

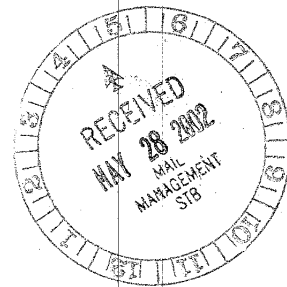
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SURFACE TRANSPORTATION BOARD

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

USX CORPORATION--CONTROL EXEMPTION--TRANSTAR, INC.

REPLY IN SUPPORT OF PETITION FOR REVIEW OF AN ARBITRATION AWARD



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*Attorneys for Tracks Traffic and Management
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May 28, 2002

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SURFACE TRANSPORTATION BOARD

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

USX CORPORATION--CONTROL EXEMPTION--TRANSTAR, INC.

REPLY IN SUPPORT OF PETITION FOR REVIEW OF AN ARBITRATION AWARD

Tracks Traffic and Management Services, Inc. ("TTMS") respectfully offers the following brief comments in reply to the Response filed by Transportation Communications International Union ("TCU") in this arbitration review proceeding:

1. The Petition for Review presents an important and fundamental question concerning the requirements of *New York Dock* that has never been squarely disposed of by the ICC or Board: whether an employee who experiences a shortfall from his "test period average" ("TPA") compensation is, for that reason alone, a "displaced employee" within the meaning of *New York Dock* Article I, § 1(b) -- that 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." What is at stake in this case is the prospect that carriers must pay monetary benefits to employees who have experienced no change in earnings potential, merely because some months have fewer work days than the average month and for other reasons having nothing at all to do with STB-regulated transactions.

It is well understood that, in the ordinary course of railroad employment, an employee's monthly earnings will fluctuate -- inevitably producing compensation in some months that is lower than his "average" monthly compensation -- for all manner of reasons (including technological change, changes in business levels, and other external factors) unrelated to regulated

railroad control transactions. Accordingly, it is settled that an employee is eligible for benefits only if there is a reasonably direct causal connection between a transaction and his claimed adversity, that is, the transaction must be the "proximate cause of the injury."¹

In this case, there is nothing approaching an adverse effect proximately caused by the transaction. The Fletcher Award holds that employees are entitled to be treated as displaced employees -- and therefore entitled to receive displacement allowances when their actual monthly earnings fall below their test period average compensation -- *because* their earnings occasionally fall below their average monthly compensation, and for no other reason. Employing what referee Fletcher openly acknowledges as "tail chasing" analysis (Award at 14), the award wrongly treats the formula prescribed by Article I, § 5 (which, by its terms, is to be used for determining when a "displaced employee" is entitled to receive a displacement allowance and the amount of the allowance) as the test for determining *whether* the employee is a "displaced employee" under Article I, § 1(b) in the first instance.

The dispute in this case arises out of *New York Dock* claims filed by former employees of the Bessemer and Lake Erie Railroad Company ("BLE") who transferred to TTMS in connection with the March 23, 2001 STB-authorized Transtar reorganization. Under the terms of the governing implementing agreement, many of the affected employees were permitted to transfer with their positions; all but one of the others obtained new TTMS clerical positions that were virtually identical to their former BLE positions. In all events, the transferring employees

¹ *Atlantic Richfield Co. and Anaconda Co.--Control--Butte, Anaconda & Pacific R.R. and Tooele Valley R.R. (Arbitration Review)*, 5 I.C.C.2d 934, 939 (1989); *Maine Central R.R.--Lease (Arbitration Review)*, Finance Docket No. 29720 (Sub-No. 1A), served July 28, 1989 (rejecting use of "but for" causation standard), *petition for review denied sub nom. Brotherhood of Maintenance of Way Employees v. ICC*, 920 F.2d 40 (D.C. Cir. 1990).

obtained positions performing the same work, at the same location, at the same (or, in a few cases, higher) rates of pay, on the same work schedules, under the same benefits packages, and subject to the same labor agreement. The parties asked referee Fletcher to consider, as a general matter, whether employees in those circumstances were "displaced employees," entitled to displacement allowances in months in which their current compensation fell below their TPAs. The parties did not present any specific employee claims for resolution and did not introduce any evidence of actual TPA shortfalls or compensation histories.

That being the case, TCU cannot defend the award, as it attempts to do in its Response (at 3 & n.1), by using the experience of one individual (Anthony Falvo) as a supposed "example" of the claimants covered by the award. The data that TCU offers here are not part of the arbitration record and were not otherwise considered in connection with the Fletcher Award.

More to the point, Mr. Falvo's experience is anything but representative of the claims that gave rise to the Fletcher arbitration. Mr. Falvo is one of the many former BLE employees who transferred from BLE to TTMS without changing jobs (the Machine Operator position that he held in the BLE Data Center was transferred to TTMS, along with all other Data Center functions and employees). However, unlike the other claimants, Mr. Falvo did not contend that he was "placed in a worse position" when he transferred from BLE to TTMS. As Mr. Falvo stated on his claim form (Attachment 1), his claim did not arise until nearly two months later, on May 14, 2001, when TTMS abolished the Machine Operator position he was occupying and he exercised seniority to "bump into" a lower-rated clerical position. TTMS ultimately denied Mr. Falvo's claim for lack of causation. By letter dated August 10, 2001 (Attachment 2), TTMS explained that management's decision to abolish the Machine Operator position was based

on technological improvements and a decline in business, not the March 23, 2001 Transtar reorganization.²

In the circumstances, it is at best disingenuous for TCU to contend that Mr. Falvo's claim somehow justifies the Fletcher Award or illustrates the type of claim it addresses. Mr. Falvo's claim presented nothing more than a garden variety dispute over causation. There is no question that Mr. Falvo was placed in a worse position when he had to bump into a lower-paying clerical position upon the abolishment of his Machine Operator position. But TCU has never shown, and TTMS denies, that this event was caused by the transaction. The Fletcher arbitration did not even address, much less resolve, that factual dispute.

The Fletcher Award resolves the Falvo claim only in the sense that it swallows it whole. Under the Fletcher Award, if sustained here, Mr. Falvo would collect displacement allowances for the remainder of his protective period whether or not the event that everyone agrees caused him to be placed in a worse position (the abolishment of his Machine Operator position) was related in any way to the transaction. Far from showing why the Fletcher Award is correct, the Falvo claim illustrates just how arbitrary, unprincipled, and far-reaching is the liability standard it adopts.

2. TCU hopes to sidestep the issue entirely by contending that the Fletcher Award only interprets the parties' implementing agreement and therefore does not implicate the *Lace Curtain* standard. Response at 11-13. To the contrary, as we explained in the Petition for

² Mr. Falvo made a point of distinguishing his claim from those of other TCU-represented employees. By note received August 9, 2001 (Attachment 3), Mr. Falvo complained that the carrier (in its initial claim denial letter (Attachment 4)) had mischaracterized his employment history. Mr. Falvo stressed that his TTMS position had been abolished after the March 23, 2001 transaction and that, having been "forced" to take a lower-paying position, "I do not hold the same position as I did before the transaction, or the same rate of pay, as your letter implies."

Review, the Fletcher Award rests squarely and directly on the referee's interpretation of *New York Dock* and, specifically, on the meaning and effect of Article I, § 1(b).

In the final analysis, TCU cannot deny that this is a dispute about *New York Dock*. Because the agreement to furnish TPA data did not constitute "precertification" that transferring employees were "displaced employees" -- as TCU acknowledges (Response at 29-30) -- the result in this case does not depend on the terms of the parties' implementing agreement.³ Indeed, TCU's own defense of the award rests on a line of arbitration awards (beginning with two awards of referee Merton Bernstein under the Washington Job Protection Agreement of 1936 ("WJPA")) that have nothing at all to do with the interpretation of any implementing agreement, much less the TTMS/TCU implementing agreement. TCU advertises the line of awards as standing "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

³ TCU meets itself coming and going on this point. In the arbitration proceeding, TCU took the position that the agreement to furnish TPA data amounted to "recognition" that affected employees were entitled to displacement allowances when their post-transaction monthly compensation fell below their TPAs. In substance, TCU was contending that the implementing agreement provided for "precertification" that affected employees were "displaced employees" -- that is, that TTMS, by agreeing to furnish TPA data, had consented to treat transferring employees as "displaced employees." But in the Board's *Ex Parte No. 582* proceeding, TCU conceded that a requirement to provide TPA data does *not* constitute precertification. Confronted with this inconsistent position, TCU resorts to double-talk (Response at 29-30). TCU now no longer says that the agreement to provide TPA data constituted precertification, but insists instead that this agreement means that BLE employees who transferred to TTMS are entitled to displacement allowances when their current compensation falls below their TPAs. But this is no argument at all. Employees who transferred to TTMS quite obviously were "affected" by the transaction; but they were not adversely affected by it (that is, they were not placed in a worse position as a result). To the extent that TCU contends that the agreement to furnish TPA data somehow substituted for a showing of causal nexus between the transaction and the inevitable TPA shortfalls (permitting referee Fletcher to treat a TPA shortfall as a manifestation of "worse position" causally related to the transaction), TCU is endorsing the flawed analysis it disavowed in *Ex Parte No. 582*.

compensation, the employee is entitled to a displacement allowance even where the position he holds after the transaction has the same rate of pay as the position he held before.” Response at 14-15. TCU contends that the use of TPA data in the Fletcher Award is justified by this line of cases and otherwise is a matter of “long settled” law. *Id.* at 28.

The awards TCU invokes do not live up to their billing. None arose in a case remotely like this one, and none stands for the proposition on which the Fletcher Award depends. Indeed, if, as the Fletcher Award holds, an employee affected by an authorized transaction could establish eligibility for a displacement allowance merely by documenting an occasional post-transaction TPA deficit, many, if not most, of the disputes that have given rise to arbitration and appeals over questions of causation could have been resolved with a simple TPA computation and comparison. The fact of the matter, contrary to TCU’s contention, is that the Fletcher Award is totally inconsistent with the way *New York Dock* has been understood and applied in the industry.

Prior to the Fletcher Award, no arbitrator had treated random or calendar-related TPA shortfalls as proof of “worse position.” Indeed, in the line of cases TCU cites, the use of TPA comparisons was born of an effort to account for actual transaction-related changes in an employee’s earnings potential, such as a decline in the opportunity for overtime work associated with the employee’s post-transaction position, compared with his pre-transaction position. *E.g.*, *TCU and Missouri Pacific R.R.*, March 1, 1988 (LaRocco, Arb.) (TCU Exh. 4); *TCU and Norfolk Southern Corp.*, April 19, 1989 (Roukis, Arb.) (TCU Exh. 12)

In the WJPA awards, referee Bernstein observed that an employee’s total compensation is a function of various “elements of compensation” -- such as work schedule, overtime opportunities, and various forms of extra pay -- that can bear as directly on an employee’s earnings potential as his straight-time pay rate. *Brotherhood of Railway & Steamship*

Clerks v. Chesapeake & Ohio Ry., WJPA Docket No. 62, 41-47 (Bernstein, Arb.) (TCU Exh. 9).

In that vein, referee Bernstein rejected the carrier's contention that the claimants *necessarily* were not placed in a worse position because they were working at the same rate of pay. By the same token, referee Bernstein did *not* treat the TPA comparison as dispositive of causation. He reasoned that an employee would have to show both that his current earnings had fallen below his TPA and that "any part of the deficit is attributable to the effects of the coordination." *Id.* at 48.⁴

In this case, TCU has not argued, much less shown, that post-transaction TPA deficits represented anything other than the inevitable, occasional consequence of variables wholly unrelated to the Transtar reorganization.⁵ The transferring BLE employees experienced no

⁴ TCU undertakes at some length to demonstrate that the definitions and operative language in Article I, §§ 1(b) and 5(a) of the *New York Dock* conditions were derived from § 6 of WJPA, all in support of its contention that the Board should defer to WJPA arbitration awards in construing its protective conditions. Response at 15-16 & nn.5-6. We do not see how this analysis buttresses TCU's defense of the Fletcher Award. As is clear from TCU's description, the WJPA terminology that found its way into *New York Dock* was substantially rearranged. Without accounting for the fundamental structural changes (TCU asserts, without authority, that it is "clear" that the changes were "solely editorial," *id.* at n.6), it is difficult to see how the mere use of parallel terminology warrants strict adherence to WJPA precedent in a *New York Dock* case that turns directly on the meaning and application of the revised passages. But the issue need not be addressed here. For the reasons we explain in the text, the WJPA cases cited by TCU do not justify the result reached in the Fletcher Award.

⁵ TCU observes that Mr. Falvo's May 2001 TPA shortfall could not be attributable to the "short month" phenomenon (as May 2001 was not a short month) and suggests, quite without basis, that some part of the deficit may be attributable to differences in overtime work. Response at n.6. There is no reason to speculate about the cause of Mr. Falvo's TPA shortfall. As we explained above, Mr. Falvo attributed it to the fact that, as of May 14, he began working in a position at a substantially lower straight-time rate than the position he held prior to and immediately following the March 23, 2001 reorganization.

change in their earnings potential: by virtue of the TTMS positions they obtained, the employees' basic rates of pay and all other elements of compensation were unchanged.⁶

To the extent that any of the awards TCU cites could be read to sustain claims in these circumstances, they deserve no consideration. The notion that an employee should become eligible for periodic displacement allowances when there has been no change in his actual earnings potential is inconsistent with the purpose of the protective benefits scheme and with the long line of ICC and STB cases that have confined liability to adverse effects proximately caused by authorized transactions. At best, TCU has shown only that there is a split in the arbitral authority that warrants the Board's review.

3. Finally, it is no answer that occasional windfalls are tolerated under employee protection arrangements; the awards that TCU cites for that proposition (Response at 30) are beside the point. There is no doubt that the Article I, § 5 calculation is a generous one, as those awards acknowledge. An employee who is determined to be a "displaced employee" -- whether he obtains that status by "precertification" or by claim -- is entitled to collect a monthly displacement allowance, for the remainder of his protective period, in any month in which his actual monthly compensation falls below his TPA. As we have explained (Petition at 12 n.5), the formula necessarily will produce at least occasional arithmetic shortfalls for almost all employees; displaced employees who work on an irregular or seasonal basis typically will register even larger and more frequent shortfalls and, as a result, collect larger and more frequent displacement allowances. But, far from justifying the Fletcher Award, the fact that a "displaced employee" is

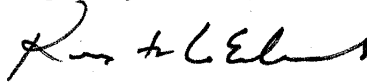
⁶ Indeed, the employees experienced the very same calendar-based monthly fluctuations in earnings after the transaction as they had before the transaction. To suggest (as TCU and the Fletcher Award do) that such post-transaction fluctuations are an adverse effect attributable to the transaction is to embrace the fallacy *post hoc ergo propter hoc*.

entitled to windfall benefits is a reason for carefully enforcing the threshold requirements for becoming a "displaced employee" prescribed in Article I, § 1(b). If sustained, the Fletcher Award would require carriers to extend windfall protections to individuals -- like the transferring TTMS clerical employees -- who, by any other standard, are in no way adversely affected by STB-regulated transactions.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Review, the Board should review and set aside the Fletcher Award.

Respectfully submitted,



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(202) 736-8178

*Attorneys for Tracks Traffic and Management
Services, Inc.*

Dated: May 28, 2002

ATTACHMENTS

1. Request for Entitlement to Benefits Form, dated July 24, 2001 (redacted as indicated).
2. Letter dated August 27, 2001 from K. A. Marsillo to A. Falvo
3. Handwritten note from A. Falvo to K. A. Marsillo, received August 9, 2001
4. Letter dated July 31, 2001 from K. A. Marsillo to A. Falvo

Request for Entitlement to Benefits

TRACKS, TRAFFIC AND MANAGEMENT SERVICES, INC.

RECEIVED
JUL 25 2001
DIR. LABOR RELATIONS
MONROEVILLE, PA

INSTRUCTIONS:

This Entitlement to Benefits Form is to assist the Employee and the Company in determining whether the Employee has been adversely affected by a coordination. We wish to do this as promptly as possible in order to expedite valid claims for displacement allowances. You may help by completing the form with as many helpful facts as will assist the Company in its initial determination as to whether you have been adversely affected.

Completed forms should be forwarded to:

Tracks, Traffic and Management Services, Inc.
ATTN: Labor Relations Department
P.O. Box 68
Monroeville, PA 15146

Notice of:



Placement in a worse position with respect to my compensation and rules governing my working conditions.

or



Deprivation of Employment.

Name: ANTHONY FALVO SSN: REDACTED

Address: 6431 OLD WM PENN HWY, DELMONT, PA 15626

Seniority Roster No.: 73 Seniority Date: 6-15-98

Immediate Supervisor: KAS SIKORA

1. Identify agreement under which you believe compensation is due:
NEW YORK DOCK AGREEMENT BETWEEN B&LE, TTMS, & TCIO.
2. On what date were you first placed in a worse position or deprived of employment? 5-14-01

How: ☒

Position Abolished.



Displaced by: _____



Other. Explain _____

3(a). What position did you hold immediately prior to the date shown in Item 2?

Position: MACHINE OPERATOR Location: DATA CENTER - MOOREVILLE

Rate of Pay: 155.61 /day

3(b). What position do you currently hold?

Position: CIE CLERK / COST SVC CLERK Location: REVENUE - MOOREVILLE

Rate of Pay: 148.71 /day

3(c). At the time of your displacement, did you exercise your seniority to obtain the highest paying position available to you? YES

4. Identify the coordination involved in your being placed in a worse position or deprived of employment. MY MACHINE OPERATOR POSITION WAS ABOLISHED, WHICH FORCED ME TO BUMP INTO REVENUE ACCTG.

5. Explain in detail how the transaction changed your work situation and caused you to be adversely affected. I WAS WORKING AS A MACHINE OPERATOR ON THE 12:00-8:00 AM SHIFT. WHEN MY JOB GOT ABOLISHED I HAD TO BUMP INTO REVENUE ACCTG. ON THE DAYLIGHT SHIFT. SO MY TITLE, SHIFT, & PAY ALL CHANGED. THIS ALSO AFFECTED ME OUTSIDE OF WORK. MY WIFE HAD TO CHANGE SHIFTS & MY DAUGHTER HAD TO BE PLACED IN DAYCARE EVERYDAY.

6. Compensation Data:

List the amount of compensation you received in the last twelve months in which you performed service immediately prior to the month in which you were affected. Certain earnings, such as lump sum payments and employee protective payments, should be excluded.

Month	Year	Compensation	Month	Year	Compensation
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

I HEREBY CERTIFY THAT THIS INFORMATION IS TRUE AND CORRECT:

Anthony Falvo
(Signature)

7-24-01
(Date)

Tracks Traffic and Management Services, Inc.

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

Kenneth A. Marsillo
Manager Labor Relations

Phone: 412/829-6729
Fax: 412/829-3455

August 27, 2001

Mr. A. Falvo
6431 Old William Penn Highway
Delmont, PA 15626

Dear Mr. Falvo:

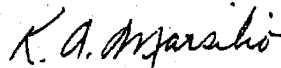
This is in reply to your note received August 9, 2001 suggesting that the Carrier's standard denial letter dated July 31, 2001 did not apply to you because of your unique circumstance.

It is true that you are no longer holding the same position that you held at the time of the coordination. It is not true, however, that your job change has any relation whatsoever to that coordination.

Ongoing technological improvements in the data center have resulted in the Carrier's ability to allow the system to work unmanned six turns per week. That operations improvement permitted the Carrier to abolish jobs in the data center and to advertise similar positions on a slightly different schedule, albeit now with one less TCU Scope-covered position. Qualified bidders were awarded those rearranged jobs in seniority order. You did not have adequate seniority to win any of those jobs.

There is no causal nexus between the transaction that resulted in the coordination and the job reduction in the data center. Further, in light of the decline in business the Carrier has suffered, your claim for a New York Dock displacement allowance is hereby denied.

Respectfully,



K. A. Marsillo

RECEIVED

AUG 09 2001

MR. MARSILIO, DIR. LABOR RELATIONS
MONROEVILLE, PA

THE LETTER I HAVE RECENTLY
RECEIVED FROM YOU REGARDING
MY TPA DOES NOT PERTAIN
TO MY SITUATION. I DO NOT
HOLD THE SAME POSITION I
DID BEFORE THE TRANSACTION,
OR THE SAME RATE OF PAY,
AS THE LETTER IMPLIES.

I WAS WORKING AS A MACHINE
OPERATOR BEFORE THE TRANSACTION
AT THE HIGHEST RATED PAY.

AFTER THE TRANSACTION, MY
JOB WAS ABOLISHED WHICH
FORCED ME TO TAKE A
MUCH LOWER PAYING POSITION
AS A RELIEF CLERK/COST SERVICES
WHICH WAS THE HIGHEST
RATED JOB AVAILABLE.
ANY QUESTIONS PLEASE CALL
6099.

THANK YOU,

ANTHONY FALVO

Tracks, Traffic and Management Services, Inc.

P.O. Box 68
Monroeville, PA 15146

Kenneth A. Marsillo
Manager Labor Relations

Phone: 412/829-6729
Fax: 412/829-3455

July 31, 2001

Mr. A. Falvo
6431 Old William Penn Highway
Delmont, PA 15626

Dear Mr. Falvo:

This is in reply to your claim for a *New York Dock* displacement allowance for the period of May 1, 2001 through June 30, 2001.

In order to be eligible for a displacement allowance under New York Dock, claimants arguing that they have been "adversely affected" by the transaction must demonstrate that they have been placed in a "worse position" as a result of the transaction. The word "position" under New York Dock Conditions connotes status, situation or posture rather than a specific job or assignment. Our review indicates that you have not been displaced; you hold the same "position" you held before the transaction, at the same rate of pay.

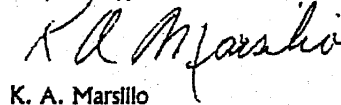
Some employees have claimed that the "transaction" caused their earnings to decline because there was less overtime work available during the claim period than there was during the test period. In fact, employees are not "adversely affected" by a transaction simply because overtime opportunities fluctuate from month to month.

Minor fluctuations in gross earnings from month to month do not, in and of themselves, justify a claim for a displacement allowance. Just as each employee's earnings fluctuated from month to month before the transaction, so it is normal for an employee's earnings to fluctuate from month to month after the transaction. Standing alone, such normal fluctuations in earnings do not prove that one has been "adversely affected" by a transaction.

In the event that there are fewer overtime opportunities available than was the case during the test period, you should be aware that the carrier, like the overall steel industry that we serve, is suffering from a substantial decline in business in comparison to the levels enjoyed in previous years. Any continuing lack of overtime opportunities is directly related to the current depressed business levels, and completely unrelated to the transaction.

Because there is no causal nexus between the transaction and the alleged reduction in overtime opportunities, your claim for a displacement allowance is hereby denied.

Respectfully,



K. A. Marsillo