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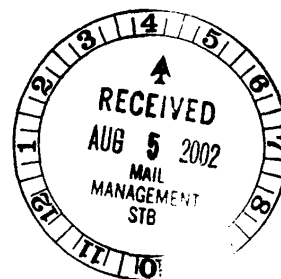
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205 978
August 5, 2002

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 715
Washington, D.C. 20423



Re: Finance Docket No. 33942 (Sub-No. 1)
USX Corporation – Control Exemption – Transtar, Inc.

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of the Reply Of Tracks Traffic And Management Services, Inc. In Opposition To Petition To Accept Late-Filed Response To Petition For Leave To Intervene And File Brief In Support Of Petition For Review Of Arbitration Award. I also enclose a diskette containing a copy of the Reply in Word 97 format.

An additional copy of the Reply is enclosed for acknowledgment of receipt. Please date-stamp the copy and return it to our messenger. Thank you for your attention.

Very truly yours,

Krista L. Edwards

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

ENTERED
Office of Proceedings

AUG 5 2002

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Enclosures

cc: Mitchell M. Kraus
Ralph J. Moore, Jr.

5 SURFACE TRANSPORTATION BOARD

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

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REPLY OF TRACKS TRAFFIC AND MANAGEMENT SERVICES, INC.
IN OPPOSITION TO PETITION TO ACCEPT LATE-FILED RESPONSE
TO PETITION FOR LEAVE TO INTERVENE AND FILE BRIEF
IN SUPPORT OF PETITION FOR REVIEW OF ARBITRATION AWARD



On July 22, 2002, seven weeks after the National Railway Labor Conference ("NRLC") petitioned for leave to intervene in this *New York Dock* arbitration review proceeding, Transportation Communications International Union ("TCU") filed a petition asking the Board to accept the union's accompanying memorandum (styled "Response To The Petition Of The National Railway Labor Conference For Leave To Intervene And Submit A Brief In Support Of Petitioner Tracks Traffic And Management Services, Inc.").

TCU's petition should be denied. The proffered memorandum will not assist the Board in considering the NRLC's brief, much less in deciding the merits of the petition for review and, accordingly, should not be accepted, even if the Board otherwise is inclined to overlook the union's unreasonable delay.

Most of what TCU says in its memorandum purports to respond to arguments made by petitioner Tracks Traffic and Management Services, Inc. ("TTMS") in support of its petition for review, not the arguments advanced by the NRLC. TCU improperly is using the occasion of the NRLC's petition to reargue issues that, by the union's own description (TCU

Mem. at 1), it briefed in its May 6, 2002 reply memorandum. TCU has offered no reason why the Board should entertain such argument now.

By the same token, TCU offers no response to most of what the NRLC says in support of the petition for review, including the substantial evidence of industry practice and usage presented by the NRLC. The NRLC demonstrated that, as a matter of settled industry practice (reflected in arbitration awards, agreements, and claims handling policies and procedures of the NRLC's members), the bare fact that an employee affected by a transaction experiences a post-transaction shortfall from his test period average ("TPA") earnings does not make him a "displaced employee" within the meaning of *New York Dock* Article I, § 1(b) (NRLC Mem. at 4-5 and Exhs. A-C); that a carrier's furnishing of TPA data to an employee on demand does not constitute "precertification" of the employee's entitlement to a displacement allowance in months in which his earnings fall below his TPA (*id.* at 6); and that, to the contrary, when a "precertification" arrangement is intended, it is set forth explicitly in terms well understood in the industry (*id.* at 6 & Exhs. D-J). And the NRLC pointed out that the interpretation advanced by TCU would impose enormous costs on railroads and chill future beneficial railroad consolidation transactions (*id.* at 7). TCU's late-tendered reply responds to none of this.

Instead, TCU contends that the case can and should be decided on the basis of TTMS' supposed failure of proof -- that is, the carrier's supposed failure to demonstrate that some cause other than the transaction resulted in post-transaction TPA shortfalls. This is an argument of convenience, with no basis in the award under review. The Fletcher Award resolved an issue, not any particular claims as to which proof of causation (or any other evidentiary question) governed the outcome. There was never any doubt or dispute about what caused the claimants in this case to experience occasional TPA shortfalls: the simple fact that some months

have fewer workdays than the "average" month. The very purpose of the arbitration was to decide whether, as TCU contended, an employee affected by the Transtar reorganization was entitled to be treated as a displaced employee based solely on the fact that his post-transaction monthly earnings sometimes fell below his TPA. 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 TPAs -- *because* their earnings occasionally fall below their TPAs, not because TTMS somehow failed to rebut the union's *prima facie* showing of causation, as TCU now contends. Referee Fletcher's self-described "tail chasing" analysis (Fletcher Award at 14) cannot be squared with the language, purposes, or policy of the protective conditions and, contrary to TCU's contention, certainly is not justified by the *post hoc* rationalization that TCU now offers in support of the award.¹

¹ TCU is wrong in contending that the Zumas Award cited in its memorandum (at 2) somehow disposes of TTMS' position in this case. The Zumas Award is one of the cases that TCU cited in its May 6, 2002 reply memorandum, to which TTMS responded in its May 28, 2002 reply in support of the petition for review. We refer the Board to that discussion, which applies with full force to the Zumas Award.

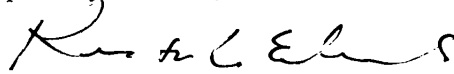
The employees whose claims were sustained by the Zumas Award, by contrast to the claimants in this case, had been displaced from their pre-transaction positions as a result of the carrier's sale of one of the rail lines comprising the claimants' maintenance of way seniority district. In the circumstances, referee Zumas rejected the carrier's contention that the claimants necessarily were not entitled to protective benefits because they had been able, in the exercise of seniority, to obtain positions at the same rates of pay. But the award certainly does not hold that an employee who experiences occasional TPA shortfalls as a result of the "short month" phenomenon at issue here is entitled to be treated as a "displaced employee."

At best, TCU has shown only that there is a split in the arbitral authority that warrants review of the Fletcher Award. The Board should review the award and, for the reasons set forth in our earlier memoranda, grant TTMS' petition for review.

CONCLUSION

For the foregoing reasons, the Board should deny TCU's July 22, 2002 petition and reject the union's late-tendered reply to the NRLC's June 3, 2002 brief.

Respectfully submitted,



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

Dated: August 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Of Tracks Traffic And Management Services, Inc. In Opposition To Petition To Accept Late-Filed Response To Petition For Leave To Intervene And File Brief In Support Of Petition For Review Of Arbitration Award has been served by facsimile and overnight delivery on Mitchell M. Kraus, General Counsel, Transportation Communications International Union, 3 Research Place, Rockville, Maryland 20850, and by hand on Ralph J. Moore, Jr., Shea & Gardner, 1800 Massachusetts Avenue, N.W., Washington, D.C. 20036, this 5th day of August, 2002.

