federal Railroad Authority safety standards. Harris Award at 60-61. Harris Award at 60.

e. ST employees hired after the date of the lease transactions who have performed work for the ST (on or in connection with a leased line or an ST line to which they had no seniority rights prior to the leases) shall have their names added to the bottom of the appropriate lessors' seniority roster. Harris Award, Implementing Agreement, Section 2.

Harris, in reaching his conclusions regarding the merits of the Award, looked at the entire record of this proceeding. In so doing, he made credibility determinations concerning the witnesses he heard. Harris Award at 47. In his attempt to arrive at an implementing agreement, Harris presided over 12 days of hearings and heard numerous witnesses. Harris Award at 1. He made extensive findings of fact with respect to ST operating practices as necessary to assist him in formulating the proposed implementing agreement. Harris Award at 47.

a. Placement of Furloughed Employees on the ST Rosters

RLEA complains of the Harris **[*52]** Award's placement of preferentially hired employees, furloughed at the time of the lease transactions, on ST's seniority rosters. During the hearing before Harris, GTI indicated that it would be willing to add to the Implementing Agreement a provision which would allow for the preferential hiring to newly established positions on ST of lessor carrier employees who were furloughed or on inactive status at the time of the lease transactions. Harris Award at 51. Harris adopted this proposal with the alteration, apparently not objected to by GTI (GTI at 59-60), that, instead of placing the preferentially hired furloughed employees on the ST/UTU seniority roster these employees would be required to be placed on the bottom of the seniority rosters of the lessor carriers. Harris Award at 53. RLEA condemns this provision as abrogating the seniority rights of furloughed employees embodied in the lessor carriers' agreements. n27

n27 RLEA also makes the argument that the modification is a "taking" without compensation. RLEA at 16, n.12. There is no "taking" in the constitutional sense, if only for the reason that there is no modification of any CBA. Moreover, these employees are being given an equity right, and for those employees unaffected by the transaction it is an additional right agreed to by GTI. **[*53]**

As discussed in footnote 11, supra, RLEA is chiefly concerned that ST has been allowed to hire new employees during the period between the lease transactions and the implementation of the proposed implementing agreement (i.e. after hireds), without giving any preferential consideration to the arguably more experienced furloughed employees. Since the Harris Award preferential hiring term only begins to apply once the agreement is in place, RLEA's contention of necessity is that the furloughed employees' existing seniority rights in the lessor CBAs have already been violated. RLEA's objection, thus, has nothing to do with the preferential hiring provision but rather addresses whether the hiring of after hired employees has already violated the furloughed employees' existing CBA rights. This is a matter which the parties can pursue at a different time, perhaps in another forum. For us, it is sufficient to conclude that no party has made a sufficient showing to warrant our vacating or modifying this provision of the Award.

b. Merging of Seniority Districts

Clearly, the merging of the MEC and PT seniority districts is within the scope of the arbitrator's authority. It is classically **[*54]** the function of

arbitrators to adjust seniority rosters in formulating implementing agreements. There can be no doubt that increasing the size of the MEC/PT seniority districts increases the flexibility in selection and assignment of forces, within those expanded districts and throughout the GTI system.

RLEA's complaint and argument addressed to this determination signify nothing more than its disagreement with that determination. Whether the increased flexibility associated with the expansion of the MEC/PT seniority districts should be provided in the overall context of the proposed implementing agreement is, of course, a matter for the informed discretion of the arbitrator. RLEA has presented no evidence to warrant the Commission's overturning this provision of the award.

c. Incidental Work Rule

Harris found that the ST was not operating under the "railroader" concept (a method of operating a railroad without the traditional railroad crafts). Harris Award at 57. Instead the arbitrator concluded that ST was:

utilizing its employees along traditional craft lines, albeit without a few of the crafts, and with a virtually unlimited incidental work rule.

Harris Award at 58. **[*55]** Harris based his conclusion on extensive findings regarding the ST's present ability to have individual employees do incidental work "historically . . . assigned" to a different craft. Harris Award at 47. The Award's factual findings then detail the ST operations to which employees of one craft have been assigned work usually assigned to other crafts. Harris Award at 47-50. Thus, for example, the ST has utilized anyone as a hostler for moving engines into repair facilities, and utilized carmen in the car repair facilities, thus eliminating machinists.

RLEA argues that the record does not demonstrate that the lessee carrier utilized its employees interchangeably and that this lack of cross-utilization (the railroader concept) defeats any argument that the modifications required by the proposed implementing agreement were necessary to the transaction. RLEA at 7-8. In our view, RLEA misstates the employee utilization scheme advanced by the lessee carrier and, as Harris properly found, also oversimplifies the reason for our authorization of the transaction. Harris Award at 46.

Harris specifically and properly rejected the simplistic notion that complete cross utilization of **[*56]** employees was the touchstone of our authorization of these transactions. Rather, as he concluded, what motivated our authorization was our desire to improve rail service in the region through increasing GTI's flexibility to operate more efficiently on a systematic basis. He addressed that concern, not by imposing the UTU/ST agreement as we had suggested, but rather by providing for the inclusion of an incidental work rule in each of the lessor and lessee carriers' CBAs. The rule plainly is intended to promote better and lower cost rail service, by facilitating the assignment of incidental work to employees when and where needed.

Thus, Harris required, in order to implement the transaction, that the lessor carriers' craft designations be utilized, but adopted in significantly modified form (i.e., subject to a 50% limitation), the virtually unlimited resort to the incidental work rule he found to exist in work assignment practices pursuant to the ST/UTU agreement. Harris expressly noted (Harris Award at 58) that this new found flexibility was central, in ST's view, to its manner of operating. Harris

Award at 47. We agree, and conclude that this aspect of the agreement which he **[*57]** imposed is indispensable to obtaining the results we found to be in the public interest in authorizing these transactions. RLEA has presented nothing that requires the Commission to vacate the Award based on Harris' establishing a uniform incidental work rule for application to all crafts throughout the GTI system, patterned after practice under the ST/UTU agreement.

d. Crew Consist Rule

UTU complains that the portion of the Award allowing ST to operate its trains with only an engineer and conductor in numerous situations (the so-called crew consist rule) is outside the scope of the arbitrator's authority. n28 UTU contends that the crew consist portion of the Award is at odds with Section 2 of the labor conditions, as well as rights under the RLA. Thus, UTU questions the ability of the arbitrator (and the Commission) under 49 U.S.C. 11347 to modify the CBAs in question. n29

n28 RLEA does not specifically challenge this portion of the Award. UTU specifically challenges only this portion of the Award. UTU at 1.

n29 As we noted in footnote 15, supra, UTU claims that prior to the lease transactions, the carriers attempted to effect an abolishment of the crew size agreements on the lessor lines. Although not a matter of record evidence, we are concerned by the assertion that GTI only sought the Commission's approval for these transactions after bargaining under the RLA on this issue stalled. UTU reply at 4. We note, first, that since this allegation was made in UTU's reply, GTI did not have an opportunity to reply to it under our rules. However, we have found that the transactions at issue were undertaken for legitimate transportation purposes and not merely as a means to circumvent RLA bargaining obligations. See supra p.23. **[*58]**

The arbitrator held that the crew consist rule was within the rubric of selection and assignment of forces. Harris found that the ST operates its train crews with an engineer, a conductor only on through freights, and a conductor only or a conductor and trainman on local freights, and a conductor only or a conductor and yardman on yard freights. Harris Award at 48. UTU argues that the ST/UTU agreement does not contain a crew consist rule and therefore it was fallacious for GTI to intimate that the Award decided to incorporate such a rule in lieu of the lessor carriers' CBA rule on crew consist size. While it is true that ST has no comparable rule, the Arbitrator found that the practice of ST concerning the crew consist was to operate without a brakeman. In light of the arbitrator's finding that the ST has made a practice of operating its trains with only an engineer and conductor in numerous situations, UTU's assertion that this provision should be vacated cannot stand. This is another instance in which Harris embodied ST practice in this implementing agreement and provided for operation of what he found to be ST practice throughout the GTI system.

We are not persuaded, moreover, **[*59]** as suggested by UTU, that the fact that a provision embodied within an overriding implementing agreement which may also be the subject of collective bargaining under the RLA prevents its inclusion in the implementing agreement absent a showing of bad faith not here made. To so hold would require finding that the WJPA, as embodied in Section 11347 and our labor protective conditions, relieves from the obligation of bargaining under the RLA only those items not bargainable under the RLA. This would reduce to insignificance the labor management compromise that everyone agrees unlocks the door to consolidations in the public interest. See, Carmen,

6 I.C.C. 2d 732-737. We conclude that the provision of the Award extending the scope of ST's crewing practices to all operations within the GTI system in the context of the total implementing agreement does not require us to vacate the Award.

e. Extension of the Harris Award To After Hired Employees

GTI asserts that the arbitrator was without authority to determine seniority for after hired employees because they are not eligible for employee protections. However, we do not view the arbitrator's placement of after hired employees of **[*60]** ST on the lessor carriers' seniority rosters as the broad exercise of arbitral authority GTI suggests. We construe the provision as limited to "after hired" employees (hired after the leases but before the final implementing agreement) and not extending to "new hires" (hired after the final implementing agreement). Applying this interpretation, we view Harris as having properly exercised his discretion to resolve the conflicting seniority interests of prior rights employees and after hireds in a manner which allows the transaction to be effectively implemented.

Contrary to GTI's contention, we do not believe that arbitrators acting under our conditions are barred from resolving seniority issues because some of the employees involved may not be eligible for the substantive protections of our conditions. Because of the substantial delay in adopting a final implementing agreement, there is a large number of after hired employees whose seniority status is in question. Resolution of their seniority status is of critical importance to them and to the other employees, as well as to a harmonious working environment.

Resolution of the important and contentious issue of seniority has traditionally **[*61]** been a principal duty of arbitrators (Carmen at 742). Furthermore, the fact that employees who are ineligible for the substantive benefits of our protective conditions are placed on a seniority roster does not make them eligible for protections. They do not thereby become "affected" employees within our conditions. Thus, at most, this aspect of the award postpones achievement of the flexibility GTI seeks to achieve by assigning employees to an ST seniority roster rather than lessor carriers' seniority rosters until an implementing agreement is in place. Given the foregoing analysis it is clear to us that GTI has failed to demonstrate that arbitrator Harris was without authority to perform this important task of resolving seniority among the employees available for service upon the effectiveness of the implementing agreement proposed. As limited to after hired employees GTI has not provided a sufficient basis for vacating or modifying the Award based on its objection to this provision.

5. The Determination of the Protective Period

a. Protective Period

The final issue before us is a determination of the period of time that the labor protections will run. The Harris Award **[*62]** found that the protective period runs with the effective date of the implementing agreement, or when the employee is adversely affected, whichever shall occur last. All of the parties agree with this basic formulation. However, GTI contends that the agreement is also limited to employees adversely affected and available for service. We read GTI's pleadings as agreeing with arbitrator Harris that all employees in active service (as that term is defined by Harris) on the lessor lines at the time of

the lease transactions involved are entitled to a "third offer" of employment. Apparently, GTI also agrees that an employee who accepts that offer and presents himself or herself as available for service will be entitled on the basis of the terms of the Award to up to six years of income protection from the date of acceptance. n30

n30 We understand from a letter filed with Chief Administrative Law Judge Cross in the Sub-No. 2 proceeding that based on the announcement of our decision at our voting conference on August 14, 1990, ST has already mailed out copies of Arbitrator Harris' Award and Test Period Average (TPA's) to the extent not already furnished to all employees who were in active service as defined by Harris and also sent copies of the Award to employees who were on furlough at the time of the transactions. This indicates that GTI is beginning the process leading to the extension of third offers to all employees. We are heartened by this apparent attempt to resolve the long festering problems arising out of the manner in which this series of transactions was effectuated. **[*63]**

This formulation does not appear to exclude persons who participated in the work stoppage from protection following the effectiveness of this implementing agreement and hence comports with our previous decisions requiring that no employee be forced to give up any rights prior to the effective date of an implementing agreement. We also agree with GTI's suggestion that, to be eligible for labor protection upon acceptance of the required offer of employment, employees offered employment must be available to begin that employment. If GTI does not intend to extend full protection up to six years to employees who participated in the work stoppage, should it be successful in overturning the Quinn Award, we can address the question of the effects of such a determination upon GTI's obligations under our employee protective conditions at that time.

b. Make Whole Provisions

Rail Labor contends that the make-whole payment protection period begins when employees were adversely affected by the lease transactions and continue from the time of the adverse effect until the effective date of the implementing agreement. Additionally, Rail Labor contends that the labor protection begins after **[*64]** the effective date of the implementing agreement when employees are adversely affected and continues for the following six years.

The Commission previously affirmed the make-whole provisions of the Kasher Award. January 10, 1989 Decision at 6. In so doing, we expressly affirmed the make whole allowances for loss of earnings and work-related expenses as provided in the Mendocino Coast labor protection provisions. Id. at 7. However, we provided that although protection could be commenced from the date of adverse effect, or the date an implementing agreement was finally arrived at, whichever came first, at the election of the parties, we expressly provided that total protection would not exceed six years. Thereafter, in response to a request for clarification by rail labor, we indicated that our prior holding did not intend to eliminate the up to 75 days of make whole protection provided in the Mendocino conditions. As a result we indicated that total benefits could not exceed the up to six years provided by our Mendocino conditions for labor protection plus the up to 75 days provided for make whole allowances. See, January 10, 1990 Decision. Once again we reiterated that the **[*65]** parties could elect to have protective benefits (not just make whole payments) run from the date of adverse affect prior to the effectiveness of an implementing

agreement, rather than trying the protective period to the effectiveness of an implementing agreement (or subsequent adverse affect) as provided in the conditions. Id. As we have noted previously, all parties have elected to commence the protective period from the effectiveness of an implementing agreement, and we will not interfere with that choice.

Questions concerning the availability of benefits during the make-whole period are already being considered in a separate Commission proceeding. This second proceeding, Delaware & Hudson Ry. Co. -- Lease and Trackage Rights Exemption -- Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 2), is designed to formulate procedures for the payment of employee claims filed with the carrier during the period after the lease transactions but before the effective date of the implementing agreement. Thus, it is an appropriate vehicle for determining the issues surrounding the make-whole benefits. n31 Referring issues surrounding make whole payments to that proceeding **[*66]** is especially appropriate in light of GTI's willingness to extend third offers to all active service employees, leaving the issue of benefits prior to the implementing agreement as the remaining major area of contention in these protracted proceedings.

n31 We committed ourselves in Mendocino to consider greater levels of protection "where the need therefor has been specifically established." 360 I.C.C. at 663. This was specifically noted by the court affirming Mendocino, and it entrusted to us the task of determining when Section 11347 "may call for more than the baseline protections we now uphold." RLEA v. United States, 675 F.2d 1248, 1256 (D.C. Cir. 1982).

CONCLUSIONS

We recognize that this decision may not provide a perfect solution to the parties' conflicting interests. However, in the contentious proceedings that have become Springfield Terminal, we believe that we not only are permitted to leave to the discretion of an arbitrator who is an expert in labor law the task of equitably reconciling diverse and conflicting interests, but are obligated to do so unless the Award is shown to be plainly beyond the authority reposed in the arbitrator by the Commission. In the **[*67]** case of the Kasher Award we found the arbitrator to have exceeded his authority by imposing each of the lessors' CBAs which defeated the purpose of the transaction by freezing in place preexisting operating practices and procedures. The principal method of achieving the benefits of improved service which we envisioned in authorizing these transactions was to achieve the operating economies and efficiencies inherent in extending the more flexible operating procedures utilized by ST uniformly throughout the entire GTI system. Thus, we would have preferred to have had Arbitrator Harris utilize the ST/UTU agreement as his starting point in arriving at an implementing agreement. But he chose not to do so, and we cannot say that he exceeded the authority we reposed in him by deciding not to, provided he has built enough flexibility and systemwide uniformity into the implementing agreement so as to permit the New England region to enjoy some of the benefits of improved service by GTI we envisioned when we authorized these transactions.

We believe this Award does so and, in the process, equitably preserves the collectively bargained rights of employees to the maximum extent possible. **[*68]** Although we have reviewed each of the matters appealed to assure ourselves that none raised issues of sufficient magnitude as to require vacation

of the Award as a whole, we view this Award as a seamless web which must be examined in its entirety for the reasonableness and fairness of its overall effect. Cf. Permian Rate Basin Cases, supra; ICC v. American Trucking Associations, Inc., supra. Had any one element been found defective, we believe the entire Award would have had to be vacated because of the inextricable interrelationships between its various components.

Based on the foregoing, we are satisfied that arbitrator Harris had jurisdiction to formulate the implementing agreement under review upon his selection by the National Mediation Board. We conclude that no party has shown that Harris exceeded the authority vested in him by the Commission pursuant to the labor conditions imposed on this proceeding or otherwise proceeded unlawfully. Nor has any party shown that any of the issues raised by the appeals, considered either individually or collectively, require us to vacate the Award. We also conclude that the Harris Award as a whole effects a reasonable and equitable accommodation **[*69]** of the various conflicting and competing interests necessary to permit the transaction authorized by us to be carried out. Finally, we conclude that the implementing agreement imposed in connection with the Award is responsive to the instructions given by us in the various orders entered in these proceedings and that it avoids the infirmities which prompted us to vacate a portion of the prior arbitral award. Therefore, we decline to vacate the Harris Award and we dismiss the appeals which we accepted for consideration by our order served May 22, 1990.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The appeals from the March 13, 1990 Award of Robert O. Harris in this proceeding by GTI, RLEA and UTU are dismissed.

2. The implementing agreement imposed in connection with the Award is approved as the implementing agreement required by our decision of February 17, 1988.

3. GTI shall cause to be distributed to all persons in active service (as that term is defined in the Harris Award) with B&M, MEC, PT or ST, at the time the first of the lease transactions embodied within this proceeding was consummated, **[*70]** a copy of this decision, the Harris Award, and a calculation of the employee's TPA to the extent these materials have not already been furnished.

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 transactions embodied within this proceeding was consummated.

5. The protective period as set forth in the Mendocino conditions for each employee who accepts the offer required in number 4 above and presents 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.

6. Issues involving make whole protection as set forth in the Mendocino conditions and the handling of claims for the period between the date the first of the lease transactions embodied within this proceeding was consummated and

the effective date of this order shall be handled in the Sub-No. 2 proceeding which is hereby expanded to encompass all such issues. A copy of this decision and order shall be filed in the Sub-No. 2 proceeding. **[*71]**

7. The Delaware and Hudson Railway Company (D&H), a party to the Springfield Terminal proceeding prior to its entry into reorganization under Chapter 11 of the Bankruptcy Code, to the extent it has not heretofore been dismissed from this proceeding, is hereby dismissed for want of prosecution and, in so doing, we vacate the stay.

8. The stay upon consummation of the B&M transaction to the extent not already consummated contained in our order of October, 1987 is vacated upon GTI's agreement to abide by the provisions of this order and its notification to the Secretary of the Commission in writing that it will do so.

9. This order is effective November 4, 1990.

CONCURBY: LAMBOLEY

CONCUR:

COMMISSIONER LAMBOLEY, concurring in part and dissenting in part:

My views regarding the exercise of arbitral authority under the labor protection conditions mandated by 49 U.S.C. § § 11343-347 and Commission review thereof, have been stated at length in conjunction with the various procedural and substantive decisions entered in these proceedings, beginning with Springfield Terminal I, n1 in the Carmen cases, n2 as well as in other related decisions, n3 and need not be reiterated here.

n1 Finance Docket No. 30965, Delaware & Hudson Ry. Co. - Lease and Trackage Rights Exemption - Springfield Terminal Ry Co. 4 I.C.C.2d 322 (1988) (Springfield Terminal I), also Finance Docket No. 30965 (Sub-No. 1), Delaware & Hudson Ry Co. - Lease and Trackage Rights - Springfield Terminal Ry Co. (Review of Arbitral Award - Kasher) (non-print), served January 10, 1989, (Springfield Terminal II) and (non-print), served January 25, 1990 (Springfield Terminal VI).

n2 The "Carmen" styled case involved two proceedings (1) Finance Docket No. 28905 (Sub-No. 22), CSX Corp. - Control - Chessie System, Inc. and Seaboard Coast Line, Inc. and Finance Docket No. 21215 (Sub-No. 4), Seaboard Airline RR Co. - Merger - Atlantic Coast Line RR Co. 4 I.C.C.2d 641 (1988), aff'g in part rev. 1, in part, Arbitration Between Bro. Ry. Carmen and CSX Transp. Co. (John B. LaRocco, Arbitrator) and (2) Finance Docket No. 24930 NS Corp. - Control - N&W Ry. Co. and Southern Ry. Co. (non-print), served June 10, 1988 (Dispatchers) aff'g Award in Arbitration Between N&W and American Trans. Dispatchers Assn. (Robert O. Harris, arbitrator). On appeal, the Commission decisions were reversed and remanded by the D.C. Circuit in Bro. of Railway Carmen v. I.C.C. (No. 88-1724) and American Trans. Dispatchers Assn. v. I.C.C. (No. 88-1694) 880 F.2d 562 (1989) modified on remand by the Commission, served June 21, 1990. CSX Corp. - Control - Chessie Systems, Inc. and Seaboard Coast Line, Inc. 6 I.C.C.2d 715 (1990) and (non-print), served July 20, 1990.

n3 See also (1) Finance Docket No. 28585 (Sub-No. 24), BN. Inc. - Control & Merger - St. Louis - San Francisco Ry. Co. - Review of Arbitral Award (non-print), served June 23, 1988 vacating Award in Arbitration Between Bro. of Loc. Engrs. and BN (Arthur Van Wart), (On appeal the Commission decision was reversed

by the 8th Circuit in Bro. of Loc. Engrs. v. I.C.C. 885 F.2d 446 (1989.)) and (2) Finance Docket No. 28905 (Sub-No. 23), CSX Corp. - Control - Chessie System, Inc. and Seaboard Coast Line, Inc. (non-print), served November 6, 1989, aff'g Award in Arbitration Between CSX Transp., Inc. and American Train Dispatchers Assn. (Robert J. Ables, Arbitrator). **[*72]**

In review of the initial Award rendered by Arbitrator Kasher, I voted to affirm that Award in its entirety. Springfield Terminal II. Notwithstanding the possibility that the Commission itself might have differed with the arbitrator on some issues, in my view, the limited, deferential scope of arbitral review, coupled with the record then developed, constrained any efforts to impose the Commission's own views and achieve other results in lieu of the arbitrator's decision. I continue to believe that Arbitrator Kasher's award should be affirmed.

Indeed, it is apparent that Arbitrator Harris, whose subsequent award is here under review, basically agrees with the Kasher Award. After hearings, Arbitrator Harris reports that but for the Commission's decision in Springfield Terminal II, by which he feels bound, "he too would have reconciled the competing interests involved by imposing the lessor carriers' collective bargaining agreements". Harris Award at 60.

For me, the central issues in this case remain focused on the Kasher Award and the Springfield Terminal II decision. n4 The Commission's refusal to affirm portions of the Kasher Award in Springfield Terminal II is ostensibly based **[*73]** on operational "efficiencies" and "work rule flexibilities" to be achieved by the transactions as asserted by GTI. Initially, such allegations appear metaphysical, but nonetheless prove measurable later. Arbitrator Harris finds and concludes, as a matter of fact, that the claimed "efficiencies" of GTI are, in most respects, self-serving, lacking credibility and non-exist on the record as now developed. n5 Moreover, prior representations concerning the provisions of the UTU/ST labor agreement significantly differ from the actual implementation and present employment practices on record. n6

n4 Arbitrator Harris frequently refers to those decisional issues as central to his analysis. See e.g., Harris Award at 5, 43, 47, and 55-57.

n5 Harris Award at 29, 47, 57-58.

n6 Id at 16-25.

At its core, the fundamental precedent for the Springfield Terminal II decision was the Commission's view of the Interstate Commerce Act (ICA), pre-emption of the Railway Labor Act (RLA), and corresponding notions that any purported operational efficiencies and economies, as well as requisite flexibility in management prerogatives, could be achieved by displacement and/or modification of existing **[*74]** collective bargaining agreements (CBA's). The authority for those plenary pre-emption views was largely discredited by the D.C. Circuit's decision in the Carmen case reversing and remanding the Commission decisions to set aside CBA's in arbitral review. n7 On remand, while acknowledging limitations on its ability to pre-empt, the Commission nonetheless, reaffirmed its basic claim pre-emptive authority under the ICA over the RLA seemingly less pervasive view of modification or displacement of CBA provisions under § 11347. n8

n7 Bro. of Railway Carmen v. I.C.C., supra n.2. (Principally dispositive was the Courts review of 49 U.S.C. § 11341(a). Arguments under § 11347 were remanded for reconsideration by the Commission.)

n8 CSX Corp. - Control - Chessie System, Inc. and Seaboard Coast Line, Inc. 6 I.C.C.2d 715 (1990).

Because I find the issues remain joined with the Kasher Award in Springfield Terminal II, I do not here consider or evaluate the Harris Award as separate or distinct. Nor do I find it necessary to address the jurisdictional and procedural claims surrounding the Harris Award. n9

n9 I should note however, my view that the functus officio principle has little relevance in remand proceedings. See Enterprise Wheel & Car Corp. v. Steelworkers 269 F.2d 327 (4th Cir. 1959) aff'd in pertinent part Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). On review, arbitral awards are customarily corrected or clarified by remand to the arbitrator rendering the award under review. Such was the Commission's order in Springfield Terminal II. **[*75]**

In my judgment, the public policy grounds asserted for vacating a portion of the Kasher Award do not withstand critical scrutiny in law or fact. If anything, the Harris Award serves to confirm the propriety of the Kasher Award. It is only because of the Commission decision in Springfield Terminal II that the Harris Award exists. The causal connection and the derivative premise of Springfield Terminal II for the Harris Award require that we again focus on the Kasher Award, as convenient as it might be at this juncture to otherwise only consider the Harris Award. The rationale and results of the Springfield Terminal II decision, in my view, remain questionable and should be reexamined. n10

n10 Cf. Harris Award at 45.

20

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES v. UNION PACIFIC RAILROAD COMPANY (ARBITRATION REVIEW)

Finance Docket No. 30964 (Sub-No. 1)

INTERSTATE COMMERCE COMMISSION

1991 ICC LEXIS 71

March 21, 1991

PANEL:
[*1]

DECISION

BY THE COMMISSION, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald.

OPINIONBY: SIMMONS, PHILLIPS, MCDONALD

OPINION:

On July 27, 1990, Randy J. Ridley petitioned for review of an arbitral decision issued on June 14, 1990, denying his claim for benefits under Commission-imposed labor protective conditions. n1 Union Pacific Railroad Company (UP) moved to dismiss, and Mr. Ridley replied. We are accepting but denying the appeal. n2

n1 Petitioner requests waiver of the 30-page limit under 49 CFR 1115.2(d) to allow him to submit the 22-page arbitral award. The rule does not apply to the submission of the arbitration award that is being appealed. Indeed, any specific award could exceed the 30-page limit. More importantly, however, the award is integral to the appeal; it is essential to the record and is not available to us unless submitted by the parties. Hence, there is no need to request a waiver if it is intended only to permit the submission of the award. See CSX Corp. -- Control -- Chessie and Seaboard C.L.I., 4 I.C.C.2d 641, 643 (1988).

n2 UP moves to dismiss contending that arbitration decisions must be appealed within 20 days of their issuance under 49 CFR 1115.8, but that this petition was not filed until the 43rd day. Consistent with our treatment of statutory appeals, we stated in Norfolk & W. Ry. Co. and New York C. & St. L. Ry. Co. -- Merger, 5 I.C.C.2d 234, 237 (1989), that this time limit would be strictly applied but that extensions would be available for good cause on request.

Mr. Ridley attributes the late-filing to his not being served with the arbitrator's award until 29 days after it had been issued. Allegedly, union counsel then informed him erroneously that he had 45 days to appeal. Although unsupported, these assertions have not been contravened by UP. They establish good cause for an extension, and one will be granted.

Relying on Finance Docket No. 28640 (Sub-No. 11), Chicago, M., St. P. & P. R. Co. -- Alternate Plan of Reorg. (not printed), served December 6, 1989 (Milwaukee), UP requests leave to reply to Ridley's petition if its dismissal motion is denied. In Milwaukee, respondents had contended that the Commission's jurisdiction did not extend to arbitrations when the transaction was authorized and labor protective conditions were imposed by the Milwaukee Reorganization Court, not the Commission. Because the jurisdictional issue was substantial and potentially dispositive, and the substantive issues complex, the Director of the Office of Proceedings granted bifurcation. UP has not shown that this case is similar to Milwaukee and, in fact, raised in its motion a substantive challenge to our review. As nothing would be gained by bifurcating this proceeding, there is no reason to adopt a separate time schedule for UP to reply to the merits of the petition. UP was previously informed that it must timely submit its entire case and chose not to. (Initially, UP wrote a letter to the Director of the Office of Proceedings asking for a time extension if the Commission "accepted" Mr. Ridley's petition. UP was granted a short extension to file a reply.) Having ignored this message and consistent Commission practice in this regard, it cannot object to the issuance of this decision in the normal course. **[*2]**

BACKGROUND

UP employed the petitioner as a track worker in the Midland Valley Seniority District comprising 167 track miles between Panama and Barnsdall, OK. On October 6, 1986, a 57-mile segment between Tulsa and Muskogee, OK, was embargoed following flood damage. UP's traffic was detoured to a parallel line of the Missouri-Kansas-Texas Railroad Company (MKT). Subsequently, upon entering into a trackage rights agreement, UP and MKT filed a notice of exemption in Finance Docket No. 30964, Missouri Pac. R. Co. -- Trackage Rts., 52 F.R. 1396 (January 13, 1987). The exemption was made subject to the employee protective conditions in Norfolk and Western Ry. Co. -- Trackage Rights -- BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc. -- Lease and Operate, 360 I.C.C. 653 (1980) (Mendocino). n3

n3 Abandonment subject to the employee protective conditions in Oregon Short Line R. Co. -- Abandonment -- Goshen, 360 I.C.C. 91 (1979) (Oregon III) was subsequently authorized for the Tulsa-Muskogee line in Docket No. AB-3 (Sub-No. 66), Missouri Pac. R. Co. -- Abandonment (not printed), served December 16, 1987. The arbitral award considered both the Mendocino and Oregon III conditions. **[*3]**

A gang of trackmen consisting of petitioner Ridley and four other more senior maintenance-of-way employees was laid off on December 2, 1986. The five filed timely displacement allowance claims and ultimately invoked arbitration. They were represented by their union.

UP attributed the displacements to an ongoing general business decline and not of the Commission-approved transaction. In a June 14, 1990 decision, the arbitral board found UP's contention unsupported with regard to four of the five claimants. Had the line been rehabilitated, the board concluded, those four claimants would have participated in the rehabilitation as well as in subsequent annual maintenance. n4 Mendocino benefits were awarded to the four claimants as of the December 2, 1986, layoff.

n4 The board also found that the line was normally maintained by a four-man gang.

The board denied Mr. Ridley's claim. It found that his junior standing on the seniority roster had limited his prospects for continued employment on the line in the face of business declines. In support, the board cited his work record during the 9-month period preceding the washout. This record had been submitted by the union in [*4] an erroneous claim for benefits from January 1986 instead of December 1986 when the alleged displacement occurred. It showed that Mr. Ridley had worked only 76 hours in 1986 prior to October of that year when emergency track work was needed following the washout. No comparable work records were submitted for the other claimants.

DISCUSSION AND CONCLUSIONS

In Chicago & North Western Tptn. Co. -- Abandonment, 3 I.C.C.2d 729, 736 (1987), aff'd sub nom. International Bhd. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (the Lace Curtain case), we set out the standards for review of arbitral decisions. Review is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." We do not review issues of causation, calculation of benefits, or resolution of other factual questions. See also CSX Corp. -- Control -- Chessie and Seaboard C.L.I., 6 I.C.C. 2d 715, 753 n. 31 (1990) (Carmen).

In Finance Docket No. 28490 (Sub-No. 1), Atl. Rich. et al. -- Cont. -- Butte, Anaconda & Pac. Ry. et al. (not printed), served March 2, 1988, aff'd 5 I.C.C.2d 934 (1988), we explained that Lace Curtain adopted the deferential [*5] criteria set forth in the so-called Steelworkers Trilogy. n5 Awards are not vacated because of substantive mistake, except when there is egregious error, the award fails to draw its essence from the [labor protective conditions], or the arbitrator exceeds the specific limits on his authority. Loveless v. Eastern Air Lines Inc., 681 F.2d 1272, 1275-76 (11th Cir. 1982). n6 "Egregious error" means "irrational," "wholly baseless and completely without reason," or "actually and indisputably without foundation in reason and fact." Id.

n5 Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960); and Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960).

n6 The Loveless test involved a collective bargaining agreement from which the award must "draw its essence." In our context, labor protective conditions are analogous to collective bargaining agreements.

Petitioner contends that his submission of an incorrect claim was a legal, not a factual, error and is subject to review. Petitioner, however, cannot complain that his own evidence is found to defeat his case. A claimant has the duty under the protective conditions to identify [*6] the transaction affecting him and to specify the pertinent facts of the transaction on which he relies. The burden then shifts to the railroad to prove that other factors affected the employee. Here, UP could not sustain its burden with respect to the other four employees. Petitioner's union, however, presented credible, competent evidence that supported UP's position. Once accepted, that evidence was entitled to the board's consideration along with all other evidence of record. Petitioner's representative may have erred tactically in submitting this evidence, but that is not a basis for declining to consider the evidence.

Petitioner also argues that the submission of incorrect claims may be a recurring problem in arbitrations and thus may present an issue of general

importance. He asks that we hold arbitrators responsible for ensuring the correctness of the claims before them. We disagree. It is not the arbitrators' role to monitor the tactical presentation of a case, any more than it is ours to review. The protective conditions squarely place on a claimant the sole responsibility to present the facts on which he relies.

Nor did the arbitral board err in relying on the [*7] "incorrect" claim. Petitioner, in fact, has not contended that the evidence of his 1986 work status before the December furlough is in any way flawed. Nor has he shown any other reason why this evidence should be rejected. He notes that furloughs earlier in 1986 were not tabulated for the other four claimants and should not have been relevant to his claim but does not explain why. In fact, it is directly relevant to UP's principal defense in the arbitral proceeding that petitioner was furloughed because of factors other than the trackage rights and abandonment.

Mr. Ridley objects to the arbitrator's use of his work record when similar evidence was not used in determining the status of his co-workers. Apart from the absence from the record of similar evidence for his co-workers, the board noted that petitioner was the fifth member of a work gang that normally needed only four workers. Thus, it could have concluded, even without Mr. Ridley's evidence, that his junior standing during a time of a general business decline showed limited work opportunities. The evidence of actual work experience is corroborative of but not indispensable to the board's findings.

Likewise, petitioner [*8] has failed to demonstrate that the board misconstrued the corroborative evidence. Petitioner notes that he was recalled to service on September 22, 1986, and concludes that he was a full-time, permanent worker on October 6, 1986, when the washout occurred. The board, however, took a broader look and found that he had worked only 20 hours in January and 56 hours in September. Petitioner's hypothesis, that he was permanently called up before the washout, is reasonable, but so is the board's conclusion that the September callup, like the one in January, carried no prospect of continued employment in view of his junior status. Thus, even if we were to review causation matters, and we do not, the board's conclusion would stand.

Finally, Mr. Ridley argues that the arbitral board committed egregious error in treating similarly situated employees unequally. The record, as noted, shows that the parties were not similarly situated, however.

We agree with UP and conclude that this case involves a question of causation only. The board determined that petitioner's displacement was not caused by the Commission-approved transactions but by general business conditions. On appeal, petitioner [*9] has shown no more than an ambiguity in his status. He has not demonstrated egregious error. While the board could reasonably have concluded that Mr. Ridley was a full-time permanent employee when displaced, its conclusion to the contrary is also reasonable. Absent a showing of egregious error, we must decline to review the board's conclusion.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. The motion to dismiss is denied.

2. The petition for arbitral review is denied.

3. This decision is effective on March 27, 1991.

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WISCONSIN CENTRAL LTD. -- PURCHASE EXEMPTION -- SOO LINE RAILROAD COMPANY LINE BETWEEN SUPERIOR AND LADYSMITH, WI (ARBITRATION REVIEW)

Finance Docket No. 31922 (Sub-No. 1)

INTERSTATE COMMERCE COMMISSION

1995 ICC LEXIS 77

SERVICE DATE: April 18, 1995

April 3, 1995

PANEL:
[*1]

By the Commission, Chairman Morgan, Commissioners Simmons, McDonald, and Owen.

OPINION:

In a decision served September 20, 1994, we reopened this proceeding and requested comments regarding an Arbitration Board award that the Brotherhood of Maintenance of Way Employees (BMWE) petitioned us to review. We have received responses from BMWE, Soo Line Railroad Company (Soo), Norfolk Southern Railway (NS), Grand Trunk Western Railroad, Inc. (GTW), the National Railway Labor Conference (NRLC), and the Railway Labor Executives' Association. In this decision, we affirm the Arbitration Board award and deny the relief being sought by BMWE in its petition for review.

BACKGROUND AND ISSUES

In a decision served November 5, 1991, we granted an exemption allowing Wisconsin Central Ltd. to purchase Soo's 102-mile Ladysmith Line. We imposed labor protective conditions under New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).

Soo notified its employees that it intended to consummate the transaction. The jobs of four members of BMWE were to be abolished, which affected other employees' jobs through bumping rights because the four were senior employees. BMWE and **[*2]** Soo met to negotiate an "implementing" agreement, and they agreed on all but one question: whether Soo must provide "test period average" (TPA) earnings information to "affected" employees upon their request. The disputed question went to arbitration. n1

n1 Each of these three procedural steps (Soo's notice to its employees, the parties' negotiation, and their arbitration) conformed to the process prescribed in Article I, section 4 of the New York Dock conditions.

The arbitration award. In the award now at issue, dated April 28, 1992, the Arbitration Board answered the question presented in the negative: under New

York Dock, Soo did not have to provide TPAs to its employees until they were adversely affected by the transaction.

BMWE specifically wanted the implementing agreement to contain the following provision:

> Each employee assigned to the line . . . and employees affected by the exercise of displacement rights by such employee will, upon request, be provided with a computation of test period earnings and hours as described in Article I, Section 5 [of the NY Dock Conditions]. (Arbitration Board award at page 7.)

The Arbitration Board in its discussion at pages 10-11 **[*3]** reasoned essentially that, while job abolishment is an effect, it is not an adverse effect that triggers entitlement to test period data. Entitlement can be triggered only after the employee exercises seniority in attaining a new job, one that places the employee in a worse position:

> That a position occupied by an employee is abolished at the time of a transaction, as in the case here at issue, does not mean that that particular employee has been adversely affected and thereby entitled to a displacement allowance. The test is what happens to the employee in the exercise of seniority and displacement rights after the abolishment of the position. And even in this regard it must be considered that the Carrier has no control over the voluntary exercise of seniority.

The Board resolved, at page 12:

> In our view, the NY Dock Conditions clearly intend that employees not be given a TPA or be certified as entitled to the protective benefits of the NY Dock conditions until they have been adversely affected. . . . (underline in original).

The Board concluded at page 14:

> AWARD:
>
> The Question at Issue is answered in the negative. The Carrier is not required under the NY Dock Conditions **[*4]** to furnish employees "affected" by a line sale with a test period average upon request for such data. Accordingly, the Implementing Agreement which has been identified above as not having included language to such an effect will be the final agreement between the parties.

New York Dock conditions. In our decision served September 20, 1994, we requested comments on "whether New York Dock conditions should be interpreted as requiring that TPAs be provided to affected employees upon request." We observed that "the carrier seems to admit a duty to make TPAs available to 'adversely' affected employees" but also noted that "it is not clear exactly how employees would be better able to exercise their seniority . . . if TPAs were furnished on demand."

Article I, sections 1 and 5 of New York Dock conditions define a "displaced employee" as an employee placed in a "worse position" as a result of a transaction and provide that the "displaced employee" is entitled to receive "a monthly displacement allowance equal to the average monthly compensation received by that employee in the position from which that employee was

displaced." n2 The monthly displacement allowance is to be calculated as [*5] the difference between the monthly compensation received on the new job and the average compensation received for each of the last 12 months; the average is based on the total compensation and total time worked during the 12-month "test period" preceding displacement.

n2 1. Definitions. - * * * *

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

5. Displacement allowances. - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline. [*6]

In our decision served September 20, 1994 at 5, we identified two issues to which the participating parties have responded: (1) "whether and to what extent such a requirement would assist employees in exercising their seniority rights" and (2) "whether and to what extent it would impose additional burdens on the carriers."

(1) Whether and to what extent TPAs would assist employees in exercising their seniority rights. BMWE argues that, by prohibiting employees from

receiving TPAs until they are placed in worse positions, the Arbitration Board award puts employees in a "catch 22 situation," because without TPAs employees cannot know whether they are adversely affected and therefore placed in "worse positions." BMWE adds that the only issue properly before the Board was whether its proposed provision requiring Soo to furnish TPAs to affected employees should be included in the entitled to TPAs until they demonstrate that they are affected adversely, which BMWE suggests would apply even to claims subject to arbitration under section 11 of New York Dock. n3 BMWE's position is that when employees are displaced they must exercise their seniority rights to obtain positions with compensation **[*7]** equal to or exceeding that of the positions from which they were displaced. BMWE maintains that the purpose of TPAs is to enable displaced employees to determine whether they are in worse positions with respect to their compensation and number of hours worked to earn that compensation.

n3 Whereas section 4 provides for arbitration of the implementing agreement, section 11 (a) provides:

In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to interpretation, application or enforcement of any provision of this appendix [the New York Dock conditions], except sections 4 and 12 [which concern losses from home removal] of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

BMWE also believes not only that TPAs are intended for this purpose but also that they are necessary. The union contends that pay stubs reflect only compensation and not information about total time worked including, for example, overtime. BMWE asserts essentially that, without time worked to produce the employees' total compensation for the 12-month test period, **[*8]** which TPA's reflect, employees cannot know whether jobs that they would bid for would be better or worse.

The carriers say that TPAs are not meant for determining whether employees are placed in a worse position. Soo maintains that TPAs are intended only to serve as a basis for calculating displacement or dismissal allowances after the employee has been adversely affected. NS argues that, because a "displaced employee" is defined by Article I, section 1 (b) as one who is already placed in a worse position, "it is not possible to speak of an employee as even having a TPA until it is first known whether the employee has been placed in a worse position, for it is that event which triggers the twelve-month backwards measuring ('test') period." NRLC maintains for the same reasons that a relevant TPA cannot be calculated until the employee has been determined to be adversely affected, and GTW maintains that "TPA's cannot be calculated until there is an adverse effect, because that is, by definition, the starting point for calculating a TPA, as defined by New York Dock."

The carriers contend that the only information needed to bid for new positions based on seniority is rate of pay, **[*9]** which the employees already know for their past jobs and can ascertain from job listings for new jobs. Then, once an employee secures a new position based on seniority but is placed in a worse position as a result, compared to the former position, a TPA will determine how much displacement allowance the employee is entitled to receive each month during the protective period. But the TPA will not determine whether

the employee is placed in a worse position in the first place. (See NS reply comments.)

The parties have further addressed whether there is an "industry practice" of providing TPAs on demand to employees upon their being affected by a carrier transaction. The Arbitration Board referred to an arbitration award (by Referee Zusman) in another dispute involving parties unrelated to this case. Referee Zusman concluded that there was "no evidence of language or practice requiring Carrier to calculate a TPA where no evidence exists that the employee has suffered a loss. . . ." The Board in this case similarly noted, at page 12 of its award:

This Board likewise fails to find by language or practice that the NY Dock Conditions require a carrier to provide a TPA to an employee **[*10]** merely because he would be affected by a job abolishment or sustain a loss of compensation.

NRLC submitted verified statements and exhibits of other arbitration awards showing that providing TPAs is not an appropriate subject for an implementing agreements award under section 4 arbitration. NRLC said that 6 of the 10 major railroads that it surveyed have "a consistent practice of providing TPAs only to employees who are shown to be 'displaced' or 'dismissed,'" and that "therefore, their implementing agreements do not include requirements for TPAs except in rare cases where a carrier 'certifies' in advance that affected employees will be 'displaced' or 'dismissed' and entitled to protective payments." (NRLC reply comments at pages 4-5).

BMWE asserts, however, that NRLC's portrayal of industry practice misstates the issues and mischaracterizes BMWE's point. BMWE explains that all of the arbitrations relied on by NRLC were concerned with causation -- "certification" that the employees were affected by the transaction in question, which is simply not the issue in the instant case. BMWE notes that none of the other parties cites any authority to support their arguments on this issue. **[*11]**

(2) Whether and to what extent requiring TPAs would impose additional burdens on the carriers. Soo asserts that processing TPAs is costly and that requiring them to be provided to employees on request, in advance of determining whether employees are affected adversely, would raise employees' expectations and result in numerous unjustified claims. The railroad describes its process of furnishing TPAs "as an involved and cumbersome manual process, far from being achievable by simply depressing a computer button." Soo presents the testimony of its Director of Labor Relations indicating that the process of administering protection claims entails numerous organizational steps. As a result, each TPA calculation requires three hours of clerical time at a cost of $ 43. Soo further submits an example of an actual line abandonment in 1990, concerning the Brooten, MN line, to illustrate how the seniority and displacement process can spawn a far-reaching process necessitating numerous TPA calculations. Soo indicates that four positions were abolished in that abandonment. Each position elimination resulted in subsequent bumps, totaling 19 employee changes. GTW states that "New York Dock **[*12]** is considerably more complicated than writing checks for separation allowances" and that "Soo is not just being hard to get along with when it says it cannot provide a TPA until there is an adverse effect."

NRLC acknowledges an increased burden of providing TPAs in advance, but with somewhat less urgency than does Soo. NRLC states that while the administrative

burden on carriers of calculating early TPAs for all employees affected by a transaction "may not be immense, it is wholly unjustified" and it "may tend to confuse employees into believing that any deviation between test-period and current earnings, whether or not caused by the transaction . . . supports a claim for benefits." (NRLC comments at page 5).

BMWE questions the credibility of Soo's assertions about the administrative burden of providing TPAs, characterizing the procedure as "far-fetched" and "performed with a pencil, paper and pocket computer . . . a rat's maze of Soo's 'Process of Administering Protection Claims' that would do credit to the imagination of a Rube Goldberg or an Ivan Pavlov." BMWE disputes NRLC's argument that carriers would have to defend numerous non-meritorious claims not caused by the transaction. **[*13]** The union says that a request for a TPA can simply be denied on the ground that the employee's claimed effect was not caused by the transaction.

DISCUSSION AND CONCLUSIONS

Standard of review. In reviewing an arbitration award, we will not vacate the award unless there is "egregious" error, the award fails to "draw its essence from the labor protective conditions," or the arbitrator exceeds the limits of his authority. Chicago & N.W. Trans. Co. -- Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain). We also will limit our review of arbitrators' decisions to recurring or otherwise significant issues of general importance regarding the interpretation of the agency's labor protective conditions. Finally, we treat the arbitrator's judgment about matters of evidence and causation with greater deference than we do the arbitrator's interpretations of our regulations or policies. Railway Labor Executives Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993) (RLEA).

The Arbitration Board in this case limited itself to interpreting New York Dock conditions. There is no suggestion that the award failed to draw its essence from New York Dock. Nor is there a substantial argument that the **[*14]** Arbitration Board exceeded its authority. BMWE intimates that the Board went beyond its authority because its award does more than rule under Article I, section 4 of New York Dock that BMWE's proposed provision will not be included in the implementing agreement, thereby precluding employees from receiving TPAs even after filing claims to determine displacement allowances. However, it appears undisputed in this case that an individual's contested claim for a displacement allowance would be subject to arbitration under Article I, section 11 of New York Dock and would necessitate a TPA. n4 We therefore construe the award as limited to section 4 and within the Board's authority. Additionally, we find that the award involves an element potentially present in almost all transactions in which the agency's conditions are imposed, the preparation and delivery of TPAs. Accordingly, our review of the award is proper under that aspect of our standard of review.

n4 BMWE states in its comments at 11 that "the Commission does not refer to the primary purpose of TPAs which is to enable an employee to determine whether he or she is in a 'worse position with respect to compensation' in the current month and therefore entitled to a displacement allowance for that month." (Emphasis in original). There appears to be no dispute, however, that once an employee is in his new job, he will be entitled to a determination of his TPA. **[*15]**

The issues that we posed in our decision served September 20, 1994, discussed below, concern whether New York Dock should be interpreted as requiring that TPAs be provided to affected employees upon request. Therefore, in our review of the arbitration award in this decision, we will focus on the first Lace Curtain criterion, whether the Arbitration Board committed "egregious error," and, under RLEA, we will be free to exercise relatively greater latitude to evaluate the award than we would if the issues concerned matters of evidence or causation.

Conclusion. We agree with the Board's finding that there is no language in New York Dock requiring TPAs on demand to affected employees before they have taken new positions. Moreover, the parties' comments support the Board's conclusion that there is no industry practice of providing TPAs on demand to employees upon being affected. Accordingly, we should affirm the award as consistent with our interpretation of our conditions, an interpretation supported by industry practice, unless it is demonstrated that this interpretation of our ocnditions, an interpretation supported by industry practice, unless it is demonstrated that this interpretation **[*16]** is causing unwarranted hardship to employees or threatening the equitable operation of our conditions.

While we are not convinced that carriers would bear a substantial burden in providing TPA's in advance, it is evident in any event that TPAs are of little or no use in helping an employee exercise seniority to bid on new jobs. TPAs are historical averages, reflecting past hours worked, including elective time, as well as rate of pay. In this regard, the Arbitration Board stated at page 13:

Paycheck stubs provided to employees twice monthly contain a statement of "year to date" earnings and rates of pay are indicated on bulletins for positions. Thus, it would appear that such information is readily available to employees to track any concern that they may have as to their individual situations . . . .

It is true that the amount of overtime is an important factor in evaluating a job, but there is no evidence that the hours to be worked in the new job can be predicted. It therefore does not appear that employees affected by a transaction would be better able to exercise their seniority rights if TPAs were furnished on demand in advance of attaining new positions.

We conclude **[*17]** that producing TPAs in advance would provide no particular benefit to affected employees, and that the present system is neither unfair nor contrary to the spirit of our conditions. Therefore, we reach the same result as the Arbitration Board, that there is nothing in the New York Dock conditions that requires an implementing agreement to contain a provision mandating delivery of TPAs on demand to affected employees. Accordingly, we find no need to modify the Arbitration Board award.

It is ordered:

1. The Arbitration Board award is affirmed and the relief being sought in BMWE's petition for review is denied.

2. This decision is effective on the date of service.