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DOUGLAS E. CHRISTENSEN

OFFICE MANAGER

September 15, 1989

Dear [REDACTED]

RE: Ethics Committee Request for Opinion

The Ethics Committee of the State Bar Association of North Dakota at its meeting on September 15, 1989, discussed the request presented by you in your letter of September 1, 1989. Based on the facts outlined in your letter and assuming all relevant information has been provided to the Committee, the Committee was of the opinion that Rule 5.4 of the North Dakota Rules of Professional Conduct, prohibit the arrangement that you outlined in your letter. The Committee was of the opinion that the proposed arrangement would constitute impermissible fee sharing with a nonlawyer in violation of Rule 5.4

The Committee was also of the view that you may be able to structure an arrangement where you would be paid by the transportation specialist to represent the interests of the former employees. Such an arrangement, however, would have to be done in full conformance with the requirements of Rule 1.8(f) of the North Dakota Rules of Professional Conduct. As you can see, Rule 1.8(f) would require consent of each of the employees involved. Of course, you would have to be careful with any such arrangement as it could be construed as an indirect attempt to get around the prohibitions of Rule 5.4. In any event, as indicated previously, the Committee was of the view that your representation of the transportation specialist, as an agent for several employee-claimants, wherein the method of compensation would be contingent


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upon the outcome would constitute an impermissible fee sharing with a nonlawyer in violation of Rule 5.4.

The above letter opinion is issued to you from advisory purposes only and is not binding on you, the Courts of North Dakota, the Disciplinary Board, Grievance Committees, or any other member of the Bar of the State of North Dakota.

Very truly yours,

Paul F. Richard
Chairman, Ethics Committee of
the State Bar Association of North Dakota

PFR/tmn

89-08

September 1, 1989

ALSO LICENSED IN MINNESOTA

Paul F. Richard, Chairman
Ethics Committee
C/O Serkland, Lundberg, Erickson
Marcil & McLean Ltd.
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RE: Ethics Committee
Request for Opinion

Dear Paul:

The opinion of the Ethics Committee is respectfully requested on the following matter.

Our firm has, to date, successfully represented certain claimants for labor protective benefits in an administrative proceeding before the Interstate Commerce Commission (ICC). Specifically, the 21 claimants, our clients, are all former employees of a rail affiliated motor carrier who have sought labor protective benefits under the Interstate Commerce Act when their jobs were terminated following the merger of two railroads. The specific federal statute provides that employees terminated as a result of an ICC approved merger are entitled to certain labor benefits. On their behalf, we petitioned the ICC to reopen the rail merger proceedings and to declare that the claimants were entitled to certain protective benefits. A non-lawyer transportation specialist also participated in that administrative proceeding before the ICC on behalf of his several clients, all of whom were discharged by the rail affiliated truck line following the ICC approved rail merger. The ICC reopened the proceeding and declared that our 21 claimants, and other employee-claimants similarly situated, including those represented by the transportation specialist, were within the class of persons entitled to such benefits. Copies of these decisions are enclosed for your reference.

In accordance with the enclosed decisions and the procedures therein referenced, we must now submit our claims to the railroad for approval or rejection. The claims will doubtlessly be denied. Then, we are required to submit our claims to binding arbitration to determine what benefits, if any, the claimants are entitled. The arbitrator's decision will, in turn, likely be appealed to the ICC and, possibly, into the federal courts.

Paul F. Richard, Chairman
September 1, 1989
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We have been contacted by the non-lawyer transportation specialist to represent the interests of its clients in the arbitration process and beyond. Under the proposed arrangement, our firm would receive a fee contingent on the outcome of the arbitration process. That fee would be paid to us by the transportation specialist and would represent a percentage of the wage benefits awarded to his client, in accordance with the agent agreement between that firm and the individual claimants. No fee would be paid in the event of an adverse determination on the claim. The transportation specialist would continue to play a major role in the gathering of information, in the submission of the claims and in the arbitration process itself.

The Canons of Ethics before the Interstate Commerce Commission specifically address the issue of fee division at 49, CFR §1103.20 (Sub D) as follows:

DIVISION OF FEES. Fees for services should be divided only with other members of the Bar of Practitioners and should be based upon a division of service or responsibility.

Like our own ethics, the ICC Canons provide that a practitioner (before the ICC) may not properly agree with a client that the practitioner shall pay or bear the expense of litigation.

I would appreciate your opinion on whether our state ethical rules would preclude us from representing the transportation specialist, as the agent for several employee-claimants, wherein the method of compensation would be contingent upon the outcome.

After reviewing the above and enclosed, if you have additional questions before submitting this request to your Committee, please advise. I will be out of town the week of September 4, but will return on Monday, September 10, and am hopeful of a resolution of this issue later that week.

I appreciate your consideration to this request.

Very truly yours,

[REDACTED]

[REDACTED]

NOV 13 1987

DECISION

Finance Docket No. 28583 (Sub-No. 1)

BURLINGTON NORTHERN, INC. - CONTROL AND MERGER - ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided: October 28, 1987

BACKGROUND

In Burlington Northern, Inc. - Control and Merger - St. L., 360 I.C.C. 784 (1980) and sub nom. Missouri-Kansas-Texas R. R. Co. v. United States, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981) (BN-Frisco), we authorized, inter alia, the acquisition, by Burlington Northern, Inc. (BN), 1/ of control of St. Louis-San Francisco Railway Company (Frisco) and the merger of Frisco and its properties into BN, subject to certain conditions, including labor protective conditions. For the protection of carrier employees affected by that transaction we imposed the conditions specified in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). BN-Frisco, supra, at 946-950, and 1182.

In BN-Frisco, supra, at 960-961, we also approved the acquisition, by BN, of a motor carrier subsidiary of Frisco -- Frisco Transportation Company (FTC). At the time of the acquisition, BN also controlled a motor carrier -- BN Transport, Inc. Subsequently, BN Transport was purchased by SFTT, Inc. (SFTT). 2/

Twenty-one former employees of BN Transport have filed a petition to reopen the BN-Frisco merger proceeding, or, alternatively, for a declaratory order. All but two of the petitioners were employees of BN Transport at the time of the merger. Those petitioners' jobs were terminated either by BN Transport or its successor, SFTT. The other two petitioners were laid off in 1979, before the Commission's approval of the merger. 3/ Petitioners were not represented in any pre-merger negotiation or by separate agreement. Petitioners claim that they did not receive the labor protective benefits prescribed in BN-Frisco even though most of them lost their jobs after the merger was approved. They seek reopening on the basis of materially changed circumstances, contending that subsequent judicial proceedings have clarified the right of employees of motor carrier subsidiaries of railroads to receive protective benefits. They submit that the Commission has jurisdiction to reopen BN-Frisco or to issue a declaratory order to remove any uncertainty that may previously have existed regarding their right to receive such benefits.

Petitioners point specifically to the decision in Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984), cert. denied, 105 S. Ct. 2344 (1985) (Cosby), in which the United States Court of Appeals for the Eighth Circuit determined that employees of FTC are

1/ The railroad operations of Burlington Northern, Inc., were transferred to the Burlington Northern Railroad Company on May 14, 1981.

2/ By decision served December 12, 1984, in Docket No. MC-F-15903, SFTT, Inc. - Control Exemption - BN Transport, Inc., and Federal Transport, Inc., SFTT was authorized to acquire control of BN Transport through stock purchase.

3/ In addition to the two petitioners who were laid off in 1979, two were laid off in 1980; none in 1981; four in 1982; three in 1983; nine in 1984; and one in 1985.

entitled to the labor protection imposed in BN-Frisco. Petitioners argue that they are entitled to receive mandatory labor protection under 49 U.S.C. 11347 because they are "employees" for purposes of section 11347, and because they were adversely affected by the BN-Frisco merger. Thus, petitioners claim, they stand in the same position as the Cosby claimants. Petitioners contend that, like FTC, BN Transport's operating authority necessarily was restricted to service "auxiliary and supplemental" to rail service, because at the time of the merger the Commission had not yet eliminated its "special circumstances" doctrine in grants of operating authority to motor carrier subsidiaries of railroads.^{4/} Petitioners submit that the purchase of BN Transport by SFTT has no bearing on their right to labor protection under BN-Frisco, since BN Transport never had any labor protective obligations. Rather, according to petitioners, those obligations were imposed upon BN Transport's corporate parent, BN, and remain with BN despite the sale. Petitioners claim that they had no reason to believe that their jobs would be affected by the SFTT's purchase of BN Transport. They state that they were told at the time of the SFTT's purchase that their jobs would be secure. Attached to the petition is a copy of a bulletin received at BN Transport's Fargo, ND, terminal on August 21, 1984. The bulletin, from a BN Transport district manager, contains assurances that all jobs are secure; that with the purchase of BN Transport, the combined annual revenues of BN Transport and SFTT will be over \$130 million; and that "good things are in the future."

BN moves to dismiss the petition. It argues that petitioners' claims represent individual labor disputes that, under the New York Dock conditions, should be resolved through arbitration.^{5/}

BN submits that the Commission will address the merits of a complaint only when: (1) the dispute involves protected employees' compensation guarantees; and (2) the interpretation of a provision of the protective conditions might affect other similarly situated employees. Since petitioners do not raise any issues concerning interpretation of any provision of the protective conditions, BN submits that these circumstances are not present here. According to BN, arbitration would be the most administratively prudent and appropriate method of resolving these claims because rigorous individualized factual inquiries will be required. These inquiries include: (a) whether the two claimants who lost their jobs before the merger was approved were dismissed as a result of the merger; and (b) whether the

^{4/} The "special circumstances" doctrine was later eliminated in Ex Parte No. MC-156, Motor Carrier Operating Authority - Railroads, 132 M.C.C. 978 (1982), aff'd American Trucking Associations, Inc. v. I.C.C., 722 F.2d 1243 (5th Cir. 1984) (ATA). In ATA the court held that the Commission possessed authority to reconsider its long-standing policy of granting rail-affiliated trucking companies permission to operate only under auxiliary-to-rail restrictions, and to establish a new policy which no longer required a showing of "special circumstances" to justify a grant of unrestricted motor carrier operating authority to a railroad subsidiary.

^{5/} BN points to the Commission's decision served January 8, 1985, reopening this proceeding subsequent to the Cosby remand, and imposing New York Dock conditions for the benefit of former FTC employees. In that decision, the Commission noted that, under New York Dock, binding arbitration is prescribed if the parties are unable to reach agreement on the application of any provision of the New York Dock conditions. The Commission therefore, referred the Cosby claimants to arbitration for determination of individual benefits. BN submits that whether additional employees beyond the original Cosby claimants would qualify as "employees" for purposes of labor protection is a question within an arbitrator's jurisdiction.

dismissal of those claimants who lost their jobs after BN Transport was purchased by SFTT was in any way related to the BN-Frisco merger, which was accomplished several years earlier. BN maintains that these types of factual inquiries are matters that the Commission and the courts have long placed in the hands of arbitrators.

Further, according to BN, arbitration is needed to resolve additional factual issues arising from the Cosby decision, particularly whether an "intimate tie" existed between the motor carrier operations of BN Transport and the railroad operations of BN. BN submits that, unlike the operating authority of FTO, a substantial portion of the BN Transport's operating authority was not restricted to activities "auxiliary or supplemental" to rail operations. Thus, BN submits, the issue of whether a particular BN Transport employee's job was "intimately tied" to the railroad's main transportation function cannot be decided, as it was in Cosby, merely by reference to the operating authority of the motor carrier subsidiary, but must necessarily turn on the facts relating to the tasks performed by that individual employee. BN submits that the task of determining whether the job was "intimately tied" to the company's railroad operations is one for which arbitrators are uniquely qualified.

DISCUSSION AND CONCLUSIONS

BN's motion to dismiss will be denied. It is based on the premise that, in view of the Cosby decision, arbitrators should determine whether BN Transport's employees qualify for labor protection under New York Dock. This is incorrect. The overall, general question of whether BN Transport's employees qualify for New York Dock labor protection is not a matter for arbitration, but, rather, is a matter subject to our jurisdiction under 49 U.S.C. 11347. Pursuant to the Cosby remand, we found that FTO employees are a class of employees that qualify under New York Dock. However, we have not as yet determined that BN Transport employees so qualify. Only if we determine that BN Transport employees as a class qualify for labor protection under New York Dock will we prescribe arbitration to resolve individual disputes (including questions of fact such as those BN raises).

In Cosby, the Court of Appeals held that the FTO employees were railroad employees entitled to labor protective benefits. The court found that, because FTO's operations were generally restricted to service that was auxiliary or supplemental to the Frisco rail service, FTO's operations were "intimately tied" to the railroad's main transportation function. There was no evidence that the skills of FTO's employees were transferable to general motor carrier services. Here, we cannot find that an "intimate tie" exists between the operations of BN and BN Transport because many of the operating certificates of BN Transport were issued after repeal of the "special circumstances" doctrine and do not contain restrictions to an auxiliary or supplemental service. The record contains no information as to whether operations conducted by BN Transport under those certificates were, in fact, auxiliary to, or supplemental of, BN's rail service. Nor does the record in the BN-Frisco merger proceeding indicate the nature of BN Transport's operations. While BN Transport may have conducted some non-rail related operations, we are unable to determine from the record whether and to what extent such operations were conducted. Thus, on the basis of the record before us, we cannot determine whether or not the BN Transport employees are "railroad employees" as defined in Cosby.

However, we need not resolve the question of whether BN Transport employees are "railroad employees" as a predicate to resolving the ultimate issue of whether BN Transport's employees are entitled to labor protection. In addition to basing its decision on its finding that the FTO employees were "railroad employees," the Cosby court based its decision that the FTO employees were entitled to New York Dock labor protection on

equitable grounds which apply equally as well to the BN Transport employees. In Cosby, the court cited a number of assurances made by officials of BN to the effect that no employee would face involuntary unemployment as a result of the merger and statements containing assurances that the operations of the motor carriers would not be changed. Among those statements was one by C.M. Illig, Assistant Vice President-Labor Relations of BN, 741 F.2d at 1083:

With the exception of clerical employees at Springfield, it is expected that the bulk of surplus employees created at any point and in any craft will be absorbed almost immediately on new positions and other vacancies caused by employees leaving service in the normal course of events... Those employees who do become surplus, or are displaced or are transferred due to the transaction will be covered by protective benefits.

Additionally, Mr. Thomas, an officer of BN Transport, was asked whether he assumed that his company's operations would be conducted in the future as in the present. His response was "Absolutely." 741 F.2d at 1084.

The Cosby court determined that these types of assurances gave the motor carrier employees no reason to intervene in the merger proceeding, or to request their union to do so to protect or clarify management's intentions. The Cosby court found that the FMC employees had a right to rely on the representations made by the officers of BN and Frisco and that it could hardly be heard to say that they waived their rights by not taking an active part in the merger proceedings.

The same equitable considerations apply with equal force to BN Transport employees. They relied upon the very same assurances when deciding neither to intervene in the merger proceeding, nor to request that their union do so. Thus, while we cannot determine whether the BN Transport employees are "railroad employees" as defined in Cosby, we do find that, in view of the equitable considerations raised in the Cosby decision, including the assurances noted by the Cosby court, the BN Transport employees are a class of employees entitled to labor protection under New York Dock.

We will, therefore, reopen this proceeding and grant former BN Transport employees the level of protection authorized in New York Dock, supra. Binding arbitration is prescribed if the parties are unable to reach agreement on the application of any provision of the New York Dock conditions. The arbitration panel will determine individual claims to benefits.^{6/}

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

It is ordered:

1. The motion to dismiss is denied.

^{6/} As BN notes, petitioners do not raise any issues concerning interpretation of the New York Dock conditions. Only causation issues are involved. Such issues are matters for arbitration. The Commission will not review arbitrators' decisions on issues of causation, the calculation of benefits or the resolution of other factual questions. Docket No. AB-1 (Sub-No. 83), Chicago and North Western Transportation Company - Abandonment - Near Dubuque and Delwin, IA, 3 I.C.C.2d 729 (1987).

2. The petition to reopen is granted, and the former employees of BN Transport, Inc., are granted the level of protection authorized in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

3. The petition for declaratory order is dismissed.

4. This decision is effective 30 days after service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley dissented in part with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

VICE CHAIRMAN LAMBOLEY, dissenting in part:

I do not agree with the position of the majority in footnote 6 stating that the Commission will not review arbitral decisions "on issues of causation, the calculation of benefits or the resolution of other factual questions." As I stated in a previous separate expression, I believe that arbitration decisions involving the scope and application of labor protection conditions imposed by the Commission are subject to Commission review as a matter of right and as a prerequisite to exhausting administrative remedies.^{1/} After acceptance or declination of review by the Commission, appeal of the final agency action would properly lie with the Court of Appeals.^{2/}

In my view, what is at issue is the scope of Commission review. Upon review the Commission should employ a deferential standard or limited scope of review over arbitration decisions except as to those issues involving the scope and application of conditions which were appropriate for Commission determination in the first instance, but delegated to the arbitration process. On those issues the Commission could choose a de novo review standard..

^{1/} See separate expression in Finance Docket No. 30853, L.A. Rowlett, Jr. v. Missouri Pacific Railroad Company, (not printed) served August 19, 1987.

^{2/} Without resolving the issue of finality, the Court of Appeals for the District of Columbia Circuit recently held accordingly that an arbitration award is an order of the Commission and that therefore whether it was final or non-final, it is ultimately subject to the exclusive jurisdiction of the Court of Appeals. UTU v. Norfolk and Western Railway Co., 822 F2d 1114 (D.C. Cir. 1987).

SERVICE DATE

JUL 8 1988

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28583 (Sub-No. 1)

BURLINGTON NORTHERN, INC. - CONTROL AND MERGER -
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided: June 30, 1988

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BACKGROUND

By decision served November 13, 1987, we reopened this proceeding and granted to former employees of BN Transport, Inc., a wholly-owned motor carrier subsidiary of Burlington Northern, Inc., the level of employee protection specified in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). Our decision granted a petition to reopen filed by 21 former employees of BN Transport (21 Employees), who alleged that, pursuant to the decision in Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984), cert. denied, 105 S. Ct. 2344 (1985) (Cosby), employees of motor carrier subsidiaries of rail carriers were entitled to protective benefits to the same extent as railroad employees.

On December 3, 1987, Burlington Northern Railroad Company (BN) filed a petition to reopen and vacate our decision on the grounds of material error. The 21 Employees replied.

Motions for leave to intervene have been filed by other former employees of BN Transport. On December 14, 1987, R. J. Stock and 109 other members of General Teamsters Local 174 (Local 174) filed their motion for leave to intervene, and on the same day Leroy Atkins and 147 other members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its affiliated locals (Teamsters) filed a separate motion for leave to intervene.^{2/} Also, we have received a "Notice of Appearance and Request for Recordation of Labor Protection Claim," together with seven supplemental claims, filed on behalf of Robert H. Veitch, Jr., and (with the supplementals) a total of 246 former employees of BN Transport (Veitch). These documents will be treated collectively as a third motion for leave to intervene.

BN filed its opposition to the motions for leave to intervene and the "Notice of Appearance and Request for Recordation of Claim." On December 29, the attorney representing Veitch replied to the BN opposition.

In our previous decision, we found that the employees of BN Transport were a class of employees entitled to the "New York Dock" employee protective benefits. This finding was based upon Cosby, which we recognize here as the law of this case.

In Cosby, which grew out of this merger proceeding, the court held that the employees of Frisco Transportation Company (FTC), a motor carrier subsidiary of St. Louis-San Francisco Railway Company (Frisco), were entitled to the benefit of the protective conditions imposed in this proceeding for railroad

1/ BN Transport was subsequently sold to SFTT, Inc. See No. MC-F-15903, SFTT, Inc. - Control Exemption - BN Transport, Inc., and Federal Transport, Inc., (not printed), served December 12, 1984.

2/ Each of these petitions states that it is filed on behalf of "other parties similarly situated." The parties purportedly represented by these petitions may overlap.

employees affected by the merger. The court determined that FTC employees were railroad employees within the meaning of the Act because the operations of FTC were restricted to auxiliary-to-rail services by its operating authority. Thus the court held that we were mandated by 49 U.S.C. 11347 to provide protection for these employees.

Alternatively, the Cosby court held that our failure to grant FTC employees the same protective conditions granted to Frisco's other railroad employees was an abuse of discretion. The court held that, under the facts and circumstances of this railroad control and merger case, the motor carrier employees of FTC had been assured that they would not be affected by the transaction, or that if they were, they would receive adequate protection.

In our previous decision, we were unable to find that the employees of BN Transport were railroad employees, but we held that we would exercise our discretion pursuant to the Cosby court's direction to grant the former employees of BN Transport the level of protection previously granted to railroad employees (the level of protection specified in New York Dock).

BN now argues that our decision was based on material error. First, it points to an alleged material factual error. We relied in part upon the testimony in the merger record of a Mr. Thomas, who was identified as an officer of BN Transport. BN now points out, correctly, that Mr. Thomas was an employee of FTC, not BN Transport.

Second, BN alleges that our previous decision denies it due process by making dispositive findings of fact, without giving the parties notice and an opportunity to submit evidence.

In their reply, the 21 Employees argue that the statement of Mr. Thomas is not material, as there is adequate additional evidence in the record to support our decision. They also note that our prior decision does not finally decide the rights of any party to this case. The 21 Employees further point out that BN has not shown the specific evidence it would introduce if this case were reopened for further hearing, referring to 49 CFR 1115.3(c).

DISCUSSION AND CONCLUSIONS

We deny BN's petition to reopen. The statement of Mr. Thomas referred to in our previous decision is not critical to our conclusion. As the 21 Employees point out in their reply, there is ample evidence in this record to grant employees of BN Transport the level of protective conditions previously imposed for the benefit of railroad employees.

Our previous decision was based upon the assurances made by officials of BN that as a result of the merger no employee would face involuntary unemployment without adequate protection. We referred primarily to the testimony of C. M. Ilig, Assistant Vice President--Labor Relations of BN, who pointed to minimal labor disruption, and provided assurances that employees who do become surplus, or are displaced or transferred due to the transaction, will be covered by employee benefits. Mr. Thomas was quoted only for his statement that the operations of his company would not be changed.

The Cosby court relied also on the testimony of Louis W. Menk, Chairman of the Board and Chief Executive Officer of BN, and of M. M. Donahue, Vice President of BN. Mr. Menk emphasized in his testimony that "no employee will face involuntary unemployment as a direct result of this merger without ample financial protection." Mr. Donahue provided assurances that the proposed merger would "produce no long-term adverse impact on our employees," and would benefit employees as well as the railroad industry and other parties.

The record contains other assurances that affected employees would receive adequate protection. For example, the application states, at p. 6, that the impact on employees of BN and Frisco would be minimal and that "protection of the employees affected by the consolidation against financial loss will be provided by labor protective conditions." Exhibit 10 attached to the application identifies the positions which applicants expected would be affected. No positions at BN Transport were shown.

The statements quoted above and others in the application (see pages 55, 63-64) and in the verified statements of witnesses Mank, Donahue and Illg provide assurances that adverse impacts on employees would be short run and confined to a few locations, and that employees who would become surplus would be covered by protective benefits.

BN alleges that the statements of Mr. Illg, when viewed in context, clearly refer only to railroad employees, not to motor carrier employees of BN Transport, and that there is no evidence in the merger record that employees of BN Transport were given any assurances regarding job security or labor protective conditions. It states that a review of the record shows that no officer of BN Transport submitted testimony in the merger proceeding, and concludes that BN Transport was simply not involved.

These arguments are not compelling. The many general references to minimal impact on employees gave BN Transport employees a reasonable basis to expect that they would not be adversely affected, or that if they were, they would be given adequate protective benefits. As a result, they did not participate in the merger proceedings here to protect their interests. We believe that these circumstances warrant the exercise of our discretion to grant to these employees the same level of protection previously granted to railroad employees.

BN also alleges that it has been denied due process because our prior decision made dispositive findings of fact without giving notice and an opportunity to submit evidence. We disagree. We simply have held that the employees of BN Transport are members of a class entitled to the level of protective benefits prescribed in that case for affected employees. We have not found that any particular employee was adversely affected, or that any adverse effect that might be alleged was the result of a "transaction" directly related to the merger and control authorized in this proceeding. It is not necessary that an employee be adversely affected to be included in a class of protected employees. Inclusion in a class does not lead to entitlement to protection until an employee has been adversely affected, and then only if the adverse effect is the result of a "transaction" directly related to the merger, control or other authorization.

We have made no final ruling on the merits or claims of any employees, including petitioners.^{3/} This determination is an issue for negotiation between the parties, or for binding arbitration, as provided in the New York Dock conditions. If arbitration is held, BN will have ample opportunity in that forum to argue questions of causation and other issues relating to the merits of individual claims.^{4/}

Finally, BN has not identified any evidence which it wishes to introduce, as required by our rules at 49 CFR 1115.3(c). BN states only that "it is essential that the parties thoroughly

^{3/} And we make no such ruling here.

^{4/} See P.D. No. 28490 (Sub-No. 1), Atlantic Richfield Company and Anaconda Company - Control - Butte, Anaconda and Pacific Railway Company and Tooele Valley Railroad Company (not printed), served March 2, 1988.

review the underlying merger record and be permitted to submit evidence on the threshold issue of whether any . . . assurances were given to the BN Transport employees and whether such employees could have reasonably relied on such assurances." However, BN has had ample opportunity to present evidence and argument on these issues. Its vague suggestion here does not warrant further evidence.

The petitions to intervene filed by Local 174, Teamsters, and Veitch state that they desire to protect the rights of the intervening parties. However, individual claims should be determined by the arbitration panel, not by the Commission. See Walsh v. United States, 723 F.2d 570 (7th Cir. 1983). We have here made no findings on the merits of any individual claims. Accordingly, these petitions will be denied as beyond our jurisdiction at this stage of the proceeding.

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

It is ordered:

1. The petition to reopen filed by Burlington Northern Railroad Company is denied.
2. The petitions to intervene filed by Local 174, Teamsters, and Veitch, are denied.
3. This decision is effective on August 7, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley.

(SEAL)

Noreta R. McGee
Secretary