THE DEVELOPMENT AND ADMINISTRATION OF THE LABOR PROTECTIVE CONDITIONS IN THE TRANSPORTATION INDUSTRIES

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The purpose of this article is to explore labor protective conditions in the transportation industries. The discussion focuses on three particular industries—railroads, motor carriers and airlines.

Mergers are the order of the day, and it appears that the trend will continue. Total mergers in 1968 reached a historic high of 4,000, an increase of 69 percent over 1967.[1] The number of large acquisitions, those involving acquired firms with assets of $10 million or more, also increased dramatically. The total value of large acquired assets equalled $12.6 billion in 1968, 50 percent greater than in 1967, and three times greater than the total for 1966.[2]

When a merger occurs, how much attention is devoted to the effects of the merger on the employees involved? In the transportation industries, merger activities and their effects on employees are subject to government regulation. The Interstate Commerce Commission has jurisdiction over railroad and trucking mergers, and therefore must approve any proposed changes; and the Civil Aeronautics Board must sanction any mergers or consolidations involving airlines. The degree to which these agencies involve themselves in matters and problems affecting the employees of these regulated industries is often a virtually unexplored area in any merger discussion. Is their role a passive one which leaves the protection of employee interests to the parties involved? Or do the agencies promulgate and apply comprehensive sets of conditions and protections?

The courts and agencies have developed labor protective conditions to assist and compensate employees whose employment status is disrupted as a result of the merger. Protection, then, refers to the preservation of employment or the compensation of employees who lose their jobs or who are forced to accept lower paying positions as a result of a merger or consolidation. To the employee, the compensation is an equitable adjustment for the loss of certain rights to job opportunities. In a sense, it is the repayment for the equity which is reflected in his years of service

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1. Federal Trade Commission, *Current Trends in Merger Activity, 1968*, STATISTICAL REPORT NO. 3 at 1 (1969).

2. *Id.* at 2.

in the industry and for the carrier involved. To the carrier, protective conditions are part of the price of consolidating or improving its facilities, operations, and services. It is viewed by the carrier as a form of insurance; that is, as a result of the labor protective conditions, industrial strife caused by a merger should be substantially minimized.

I. History and Development of the Labor Protective Conditions

A. The Role of the Supreme Court

There was a time, within this century, when the Supreme Court strictly construed the commerce clause of the Constitution and restricted the areas in which Congress could properly legislate. The Court believed that a free market economy, coupled with the unfettered right of capital accumulation, was the primary reason for the phenomenal economic growth that marked the latter half of the 19th century. A majority of the Justices dedicated themselves to insuring that the free market economy would continue to flourish during the 20th century as well. Minimum wage and hour laws were struck down on the ground that such laws were not within the police power of the state and therefore not a proper subject for legislative action.[3] Such laws ran counter to the Court's belief in an individual's freedom to enter into a contract which included an individual's employment contract. An example of the Court's philosophy is revealed in the following quotation from a case that invalidated a maximum hours law for bakery workers. Speaking for the Court Justice Rufus Peckham stated that such laws are:

> an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with. . . .[4]

This represented the thinking of the Supreme Court during the early part

3. *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923).
4. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

of this century. The Court had committed itself to preserve the freedom of an individual to assume contractual obligations with respect to his employment. This belief in the inviolability of the individual's freedom to contract also found expression in the Court's belief that business should be allowed to operate with the least amount of government interference. In furtherance of this judicial philosophy, the Court invalidated the Agricultural Adjustment Act,[5] the Bituminous Coal Conservation Act of 1935,[6] and certain laws dealing with the regulation of child labor.[7]

There were, however, certain exceptions to the laissez-faire attitude which the Court had embraced during this period. Congress, with the high court's approval, as far back as the 1880's began to regulate labor relations in the railway industry.[8] The strategic position of the railway industry in the American economy at that time and the consequent inconvenience or harm to the public whenever railroad service was interrupted prompted early recognition by the judiciary that Congress had the right to regulate railroads—although at times even this was carefully restricted. In this area government regulation began with the Arbitration Law of 1888 and was followed by various legislative enactments during the 1890's and early 1900's. The passage of the Railway Labor Act in 1926 was the culmination of all this piecemeal legislation and has served as the prototype for legislation governing labor relations in the railway and airlines industries. As the first to be subjected to governmental regulation of its labor relations, the railroad industry has served as an experimental laboratory in developing our present statutes governing labor relations. It is therefore not surprising to find that the railway industry was the first to concern itself with the problem of providing for job elimination or job reclassification resulting from a merger, consolidation, or other organizational change adversely affecting employment status.

B. The Experience of the Railroad Industry

Protection for railroad employees began informally around 1900 when carriers sometimes paid moving and transportation expenses in hardship cases where there had been a transfer of jobs because of a change in operations.[9] The impetus for the imposition of protective conditions

5. *United States v. Butler*, 297 U.S. 1 (1936).
6. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).
7. *Hammer v. Dagenhart*, 247 U.S. 251 (1936).
8. H. NORTHRUP & G. BLOOM, GOVERNMENT AND LABOR 311 (1963).
9. REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION, THE HISTORY OF AND EXPERIENCE UNDER RAILROAD EMPLOYEE PROTECTION PLANS (1962).

began during the Depression years. Between 1929 and 1933, the gross national product fell from $104.4 billion to $55.9 billion. Wages and salaries paid dropped from $50 to $28.9 billion in this period. Unemployment was estimated to number as many as 15 million. These circumstances contributed to the creation of a new social environment which in turn resulted in a new government attitude toward organized labor.[10] The government was guided more by the pragmatic facts of life than by the strictures of economic philosophy. The railroad industry was recognized as indispensable to any economic rebirth. The existence of the railway industry was insured by the government which, during this period, began to involve itself actively in guiding the financial and physical structure of the industry. Thus, the protective conditions were developed not in the abstract but as a response to the necessary economic restructuring of the railway industry.

The first statutory protection was created in 1933, a time in which general employment was widespread, with the Emergency Railroad Transportation Act[11] in which Congress established a job freeze on all those actively employed as of May, 1933, who might be affected by a consolidation or organizational change The inadequacy of this remedy soon became quite evident. The 1933 Act was designed to encourage more efficient railroad operation; yet if joint uses of railroad facilities were established, by the Act's own force no employee could be displaced.

When the Emergency Railroad Transportation Act expired in 1936, there was widespread Congressional support for the continuation of some form of statutory protection for employees adversely affected by mergers and other organizational changes. The railroads, cognizant of the impending legislation, and hoping to get more favorable terms than appeared likely if the matter were left solely to Congress, began to negotiate with a number of labor organizations representing railroad employees. These negotiations culminated in the establishment of a comprehensive set of conditions known as the "Washington Job Protection Agreement," which has since served as a guide for all protective conditions governing railroad as well as airline and motor carrier employees. The agreement, approved by approximately 85 percent of the railroad carriers and 20 of the 21 railroad brotherhoods, contained a schedule of substantial benefits for employees adversely affected by consolidations. Basically, the agreement provided that an employee deprived of employment because of a consolidation, or

10. *See* S. COHEN, LABOR IN THE UNITED STATES 133 (1960).
11. 48 Stat. 211.

"coordination," was to receive a monthly allowance, with the option of electing a lump-sum dismissal payment in lieu of this monthly allowance. An employee forced to accept a lower paying position also qualified for a monthly allowance. In addition, moving, transportation, and any loss on the sale of the employee's home were paid by the carrier. On the surface, these benefits may appear to be easily applied; however, there have been difficulties in their interpretation and application.

Between 1936 and 1940, there were no specific federal statutes authorizing or requiring the ICC to impose conditions for the protection of employees adversely affected by a merger or consolidation. But the Commission, relying on the merger provisions of the Transportation Act of 1920,[12] continued to impose some of the protective conditions contained in the Washington Agreement on two railroads involved in extensive leasing arrangements.[13] In the Commission's view, its power to impose protective conditions was not affected by the expiration of the 1933 Act, as the Transportation Act of 1920 required the Commission to approve mergers, "subject to such terms and conditions and such modifications as it shall find to be just and reasonable," and which "will promote the public interest."

The carriers challenged the basis upon which the ICC continued to impose labor protective conditions. Ultimately the Supreme Court affirmed the agency's authority to impose the protective conditions. In a perceptive opinion written by Chief Justice Stone, the Court noted that the ICC estimated that 75% of the savings resulting from consolidations would be at the expense of labor and thus the authority to provide for the labor force was an appropriate inquiry for the agency in passing on the "public interest" aspect of the leasing arrangement.[14]

This decision dispelled any doubt about the authority of the ICC to impose just and reasonable terms and conditions to protect employees affected by consolidations. Just a year later, Congress confirmed the Court's opinion by providing the ICC with the specific power to impose such conditions under the Transportation Act of 1940.[15] Section (5)(2)(f) of the Transportation Act provides that the Commission is required to "give weight . . . to the interests of the carrier employees involved."

Pursuant to this statutory authorization, the Commission insists on a "fair and equitable arrangement to protect the interests of the railroad

12. 41 Stat. 456.
13. *United States v. Lowden*, 308 U.S. 225 (1939).
14. *Id.* at 233.
15. 49 U.S.C. § 5(2)(c), (f) (1968).

employees affected." Its standard order provides that for a period of four years from the effective date of the order, the merger will not result in employees of the carriers "being in a worse position with respect to their employment." If, however, the carriers and the unions involved agree to terms for protection, such as those embodied in the Washington Agreement, the Commission will not prescribe any terms and conditions for protection. The clear intent of the Congress in including this latter provision was to encourage the private resolution of disputes arising from any form of organizational change requiring ICC approval.

In the period following the enactment of Section (5)(2)(f), the ICC, with the active participation of a number of railway unions, has continued to develop and refine various sets of conditions for the protection of employees affected by consolidations.[16]

C. The Motor Carrier Industry

The motor carrier industry's experience with protective labor conditions, although related to the developments in the railway industry and therefore the same in many respects, has differed significantly in other respects.

Both railroads and motor carriers, pursuant to Section 5(2) of the Interstate Commerce Act, must seek ICC approval for any merger or consolidation or purchase, lease or contract to operate the properties of another carrier. Section 5(2)(c) of the Interstate Commerce Act sets forth a number of factors that must be weighed by the ICC when it passes upon such transactions. One of these considerations is "the interests of the carrier employees affected." That is, when a carrier applies to the Commission for approval of a merger or acquisition, the ICC is required to examine the various effects the transaction may have on the employees involved. Generally speaking, the Commission, deriving its authority from the general mandate of Section 5(2), determines whether the carrier's employees would be adversely affected by the proposed action. If the employees are so affected, the Commission may deny the carrier's application for approval. In most cases, however, the ICC either imposes various protective labor conditions, or conditionally approves the transaction but reserves jurisdiction to subsequently impose protective conditions if necessary.

The Act distinguishes between the protection accorded railroad and

16. *See* Chicago & N.W. Ry. Co. Merger, 261 I.C.C. 672 (1946); Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177 (1944); New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952).

motor carrier employees. Section 5(2)(f), *see supra,* is directed exclusively to railway employees. This Section requires that a "fair and equitable arrangement" be made to protect their interests and also imposes certain minimum protection spanning a period of four years so that these employees will not be in a worse position with respect to their employment because of the carrier's acquisition or merger.

However, no explicit requirements have been enacted by Congress for motor carrier employees. The only statutory language relevant to protective labor conditions for motor carrier employees is broad language dealing generally with the factors the ICC must weigh when it passes upon a merger type transaction.

In summary, then, the ICC is required to impose minimum protection for railway employees. The Commission does have the discretion to increase such protection, but it must provide some minimal amount. In motor carrier transactions, however, no minimum protection is prescribed, and the Commission may decline to impose any protective conditions whatsoever. But the Commission is granted the discretionary authority to impose those conditions that it deems to be in the public interest.

The Commission's policy with respect to protective labor conditions for motor carrier employees is best illustrated by the following quotation from one of its decisions:

> Based upon our examination of the legislative history of the Transportation Act of 1940, and the plain language of the provisions of Section 5(2)(c), which require that we give weight to the "effect of the proposed transaction upon adequate transportation service to the public," and to the interest of the carrier employees affected, we are, as previously indicated, convinced that the law does not *require* that we impose conditions for the protection of motor-carrier employees. Section 5 does require us to consider all aspects of the transaction as they affect the public interest. This includes the effect on employees. And in determining whether employees should receive any protection or compensation for the adverse effect which a transaction has upon them, we must consider the size and financial resources of the carriers involved, the expanding nature of the motor-carrier industry, and the high degree of transferability of motor-carrier employees within the industry. With rare exceptions, motor carriers involved in Section 5 transactions and their employees have been able to resolve their differences by mutual agreement. In no cases involving motor carriers have the protective conditions imposed

> gone beyond requiring the payment of severance pay to dismissed employees : . . . Although we have occasionally suggested voluntary consideration of the nature of the Oklahoma and Burlington conditions, they have not been, and in our opinion, they should not be, in the absence of a Congressional mandate similar to that contained in Section 5(2)(f), imposed in motor carrier proceedings unless compelling reason so dictate.[17]

The differing treatment accorded motor carrier employees has been upheld by the courts,[18] including the Supreme Court.[19] It is now well established that the ICC is not required to follow the Congressional mandate regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier employees.

But despite the absence of express statutory mandate, the ICC has provided some protection for those motor carrier employees affected by a merger, purchase, or other type of transaction subject to Section 5 approval. The Commission has justified the imposition of protective conditions for these employees on the ground that it was the clear intent of Congress to accord such employees "fair and equitable treatment."[20] The Commission has decided, for example, that public policy is best effectuated by requiring motor carriers to provide severance pay for those employees who are dismissed because of a merger or acquisition.[21]

The Commission, however, has resisted attempts by various unions who have sought greater protection for motor carrier employees adversely affected.[22] Two specific reasons have been put forth by the Commission. First, unlike railroad employees, motor carrier workers do not require financial protection because "they move in an expanding industry and possess quite a degree of transferability within the industry itself."[23] One of the prime reasons leading to the enactment of protective conditions in the railroad industry was the fact that employees dismissed

17. Midwest Buslines, Inc., 97 M.C.C. 568 (1964). This purchase has resulted in a number of proceedings before the ICC as well as before a number of courts. *See American Buslines v. United States*, 253 F. Supp. 481 (D.D.C. 1966); *Amalgamated Transit Union v. United States, sub nom International Brotherhood of Teamsters v. United States*, 385 U.S. 38 (1966).

18. *American Buslines v. United States*, 253 F. Supp. 481 (D.D.C. 1966).

19. *Amalgamated Transit Union v. United States*, 385 U.S. 38 (1966).

20. Short Line, Inc., 75 M.C.C. 233 (1958).

21. The Commission also has required in one case that certain moving and transportation expenses be paid. *Midwest Buslines, Inc.*, 97 M.C.C. 568 (1964).

22. Watkins Motor Lines, 90 M.C.C. 567 (1962); *cf.* BRT v. United States, 1967 Federal Carriers Cases, ¶ 81,958.

23. *American Buslines v. United States*, 253 F. Supp. 481 (D.D.C. 1966).

or laid off due to merger or acquisition were at a severe disadvantage in finding other work in the railroad industry. The industry was contracting and not simply readjusting. The motor carrier industry, however, has been characterized by a shortage of qualified employees. Unlike the experience of the railway industry, more often than not motor carrier employees have been the prime beneficiaries of a merger or acquisition.

Second, the Commission has maintained that the skills of motor carrier employees are more adaptable than the more technical and limited skills of most railroad employees. In short, displaced railroad employees meet with more difficulties in obtaining similar positions and therefore need more protection than do motor carrier employees.[24]

Technological advances and the utilization of labor-saving devices have more directly affected the railroad employee than his counterpart in the motor carrier industry. Despite the featherbedding practices of the railway industry, many technological innovations have been utilized, and labor-saving devices have been installed. For example, many railway clerks have been displaced by an IBM system of freight billing; containerization has replaced cargo handlers; and automated safety devices have replaced the guards at railroad crossings. The importance and significance of protective labor conditions to these technologically obsolete employees becomes obvious. In contrast, the motor carrier industry due to the nature of its service is not an industry readily adaptable to mechanization. Despite certain technological advances, the need for qualified employees has not diminished; rather, it has increased. Although labor-saving devices have been introduced, no substitute has been found for drivers.

Another reason that might explain the different treatment accorded motor carrier employees is that at the time protective conditions were developed and applied to railroad employees, the motor carrier industry was in its infant stage. There were relativly few over-the-road-drivers, and most of the work was confined to specific localities, within a limited geographical area. Consequently, Congress in enacting Section 5 in 1940, saw little need to provide extensive protection for an industry then generally confined to local areas.

In addition, the overwhelming number of motor carrier companies are relatively small concerns. Thus, a merger or consolidation affects relatively few employees. Contrast this with the railway industry, where it is not uncommon to have a merger or consolidation which affects several thousand employees.

24. *Id.* at 483.

In summary, the nature of the industries and the predictable effect of a merger or consolidation continue today to justify the statutory distinction regarding the imposition of labor protective conditions between the railroad and motor carriers.

D. The Airlines Industry

The imposition of labor protective practices in the airlines industry combines many features of both railroads and motor carriers, and in addition there are practices which are unique to the airlines industry. Many factors that have influenced the formulation and application of protective conditions in the railroads have been instrumental in the development of similar conditions in the airlines industry. For example, both have undergone vast changes due to technological advances. The labor force in both industries is proficient in skills not readily adaptable to any other industry. A merger in the airlines, as in the railroads, usually involves a substantial number of employees.

However, in certain respects, the airline industry differs significantly from the railway industry, and has much in common with motor carriers. Both industries have experienced unprecedented growth. Despite the technological advances of recent years, employment opportunities have been increasing, not decreasing. Critical shortages of certain types of employees exist. Furthermore, when protective conditions were first being adopted in the 30's, both industries were in their infant stage.

The Civil Aeronautics Board is empowered to approve any merger or consolidation involving airlines, and under this power the Board has developed protective conditions for the airlines industry. The CAB's jurisdiction over these transactions is derived from Section 408 of the Aviation Act,[25] which provides that the CAB shall approve mergers and other related transactions, "upon such terms and modifications as it may prescribe . . . unless the Board finds that . . . merger . . . will not be consistent with the public interest. . . ." As in the statute regulating merger activity in the motor carrier industry, there is no express authorization for the imposition of minimum labor protective conditions.

In implementing the statutory mandate the CAB has borrowed from the ICC some of the methods used to regulate both railroad and motor carrier mergers. The CAB has developed standard labor protective conditions not unlike those utilized by the ICC in the railroad industry.

25. 49 U.S.C. § 1301, *et seq.*

At the same time the CAB leaves the implementation of these general conditions to the parties involved in a given merger or consolidation in a manner somewhat similar to the more flexible regulation in the motor carrier industry.

The CAB first imposed labor protective provisions in 1950,[26] and has adopted several features of the Washington Agreement as developed by the ICC for railroad employees.[27] The Board has justified the imposition of these conditions on the grounds that they serve the public interest by promoting the adequacy and efficiency of the air transportation system and by facilitating mergers, consolidations, and acquisitions. The Board maintains that the application of these conditions tends to prevent labor disputes,[28] and its authority to impose protective conditions has been upheld by the courts.[29]

II. The Application of the Protective Conditions

To illustrate the preceding general discussion this section focuses on a selected number of specific labor protective conditions which concern the airlines industry and the standard provisions as applied by the Civil Aeronautics Board.

A. Employees Protected

The right to impose labor protective conditions is derived from the agency's statutory authority to approve mergers, consolidations, and acquisitions. Consequently, the protections are limited in application to only those employees adversely affected by such a transaction.[30] Employees affected for other reasons are not covered by the protective provisions. Thus, a carrier is not required to apply the protections to employees dismissed for valid business considerations not directly caused by a merger or consolidation.[31] Employees who retire, resign, or who are dismissed for just cause also are not protected.

Often a problem arises in attempting to distinguish between those

26. United-Western, Acquisition, Air Carrier Property, 11 C.A.B. 701 (1950), *aff'd sub nom.*, *Western Air Lines v. CAB*, 194 F.2d 211 (9th Cir. 1952).

27. North Atlantic Route Transfer Case, 12 C.A.B. 124 (1952). *See also* Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952); Delta-Chicago and Southern Merger Case, 16 C.A.B. 647 (1952); Flying Tiger-Slick Merger Case, 18 C.A.B. 326 (1954).

28. *Id.*; United-Capital Merger Case, 33 C.A.B. 307 (1961).

29. *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960); *Kent v. CAB*, 204 F.2d (2d Cir. 1953).

30. Delta-Chicago and Southern Merger Case, 16 C.A.B. 647 (1952).

31. *Id.*

employees affected solely by a merger, and those affected by technological changes and economic reasons unrelated to merger activities. The carrier will argue that certain disruptions of its labor force occurred as a result of action dictated by sound business practice and in no way related to a merger; whereas its employees or their union will contend that the adverse effect results directly from the merger or consolidation.[32]

B. The Displaced Employee

Employees displaced or dismissed because of merger activities are protected by a standard labor protective condition which provides a form of severance pay. The CAB has uniformly ordered that any employee deprived of employment as a result of a merger or consolidation shall be accorded an allowance based upon his length of service.[33] An affected employee receives a monthly payment equal to 60 percent of his earnings in the year prior to the loss of employment, subject to certain qualifications. If the employee obtains other employment, or receives unemployment compensation, his allowance is reduced. If the employee resigns, or without proper cause fails to return to employment after a recall notice, his allowance is terminated.[34] The employee is entitled to elect to receive a lump-sum dismissal allowance in place of the monthly allowance.[35]

An indication of how the CAB views this protective provision can be found in the Braniff-Mid-Continent Merger Case, where the CAB rejected the contention that the lump-sum payment would result in a windfall in cases where an employee finds reemployment immediately

32. In this connection, the CAB, in the Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952), broadened the scope of the protections to include certain employees dismissed prior to the merger. In this case, one of the unions argued that the carriers could successfully avoid paying benefits contained in the Board's protective conditions by reducing the number of employees *prior* to the merger. Consequently, the Board ordered that if either carrier rearranges or adjusts its forces in anticipation of the merger "with the purpose or effect of depriving an employee of benefits to which he should be entitled under the protective conditions as an employee immediately affected by the merger, the protective conditions are to apply to such an employee as of the date when he is so affected." *Id.* at 716.

33. Appendix A, attached hereto, contains the Labor Protective Conditions imposed in the United-Capital Merger Case. These conditions contain what are generally referred to as the Board's standard protective conditions. Dismissal allowance is covered in Appendix A, sec. 5.

34. Appendix A, sec. 5.

35. Appendix A, sec. 7.

after dismissal. The Board observed that "to some extent, all severance pay entails some danger of this so-called 'windfall.' In point of fact, however, severance pay is intended to offset to some extent the hazards and inconveniences involved in seeking new employment."[36]

Carriers have contended that the basic formula should be altered, or the claim period should be shortened;[37] in rejecting these arguments, the CAB has emphasized that it is undesirable to make changes in the standard provisions which have been imposed in preceding cases.[38] Consequently, the Board's protective provisions in almost all merger cases are the same. Only minor changes have been made over the years. This attitude may be self-defeating. Precedent should not be an excuse for stagnation, and rulings which have little relevance to the facts presented are a disservice.

Seniority considerations often give rise to job displacement disputes where an employee is "bumped," forced out of his present position, to a job paying less money because another employee has greater seniority. In those cases, under the standard labor protective conditions, an employee is entitled to receive the difference between his earnings after displacement and his earnings at his prior position.[39] This allowance applies to changes which occur within a period of three years from the effective date of the merger. The allowance is paid for four years from the date on which the employee is displaced.

Employees who voluntarily resign rather than accept appropriate positions requiring a change of residence are not entitled to dismissal and displacement allowances. In the United-Capital Merger Case, the CAB offered its justification for this exclusion by pointing out that "should employees have the option not to move and still be eligible for benefits of the nature afforded by our present provisions, and should a large number of employees elect not to move to another city to maintain employment with the surviving carrier, which would then have to replace them, the cost to the surviving carrier could indeed be staggering."[40]

The Board noted that those employees who are required to change their places of residence "are not without a measure of protection from the hardships of that requirement."[41] The employee is reimbursed for all the expenses involved in moving his household, as well as for the

36. Brainiff-Mid-Continent Merger Case, 15 C.A.B. 708, 713 (1952).
37. United-Capital Merger Case, 33 C.A.B. 307, 327 (1961).
38. *Id.* at 323.
39. Appendix A, sec. 4.
40. United-Capital Merger Case, 33 C.A.B. 307, 329 (1961).
41. *Id.* at 328.

traveling expenses incurred by him and his family.[42] He is entitled to receive living expenses and his actual wage loss during the time necessary for such a transfer.[43]

C. The Role of the Agency and Arbitration

The Board's view of its role is not difficult to discern. In the CAB view its function is to provide the framework for a fair and equitable arrangement, protecting the interests of the employees, the carriers, and the general public. The Board, with court approval, has determined that the public interest in maintaining peaceful labor relations to effect an orderly continuation of operations is satisfied, in part, by the provisions it has developed for the protection of employees adversely affected by a merger of consolidation.[44] Consequently, the Board has systematically rejected many specific proposals and modifications presented by parties to particular mergers or consolidations, relying rather on the general conditions that were developed in the early 50's, and refined in the United-Capital Merger Case. In the Board's view these conditions are of sufficient detail to provide the proper guidance. Furthermore, with some justification the Board argues that to go beyond the general labor protective conditions and attempt to resolve specific disputes arising from a merger not only would overburden the Board's limited staff, but also would unduly involve the CAB in areas beyond its expertise.

If any difficulty arises, initially the parties are left to private resolution. If this does not work, the parties can resort to arbitration. This view is well illustrated in the Delta-Chicago and Southern Merger Case, where the CAB stated:

> [N]o formula can be sufficiently precise to cover every case, and we do not believe that we should be called upon to pass upon specific transportation and per diem allowances. The provisions (. . . which have been previously imposed . . .) offer sufficient guide for protection of all parties concerned and in the event that there is finally a disagreement which is not resolved by amicable negotiations, the resort to arbitration is ultimately available.[45]

Machinery has been provided whereby disputes arising from a merger may be resolved. Each protective order issued by the CAB (and the ICC)

42. Appendix A, sec. 8.
43. *Id.*
44. *See Kent v. CAB*, 204 F.2d (2d Cir. 1953).
45. Delta-Chicago & Southern Merger Case, 16 C.A.B. 647, 658 (1952).

contains an arbitration provision which provides that if a dispute or controversy arises in connection with an interpretation, application, or enforcement of any of the provisions of the protective order, it may be referred by either party to a neutral referee.[46]

III. A Recommendation Concerning Agency Involvement

The CAB's failure to involve itself in the details of the terms of employment governing the integration after merger of the pre-existing labor forces has in one area not served the public interest. That area is union representation.

A. The Merging of Seniority Lists

The merging of seniority lists provides a framework for the discussion of post-merger union representation. The treatment of seniority lists is generally capable of peaceful and equitable resolution through the existing agency practice of issuing general labor protective conditions with resort to arbitration to resolve disputes. Seniority confers upon an employee a claim to available work relative to the seniority of his fellow employees and to other fringe benefits flowing from his employment, such as vacations, promotions, and transfers.

The standard condition imposed by the CAB in this area provides that "provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees expected."[47] In the event that the parties fail to agree, the controversy may be submitted, by either party, to arbitration for consideration and determination.[48]

Carriers seldom raise any serious obstacles to seniority integration.[49] The carrier's main concern is to reconstitute its labor force, retain experienced workers, and develop a plan that is equitable to as many of its employees as possible. Employees and their union representatives, however, are very much concerned and have indeed created many obstacles with respect to this problem—and to an extent, this is understandable. On occasion employees disaffected by the methods and criteria used to integrate the labor force, as well as by the final integrated

46. Appendix A, sec. 13.
47. Appendix A, sec. 3.
48. Appendix A, sec. 13.
49. Delta-Chicago & Southern Merger Case, 16 C.A.B. 647 (1952); United-Capital Merger Case, 33 C.A.B. 307 (1961).

list, have contested the issue before the CAB and in the courts.[50] In all cases, the CAB, with court approval, has upheld the method of seniority integration arrived at by the parties to the merger. The final seniority list had been either formulated by the parties themselves or was the result of an arbitrator's decision.

On occasion the CAB has deviated from its standard operating procedure and actually involved itself in the details of integrating seniority lists.[51] In one case involving the question of the seniority of flight engineers and the relationship of a collective bargaining agreement between the surviving carrier and its engineers, the Board ordered, after attempts at private resolution failed, that service with each carrier was to be given equal effect.[52]

The surviving carrier's employees sought court review on two fundamental issues, the authority of the CAB to rule on the question, and the conflict between the CAB decision and an existing collective bargaining agreement. The Court of Appeals for the Second Circuit sustained the position of the Board on both issues. On the question of the CAB authority to rule on the issue the court ruled:

> [W]hen a merger involves two or more groups of employees each having separate seniority rights, the public interest in maintaining peaceful labor relations so as to effect an orderly continuation of operations is not always satisfied merely by conditioning approval of the merger on financial protection to the employees. Industrial strife may arise by reason of a dispute between the two or more employee groups as to how a unified seniority list should be drawn. And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carriers so as to protect adequately the public interest is what Section 408(b) of the Act contemplates, and that is what these orders accomplish.[53]

With regard to any conflict between the existing collective bargaining agreement and the CAB order the court stated:

> A private contract must yield to the paramount power of the Board

50. *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960); *Aling v. ALPA*, 346 F.2d 270 (7th Cir. 1965), *cert. denied*, 382 U.S. 926 (1966).

51. *Saturn-AAXICO Merger Case*, 41 C.A.B. 827 (1965).

52. *Kent v. CAB*, 204 F.2d (2d Cir. 1953).

53. *Id.* at 265, 266.

> to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest . . . . The paramount public interest required that due consideration be given conflicting seniority interests of both groups of these engineers. The Board has done that with meticulous care and, far from acting in an arbitrary and capricious way, has provided a method which fairly distributes the burdens and the benefits . . . it was within the competence of the Board to make its determination free from private contract restraint . . . .[54]

B. Union Representation

When a carrier is contemplating a merger, one of the initial considerations regarding personnel involves the question of union representation. It is not uncommon to find that a group of employees, described in the airline and railroad industries as a craft or class, is represented by a labor organization while the employees performing the same job function for the surviving carrier are unorganized. Typically the organized craft or class will have a collective bargaining agreement with the merging carrier. Two questions arise: will the union continue its representative status following the merger and, what is the effect of the existing collective bargaining agreement on the surviving carrier?

A variation of the same vexing problem occurs when both carriers class or craft of employees are represented, but by different unions. Which, if either, collective bargaining contract will govern the wages, hours, and conditions of employment of the combined class or craft following the merger?

The CAB's role in the area of union representational rights is limited. Union representational rights under the Railway Labor Act, 45 U.S.C. § 184 (which also applies to the airlines), is the exclusive province of the National Mediation Board. Interpretation of the collective bargaining agreement under the Railway Labor Act is handled by third party arbitration, a system board of adjustment. Thus at the time of merger only one question is presented to the CAB: whether the Board, as a condition of approving the merger, will require the surviving carrier to assume the labor agreement of which the merged carrier was a party.

Where there is no question as to majority status, for example where the organized class or craft commands an overwhelming majority in the

54. *Id.* at 266.

combined class or craft, the carrier will as a condition of merger accept the union as the employee representative and any existing collective bargaining agreement in effect. The problem area occurs when a union represents a small group of employees of the merged carrier which is integrated into a larger unorganized class or craft at the surviving carrier. If the union's representational rights continue, it will represent a minority group within the entire class or craft. The Railway Labor Act prohibits a minority union.[55] The question of representation is one for the National Mediation Board. However, the representational issue is presented to the CAB in a collateral sense when it is asked by the union to require the surviving carrier to assume the collective bargaining agreement in effect between the union and the merged carrier. The CAB when faced with this issue has, to date, avoided the question by imposing the standard labor protective conditions which, in effect, provide that the dispute between the union and the surviving carrier regarding the collective bargaining agreements' applicability to the merged operation is a matter to be worked out between them.[56]

Such a decision can hardly be considered in the interest of the carrier, its employees or their union representative, or the public in general. The result has been extensive and needless litigation between the union and the surviving carrier.[57] The issue is one for which the courts have provided the CAB with the guidelines[58] necessary for a decision, and therefore the Board should exercise its statutory power in this situation and provide the parties with an answer to this fundamental question at the commencement of the merger operation. In the situation in which the carrier would be compelled to deal with a minority union, the CAB should hold that the contract terminates upon approval of the merger and the union must pursue its representational rights before the National Mediation Board, pursuant to the Railway Labor Act.

The situation is somewhat analogous to the seniority dispute discussed, *supra*; the present CAB should follow the precedent established there by the predecessor Board members and approved by the Second Circuit Court of Appeals. The Board should eliminate this cause of industrial strife by decision at the time of the merger thereby putting the matter of contract survivability to rest. Such a course of action

55. Railway Labor Act § 2 (third), (fourth), (ninth), 45 U.S.C. § 152 (third), (fourth), (ninth) (1968).

56. Appendix A, sec. 13.

57. *BRC v. United Airlines*, 325 F.2d 576 (6th Cir. 1963), *cert. denied*, 276 U.S. 26 (1964); Air Line Employees Assn. v. CAB, 413 F.2d 1092 (D.C. Cir. 1969).

58. *BRC v. United Airlines*, 325 F.2d 576 (6th Cir. 1963).

would in the long run benefit the carriers, unions, and the public in general.

IV. CONCLUSION

This article has dealt with a complex area that has not received a great deal of attention and is often overlooked even by those who are actively involved in merger activities. It was intended as a discussion, not as an exhaustive study, of the types of protective conditions that have been imposed. For example, there was no analysis of the notice requirement, which compels the carrier to present a full statement of the proposed changes to be effected by the merger.[59] Nor was there any mention of the rapidly expanding role of the Federal Maritime Commission in the area of mergers, consolidations, and acquisitions of common carrier fleets.[60]

The nation has come a long way since a maximum hours law for bakery workers was declared unconstitutional. It has witnessed the growth of governmental involvement in the field of labor relations. With respect to regulated industries, the government has taken upon itself the responsibility to insure that the rights and interests of all the parties involved are protected and safeguarded. Protective conditions were first developed at a time when employees were relatively powerless to improve their plight. Over the years, these provisions have served to minimize industrial strife caused by merger activities. Employees beset by doubt and insecurity are assured that they will receive some protection. Carriers, fearful of work stoppages and extreme union demands, are aware of the benefits that must be provided for their employees.

The government's role in this area should be to act as an overseer. Its goal should be to protect and balance the interests of the employees, the carriers, and the general public. It should seek to minimize the causes of friction between the parties to a merger or acquisition. It should be alert to the danger that the participants may place their own interests above those of the general public; and consequently, it should make every effort, through its agencies, to guard against this danger. In the

59. Railway Labor Act § 6, 45 U.S.C. § 156 (1968).

60. For a discussion of the Federal Maritime Commission's emerging role in this area, *see* , *The Federal Maritime Commission—Late Bloomer in Regulating Merger, Consolidation, and Acquisition*, TRANSPORTATION L.J. ( ).
The "Order of Investigation" discussed on pages is particularly noteworthy in that for the first time the Federal Maritime Commission requires the parties to submit information on the ". . . effect upon the labor force."

last analysis government should foster a climate which promotes the process of collective bargaining and encourages the parties to equitably resolve their differences and thus to reach private agreements and safeguard the rights and interests of all.

APPENDIX A

LABOR PROTECTIVE PROVISIONS AS SET FORTH IN THE UNITED CAPITAL MERGER CASE

Section 1. The fundamental scope and purpose of the conditions specified in paragraph 2(c) of this order are to provide for compensatory allowances to employees who may be affected by the proposed merger of United and Capital approved by this order, and it is the intent that such conditions are to be restricted to those changes in employment solely due to and resulting from such merger. Fluctuations, rises and falls, and changes in volume or character of employment brought about solely by other causes are not covered by or intended to be covered by this order.

Section 2(a). The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein refers to either United or Capital or to the corporation surviving after consummation of the proposed merger of the two companies.

(c) The term "effective date of merger" as used herein shall mean the effective date of the amended certificates of public convenience and necessity transferred to United pursuant to the approval granted in this order.

(d) The term "employee" as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Section 4(a). Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the merger who is continued in service shall as a result of the merger be placed in a worse position with respect to compensation than he occupied immediately prior to the effective date of such merger 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 immediately prior to such date, 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.

(b) The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(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 12 months in which he performed service immediately preceding the date of his displacement (such 12 months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, 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.

(d) The protection afforded herein shall only apply to displacements occurring within a period of 3 years from the effective date of the merger (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of 4 years from the date on which the employee is displaced.

Section 5(a). Any employee of either of the carriers participating in the merger who is deprived of employment as a result of said merger shall be accorded an allowance (hereinafter termed a dismissal allowance), based on length of service, which (except in the case of an employee with less than 1 year of service) shall be a monthly allowance equivalent in each instance to 60 percent of the average monthly

compensation of the employee in question during 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 merger. This dismissal allowance will be made to each eligible employee, while unemployed, by United during a period beginning at the date he is first deprived of employment as a result of the merger and extending in each instance for a length of time determined and limited by the following schedule:

Length of service *Years*	*Separation allowance* *Months' pay*
1 and less than 2	3
2 and less than 3	6
3 and less than 5	9
5 and over	12

In the case of an employee with less than 1 year of service such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by section 7.

(b) For the purposes of this order, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for 1 month's service for each month in which he performed any service (in any capacity whatsoever) and 12 such months shall be credited as 1 year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: *Provided*, That in calculating the dismissal allowance for such an employee, such allowance shall be based upon the compensation paid such employee by the carrier during his last 12 months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c) An employee shall not be regarded as deprived of employment in case of his resignation, death, or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction in forces due to seasonable requirements

of the service; nor shall any employee be regarded as deprived of employment as the result of the merger who is not deprived of his employment within 3 years from the effective date of said merger.

(d) Each employee receiving a dismissal allowance shall keep United informed of his address and the name and address of any other person by whom he may be regularly employed.

(e) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f) An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g) If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he shall be entitled to protection in accordance with the provisions of section 4.

(h) If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: *Provided*, That this shall not apply to employees with less than 1 year's service.

(i) A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of—

1. Failure without good cause to return to service after being notified of position for which he is eligible and as provided in paragraphs (f) and (g).

2. Resignation.

3. Death.

4. Retirement or on account of age or disability in accordance with the current rules and practices applicable to employees generally.

5. Dismissal for justifiable cause.

Section 6. An employee affected by the merger shall not during the applicable protective period be deprived of benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 7. Any employee eligible to receive a dismissal allowance under section 5 hereof may, at his option at the time of merger, resign and (in lieu of all other benefits and protections provided in this order) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of service *Years*	*Period of payment* *Months*
1 and less than 2	6
2 and less than 3	12
3 and less than 5	18
5 and less than 10	36
10 and less than 15	48
15 and over	60

In the case of employees with less than 1 year's service, 5 days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in section 5.

(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to time of the merger.

Section 8(a). Any employee who is retained in the service of the carrier surviving the merger (or who is later restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as result of such merger, and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter (not to exceed 2 working days), used in

securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred within 3 years from the effective date of the merger, and the claim must be submitted within 90 days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the merger and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 9(a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of the carriers involved in this merger (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the merger to be unaffected thereby: *Provided, however*, That if the home is not sold within a substantial period of time after the merger, then the fair-value of the home shall be determined as of a date as closely related to the date of sale as possible, with an agreed-upon adjustment being made to exclude any effect of the merger on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the merger and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within 3 years after the effective date of the merger.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and, in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier, respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 10. If either carrier, on or after July 19, 1960, shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this order as an employee immediately affected by the merger, the provisions of this order shall apply to such an employee as of the date when he is so affected.

Section 11. United and Capital shall jointly or severally give at least 45 days' written notice containing a full and adequate statement of the proposed changes to be effected by the merger, including an estimate of the number of employees of each class, craft, or field of endeavor affected by the intended changes. Such notice shall be posted on bulletin boards or other conspicuous places convenient to the employees of said carriers, and a copy of the notice shall be sent by registered mail to all authorized representatives of any of the employees of both carriers.

If requested in writing by any employee or employees of either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the

merger shall be agreed upon within 10 days after such request is received by the carrier. The meeting shall commence within 30 days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with section 13.

Section 12. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order be required to accept employment with the surviving carrier that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date of this order.

Section 13. In the event that any dispute or controversy (except as to matters arising under sec. 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees.