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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 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.**

The Transportation•Communications International Union ("TCU") hereby submits its Response to the Petition of the National Railway Labor Conference for Leave to Intervene and to its Brief in Support of Petitioner Tracks Traffic and Management Services, Inc. TCU does not oppose NRLC's Petition for Leave to Intervene, and is responding only to the substantive arguments raised in NRLC's brief.

As we noted in our May 6, 2002 Response to TTMS' Petition for Review of an Arbitration Award ("TCU Response"), the Board should deny review of TTMS' petition under the Board's *Lace Curtain* review standard, on the grounds that it does not present a "recurring or otherwise significant issue of general importance" regarding the interpretation of the *New York Dock* Conditions. See TCU Response, at 11-13. The arbitration award which TTMS seeks to have reversed is not based upon Arbitrator Fletcher's interpretation of the *New York Dock* Conditions themselves, but rather upon his interpretation of the implementing agreement (as clarified by the bargaining history of that agreement) entered into between TCU and TTMS. See TCU Response, at 13-24. In its petition to

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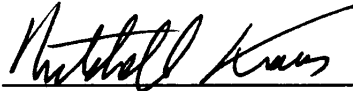
intervene, NRLC has expressly refrained from taking any position on this issue. *See* NRLC Petition to Intervene, at 3.

The remainder of the Conference's brief focuses on the question of causation. In one of the seminal interpretations of the WJPA, Referee Bernstein noted that an employee makes out a *prima facie* showing that he was placed in a "worse position with respect to compensation" by demonstrating that his compensation in a month following the transaction fell below his average compensation (as measured by the TPA) before the transaction; that inference is rebuttable, but the Carrier bears the burden of making such a rebuttal. *See* WJPA Award No. 65 (TCU Exhibit 10). TCU clearly has made out the necessary *prima facie* case, and TTMS failed to rebut this presumption. Arbitrators interpreting the WJPA and ICC/STB-imposed protective conditions have repeatedly held that the fact that employees receive the same pay rate post-merger as pre-merger does not preclude the employee being eligible for protective benefits as maintained by TTMS. *See TCU and Missouri Pacific* (LaRocco 1988) (TCU Exh. 4), at 11; *Burlington Northern Santa Fe Ry. Co. and TCU*, (Sickles 1999) (TCU Exh. 5), at 7-8; WJPA Award No. 62 (TCU Exhibit 9); *TCU and Norfolk Southern Corp.* (Roukis 1989) (TCU Exh. 12) at 13; *BRAC v. Western Maryland R. Co.* (Robertson 1964) (TCU Exhibit 18) (interpreting *Oklahoma* conditions).

The NRLC argues that Carriers have met their burden of demonstrating that a loss in compensation was not caused by the transaction, but by some other factor such as a decline in business caused by the closing of a major shipper, or an employee's failure to take reasonable steps to protect his seniority, or the completion of a project, or the effects of a new collective bargaining agreement. NRLC Brief at 5. But TTMS has not offered any of these claims of causation. As noted above, its contention that a short month, not the transaction, caused the employee to be placed in a

worse condition has previously been rejected. See *Brotherhood of Maintenance of Way Employees and CSX Transp. Inc.*, (Zumas 1991) (TCU Exh. 11), at 9. An affirmance of this arbitration award simply does not raise the broader question of causation in other factual contexts. Accordingly, under the *Lace Curtain* standards, the award should be affirmed.

Respectfully submitted,



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