

of some or all of the plaintiffs. Before the court now is the defendant's motion for summary judgment against certain plaintiffs based on nonconstitutional grounds.

The parties having agreed on a categorization of the plaintiffs which would facilitate the further disposition of this case, the court ordered the plaintiffs to furnish to the defendant a list which places each of the plaintiffs into one or another of the following groups: (1) persons asserted by the defendant as not being affected by the Springfield Terminal lease transactions; (2) persons who did not make application for employment to the defendant and who never received an offer of employment from the defendant; (3) persons who received an offer of employment from the defendant and began employment with the defendant immediately following the lease transactions; (4) persons offered employment by the defendant who accepted employment but who were never permitted by the defendant to commence work; (5) persons who rejected an offer of employment from the defendant or who commenced employment with the defendant after the lease transactions but whose employment was subsequently discontinued; and (6) persons who received offers of employment from or made applications for employment to the defendant but whose offers or applications were delayed subsequent to the lease transactions. *See* Report of Scheduling Conference and Orders (docket #18). The final list furnished by the plaintiffs categorizes all plaintiffs except five whose names do not appear on the list. The defendant moves for summary judgment against fifty-nine plaintiffs, regardless of their categorization, on the ground that they have admitted receiving offers of employment to fill available Springfield Terminal positions and that therefore they have been accorded a "first right of hire" under the Act. In addition, the defendant moves for summary judgment against certain plaintiffs who, it asserts, have or should have been listed in categories one, three and five, and moves to dismiss those plaintiffs who have not been categorized, who have failed to allege specific harm or who have agreed voluntarily to withdraw.

The plaintiffs have previously advised the defendant that the following nine plaintiffs will withdraw voluntarily from this action and have indicated in response to the pending motion that they do not oppose the defendant's motion for summary judgment as to their claims: James R. Ashe, Dorothy L. Begin, Michael J. Connolly, Arthur W. Ferland, Paul P. Gallant, Phillip E. Maddocks, Elden C. McKeen, Douglas A. Morris, III, and Walter L. Scott. *See* Plaintiffs' Memorandum in Opposition to Defendant Springfield Terminal Railway Company's Motion for Summary Judgment as to Certain Plaintiffs ("Plaintiffs' Memorandum") at 29. The plaintiffs further state that they do not oppose the entry of summary judgment against the following plaintiffs because it appears after further investigation that they do not have causes of action under the Maine statute: Lloyd G. Beal, Leonard G. Brown, Murray J. Brown, Calvin L. Caler, Robert M. Cameron, Clarence J. Dill, Ashley C. Dumont, Ronald B. Googins, Peter N. Greene, Richard F. Higgins, Norman R. Jackson, John E. Jones, William E. Kopacz, John H. Maxwell, Francis J. Michaud, Donna E. O'Bryan, William F. Smith and Carroll H. Staples. *Id.* Finally, the plaintiffs inform the court that they also do not oppose summary judgment against the following plaintiffs who were not categorized and whose responses to the defendant's interrogatories were not submitted because the plaintiffs' counsel were unable to obtain information from them: Daniel P. Barnett, Vincent P. Dostie, Robert F. Mahon, David L. Mitchell and Leon F. Peasley, Jr. *Id.*

The following plaintiffs oppose the defendant's motion: Richard D. Adams, William B. Bailey, Margaret A. Berry, Wayne D. Bubar, James H. Chalmers, Edward F. Cleary, Paul O. Clendenning, Marion A. Dawson, Charles E. Day, Jr., Randall L. Elliot, Kenneth A. Fitton, James R. Fletcher, Paul K. Foley, Angus A. Gaudette, Leonard L. Greenlaw, David A. Higgins, Roger A. Ireland, Nancy W. Jackman, Daniel P. Jones, Joseph R. LeBlanc, David M. Levesque, Richard L. Luce, Jr., Richard I. Luce, Sr., James A. Magee, Thomas A. McDonald, Jr., Robert Messer, George H. Nightengale,

Douglas R. Niles, Joseph M. Paul, Jeanette F. Perro, Wayne Putnam, Roy A. St. Peter, Marilyn S. Stubbert, Jerome E. Tibbetts, Gene R. Villacci, Florian J. Warren, Michael Whalen and Keith A. Wilbur. Neither the Plaintiffs' Response to Defendant's Statement of Undisputed Facts nor the Plaintiffs' Memorandum contains any mention of Stephen A. Carrier, Gregory F. Geagan², David E. Mahon, Millard H. Palmer or Lawrence Pettingill. These plaintiffs, therefore, have failed to comply with Local Rule 19(b)(2) requiring parties opposing a motion for summary judgment to include a statement of the material facts supported by appropriate record citations as to which those parties contend that there exists a genuine issue. Thus, I accept as uncontroverted the supported facts relating to these plaintiffs contained in Defendant Springfield Terminal Railway Company's Statement of Undisputed Facts. *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984).

Pursuant to Fed. R. Civ. P. 56(c), the court shall render summary judgment if there remains "no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." The movant must initially show "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "The burden then shifts to the nonmovant to establish the existence of at least one fact issue which is both 'genuine' and 'material.'" *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court "must view all facts and reasonable inferences that may be drawn therefrom, in the light most favorable to the non-moving party." *Chambers Steel Engraving Corp. v. Tambrands, Inc.*, 895 F.2d 858, 860 (1st Cir. 1990).

The following facts are not in dispute. In 1981 Guilford Transportation Industries

² Gregory F. Geagan's name was misspelled in Springfield Terminal's motion as Gregory F. Grogan. I find, however, that such misspelling did not preclude identification of plaintiff Geagan.

(` Guilford") purchased Maine Central and its subsidiary, Portland Terminal. In 1983 it also purchased the Boston & Maine Railroad Corporation and its subsidiary, Springfield Terminal. Springfield Terminal, Maine Central and Portland Terminal are all now subsidiaries of Guilford. Maine Central's first lease of lines and trackage rights to Springfield Terminal occurred on February 1, 1987. Portland Terminal leased its Rigby Yard in Portland to Springfield Terminal on or about August 16, 1987. The collective bargaining agreement in effect between Springfield Terminal and its employees' union, United Transportation Union (` UTU"), at the time of these lease transactions required Springfield Terminal to offer employment to Maine Central and Portland Terminal employees who were working on the leased lines at the time of the lease transactions. Memorandum of Agreement Between Springfield Terminal Railway Company and its Employees Represented By the United Transportation Union dated November 19, 1986, at & I, attached as Exh. 2 to Second Affidavit of Daniel J. Kozak (` Second Kozak Affidavit") appended to Memorandum in Support of Defendant Springfield Terminal Railway Company's Motion for Summary Judgment as to Certain Plaintiffs (` Defendant's Memorandum"). The agreement does not specify when such offers were to be made. *Id.* In 1989 Springfield Terminal and UTU entered into a new agreement which specified particular seniority dates of employees affected by the leases and established fourteen job designations which generally correspond to the traditional craft designations on the lessor railroads. Memorandum of Agreement Between Springfield Terminal Railway Company and its Employees Represented By the United Transportation Union dated February 14, 1989, attached as Exh. 6 to Second Kozak Affidavit. Rather than providing specifically that employees would "` follow their jobs" in their new employment at Springfield Terminal, however, the contract provided that employees would be assigned "` based on the type of work that they previously performed" as well as the preponderant type of work entailed in the new job. *Id.* at & II. The agreement also reserved to Springfield Terminal the right to assign work

and reserved to employees the right to perform work outside the specified designations. *Id.* Finally, the agreement provided that in filling vacant positions Springfield Terminal could assign junior qualified employees to assignments as dictated by the needs of service and that it may fill vacancies by recalling qualified furloughed employees or hiring new employees. *Id.* at & III.

Subsequent to the implementation of the leases at issue in this case, but prior to the implementation of other leases not at issue here, the Railway Labor Executives' Association ("RLEA") petitioned the Interstate Commerce Commission ("ICC") for revocation of the exemption of the intra-corporate leases from prior approval by the ICC. On February 17, 1988 the ICC issued a decision addressing the proper level and method of implementation of labor-protective conditions which should apply to all of the Springfield Terminal lease transactions, including those at issue here. ICC Finance Docket No. 30965 (Feb. 17, 1988), Exh. 3 to Second Kozak Affidavit. The order required that the lessee (Springfield Terminal) and the lessor railroads, as well as the employees (or their representatives) of all the rail carriers, participate in the formulation of an implementing agreement for all lease transactions whether or not such leases had actually been implemented. *Id.* at 5, 13. The order further required the parties to reach an implementing agreement and provided for the use of binding arbitration if no such agreement were reached. *Id.* Although the commission refused to rescind the leases already implemented, it stated that such leases "are to be covered by the agreement or arbitration." *Id.* at 5.

Because the parties were unable to reach an agreement, they submitted the matter to arbitration before Arbitrator Richard R. Kasher. On June 12, 1988 Arbitrator Kasher issued an award ("Kasher Award") establishing an implementing agreement which essentially required Springfield Terminal to determine seniority on the basis of the seniority rosters of the lessor carriers. Kasher Award, Exh. 4 to Second Kozak Affidavit. In a decision dated January 5, 1989 the ICC affirmed in

part and vacated in part the Kasher Award. Review of Arbitral Award, Docket No. 30965 (Jan. 5, 1989), Exh. 5 to Second Kozak Affidavit. Concerning the determination of seniority, the commission approved in general the arbitrator's efforts to allow, to the extent possible, lessor railroad employees to "follow their jobs" to the new Springfield Terminal positions but stated that the proper means of implementing such a policy had to take into account the elements of the existing UTU-Springfield Terminal agreements and the methods and practices by which they are presently implemented. *Id.* at 9. The commission subsequently issued an order requiring further arbitration on the question of what agreements and work rules would apply to Springfield Terminal's operation of the leased properties. Review of Arbitral Award, Finance Docket No. 30965 (Dec. 19, 1989), attached to Plaintiffs' Memorandum. On February 28, 1990 Arbitrator Robert O. Harris issued an award ("Harris Award") pursuant to the ICC's order. Harris Award, Exh. 7 to Second Kozak Affidavit. The Harris Award provided that lessor employees were entitled to obtain Springfield Terminal positions on their former lines generally in accordance with their seniority rights under the lessor collective bargaining agreements with the exceptions that the Portland Terminal and Maine Central rosters were to be merged and employees furloughed at the time of the leases were to be placed on the bottom of the Springfield Terminal's seniority rosters.³ *Id.* at 2. Each of the parties petitioned the ICC for administrative review of the Harris Award. The ICC accepted the petition for review, Review of the Arbitral Award, Finance Docket No. 30965, 1990 ICC LEXIS 133 (May 10, 1990) and the matter is currently pending before the commission.

The action presently before this court is predicated on rights provided for under the Act. *See*

³ The Harris Award does provide that such employees have preferential rights to newly created positions. Harris Award at 2.

n.1, *supra*. The first two priorities established by the Act are the following:

1. Priority under federal law. First, all employees who are required to be accorded priority under federal law, employee protection obligations imposed by law, regulation or contracts which require the new operator to select employees of the prior operator or existing or future collective bargaining agreements;

2. Seniority rights. Second, all employees, in seniority order for each craft or class, who hold or held seniority rights on the line to be operated when last operated by its prior operator.

26 M.R.S.A. ' 2072(1) & (2). The defendant is thus required by the statute first to offer positions on the line in accordance with any obligations imposed on it by federal law, regulation or contracts. Any positions remaining available after compliance with such federal-law priorities must be offered in accordance with the lessor railroad's seniority order for each craft pursuant to ' 2072(2).

The defendant makes the following argument in support of its motion: (1) those plaintiffs who have admitted receiving Springfield Terminal offers have no cause of action under the Act because such offers satisfied the defendant's obligation arising from the 1986 collective bargaining agreement; (2) plaintiffs who were furloughed or inactive at the time of the lease have no right of first hire under the Act because the 1986 contract required the extension of offers only to employees who were working prior to the lease transactions and the Harris Award provided that inactive or furloughed employees have no prior rights of hire over any Springfield Terminal employees working as of the date of the arbitral decision; (3) plaintiffs employed at the Rigby Engine House at the time of the lease transactions have no rights under the Act because the Rigby Engine House was not included in any of the lease transactions; and (4) in addition to those plaintiffs who do not oppose the defendant's motion, the court should dismiss additional plaintiffs who either failed to allege any delay between the relevant lease transaction and the receipt of an employment offer or failed to make allegations of intervening offers to junior third parties.

I first address the defendant's argument that its offers of employment to certain plaintiffs constitutes compliance with the terms of the 1986 Springfield Terminal-UTU collective bargaining agreement in full satisfaction of its obligations under the Act. The plaintiffs respond that, because the 1986 agreement established no hiring priorities, Springfield Terminal was required to give a first right of hire in accordance with ' 2072(2) of the Act. I reject both arguments. Assuming, without deciding, that the defendant's extension of offers of employment to certain plaintiffs constitutes compliance with the 1986 collective bargaining agreement, the defendant still has failed to demonstrate compliance with other sources of federal hiring priority under the Act. Although it acknowledges that "the Harris Award defined a hiring priority scheme under federal law" within the meaning of 26 M.R.S.A. ' 2072(1), Reply Memorandum in Support of Defendant Springfield Terminal Railway Company's Motion for Summary Judgment as to Certain Plaintiffs at 7, n. *, the defendant fails to indicate how it complied with Arbitrator Harris' directive that hiring priorities are to be determined in accordance with the provisions of the collective bargaining agreement of the lessor carriers (with the modifications discussed above). I agree that the Harris Award defines hiring priority obligations under federal law. I therefore cannot find, as a matter of law, that the defendant's offers of employment to certain plaintiffs constitutes compliance with 26 M.R.S.A. ' 2072(1).⁴ Because the ICC has accepted the parties' petition for review of the Harris Award, however, I conclude that judgment on this issue should be

⁴ Another source of federal hiring priority under the Act is the 1989 Springfield Terminal-UTU collective bargaining agreement which expanded upon the obligations set forth in the 1986 agreement by specifying particular seniority dates of employees affected by the leases and by establishing job designations for the purpose of allowing employees of the lessor railroads to follow their jobs while reserving certain assignment rights to Springfield Terminal.

deferred until the commission has ruled.

The defendant also argues that employees on furlough or inactive status are not entitled to priority under either collective bargaining agreement or the Harris Award.⁵ Of those employees, Margaret A. Berry, Marion A. Dawson, Charles E. Day, Jr. and James R. Fletcher all have provided affidavits stating that they were active Maine Central employees until the February 1, 1987 lease transaction and that they were furloughed after or at the time of the lease transaction. Exhs. A-1, A-2, A-5, A-6 to Plaintiffs' Memorandum. Paul O. Clendenning states that at the time of the February 1, 1987 lease he was on sick leave due to a back injury.⁶ Exh. A-4 to Plaintiffs' Memorandum. Berry and Dawson also state that they have never received offers and that Springfield Terminal has employed others junior to them to perform the same work that they had formerly performed. Exhs. A-1 && 4-5, A-2 && 8-10 to Plaintiffs' Memorandum. The plaintiffs concede that Edward F. Cleary, Daniel P. Jones, Richard A. Luce, Jr., James Magee, Joseph M. Paul, Jerome E. Tibbetts and Florian J. Warren all were on furlough status at the time of the relevant lease transactions. I find, therefore, that summary judgment should be denied as to Margaret Berry and Marion Dawson since there is an issue of fact as to whether they were on furlough and because they are not among those who have admitted that they received an offer. As to the other plaintiffs on sick leave or furlough, judgment should be

⁵ The defendant names the following employees as those who were either on furlough or inactive status: Margaret A. Berry, Edward F. Cleary, Paul O. Clendenning, Marion A. Dawson, Charles E. Day, Ashley C. Dumont, James R. Fletcher, Daniel P. Jones, Richard I. Luce, Jr., James A. Magee, Joseph M. Paul, Jerome E. Tibbetts and Florian J. Warren. Defendant Springfield Terminal Railway Company's Statement of Undisputed Facts & 12. I do not address the claims of those plaintiffs listed here who have stated that they do not oppose the defendant's summary judgment motion.

⁶ The plaintiffs do not explain the legal effect of being on sick leave. Arbitrator Harris, however, drew a distinction between "those individuals who, because of low seniority, were not working at the time of the transaction and those individuals who were not working for reasons which had approval through the collective bargaining agreement," Harris Award, findings of fact at 52, and accordingly found that employees who were on approved leave should not be included in the inactive or furloughed category.

deferred until it is established whether and to what degree such employees have seniority rights pursuant to federal law. Until federal priorities are established it is impossible to determine whether such employees have any rights under the Act.⁷

⁷ I disagree with the plaintiffs' characterization of the Harris Award as not affecting their claims for the period up to February 28, 1990 (the date of the award). As stated earlier, the Harris Award is one of the components of federal law providing the first hiring priorities under the Maine statute. The issue is not what Springfield Terminal relied on in its hiring practices, but rather what rights of first hire the employees have under federal law -- whether or not these rights are articulated at the time of the lease or afterwards.

Next, the defendant argues that the plaintiffs employed at the Rigby Engine House at the time of the lease transactions have no rights under the Act because the engine house was not included in the Portland Terminal lease and was never otherwise leased or acquired.⁸ The plaintiffs assert, on the other hand, that, because engine house employees serviced engines on the leased lines, Springfield Terminal leased the engine house. I disagree. Even viewing the facts in the light most favorable to the plaintiffs, the use of engine house employees to service Springfield Terminal-operated lines simply does not show that Springfield Terminal leased or otherwise acquired the engine house.⁹ Accordingly, I find that Lawrence Pettingill and Robert Messer, both of whom worked in the Rigby Engine House,¹⁰ are not entitled to a first right of hire under the Act because Springfield Terminal did not acquire, lease or otherwise obtain the engine house as part of the Portland Terminal or any other lease transaction. Leonard T. Greenlaw's affidavit, however, raises an issue as to whether he was employed by Portland Terminal prior to its lease transaction. In his affidavit Greenlaw states that at the time of

⁸ The defendant lists the following plaintiffs who it alleges were employed by Portland Terminal at the Rigby Engine House as of the date of the Portland Terminal lease transaction: Leonard Greenlaw, Lawrence Pettingill, Robert Messer and Leon F. Peasley, Jr. Defendant Springfield Terminal Railway Company's Statement of Undisputed Facts & 13. Plaintiff Peasley is among those who did not respond to the defendant's interrogatories and as to whom the plaintiffs do not oppose summary judgment. Thus, I do not address his entitlement to bring an action under the Act as an alleged employee of the engine house.

⁹ I note in this regard that Robert Messer's affidavit further undercuts the plaintiffs' argument. In his affidavit Messer, one of the engine house employees, states that "[t]he Rigby Engine House continued to operate as a [Portland Terminal] entity after the August 1987 lease, performing work on locomotives that were leased to [Springfield Terminal]." Affidavit of Robert R. Messer & 9, Exh. A-14 to Plaintiffs' Memorandum.

¹⁰ Lawrence Pettingill states in his answers to the defendant's interrogatories that he was employed as an engine house supervisor prior to the Portland Terminal lease transaction. Attachment A to Plaintiffs' [sic] Responses to Defendant's First Set of Interrogatories (appended to Defendant's Memorandum). He has not submitted an affidavit raising any issue as to whether he was employed by an entity leased to Springfield Terminal. Robert Messer states in his affidavit that he was employed by Portland Terminal as an engine house foreman until June 20, 1988. Affidavit of Robert R. Messer & 2-3, Exh. A-14 to Plaintiffs' Memorandum.

the lease transaction he was a foreman in Portland Terminal's car shop and that he took a position with the engine house after the lease was entered into because he was informed that it was the only way to maintain his *Mendocino Coast*¹¹ rights. Affidavit of Leonard L. Greenlaw && 2-4, Exh. A-13 to Plaintiffs' Memorandum. Thus, Greenlaw (who has admitted accepting an offer, albeit, one that he claims was not made in good faith) belongs among the plaintiffs as to whom ruling on the defendant's summary judgment motion should be deferred.

The next issue is whether summary judgment should be granted against Millard H. Palmer. The defendant contends that this plaintiff is in the category of plaintiffs who have failed to allege any delay between the relevant lease transaction and the receipt of an employment offer. The plaintiffs have placed Palmer in category 5 (persons who rejected an offer of employment from the defendant or who commenced employment with the defendant after the lease transactions but whose employment was subsequently discontinued). In Palmer's answers to the defendant's interrogatories he admitted accepting a position as a railroader performing crew dispatcher duties and working at this position from lease date until he ceased work due to a strike. When Palmer returned to work, he was told his job no longer existed. Attachment A to Plaintiff's [sic] Responses to Defendant's First Set of Interrogatories (appended to Defendant's Memorandum). The defendant has made a showing of "an absence of evidence to support the nonmoving party's case," *Celotex*, 477 U.S. at 325, sufficient

¹¹ The rights referred to in the Greenlaw affidavit are certain labor-protective conditions typically imposed as the minimum protection in lease and trackage rights transactions as set forth in *Mendocino Coast Ry -- Lease and Operate -- California Western RR.*, 354 I.C.C. 732 (1978), *as modified at* 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

to require the plaintiff to affirmatively establish the existence of a genuine issue of fact. The plaintiffs have submitted no affidavit or other evidence demonstrating that Palmer's right of first hire has been denied and they have not so argued in their memorandum. Therefore, I conclude that the defendant is entitled to judgment against plaintiff Palmer as a matter of law.

Next, the defendant lists six plaintiffs who, it argues, have failed to make allegations of intervening offers to junior third parties, and therefore have no claim under the Act. According to the defendant, Nancy W. Jackman and Michael Whalen have no claim under the Act because they have merely alleged a delay in receiving an offer of employment but have not alleged that during such delay any other person was offered or given a position to which they were entitled. Because federal law may establish an obligation to offer specific positions to lessor employees upon the date of the applicable lease transaction, such a requirement would be included in the employees' right of first hire under the Act. This conclusion is buttressed by ' 2074 which provides a cause of action allowing an employee to enforce the right of hire guarantee under the Act and recovery as damages of ` ` an award of back pay *from the date the person should have been hired until the date actually hired or until the claimant declines a bona fide offer of employment . . .*" 26 M.R.S.A. ' 2074 (emphasis added). Nancy Jackman and Michael Whalen each have provided affidavits in which they allege a delay after the August, 1987 lease transaction in receiving an offer from Springfield Terminal. *See* Affidavit of Nancy W. Jackman && 2, 4, Exh. A-24 to Plaintiffs' Memorandum; Affidavit of Michael Whalen && 2-3, Exh. A-35 to Plaintiffs' Memorandum. Accordingly, ruling as to these plaintiffs should be deferred. Ruling should also be deferred as to Stephen A. Carrier, who states in his answers to interrogatories¹² that he did not receive an offer until March, 1989, and David E. Mahon, who states in his answers to

¹² *See* Attachment A to Plaintiff's [sic] Responses to Defendant's First Set of Interrogatories.

interrogatories¹³ that Springfield Terminal's offer did not allow him to keep his seniority, because both essentially uncontested statements may raise an issue, pending the ICC's ruling, as to whether the offers complied with Springfield Terminal's obligation under federal law.

The defendant states that Gregory F. Geagan has failed to show any facts establishing a delay in an offer or any prior employment offers to third parties with junior rights. Geagan states that an offer was extended by Springfield Terminal on August 16, 1987, that he accepted the offer and that he continues to be so employed. *See* Affidavit of Gregory F. Geagan, attached to Second Amendment to Plaintiffs' Responses and Supplement to Defendant's First Set of Interrogatories (appended to Defendant's Memorandum). Because Springfield Terminal has met its *Celotex* burden, Geagan was required to affirmatively establish the existence of a genuine issue of fact. This he has failed to do.

Finally, Springfield Terminal claims that David M. Levesque has no claim because he admitted that he received and accepted an offer of employment prior to the effective date of the lease. Levesque, who prior to the lease transaction had served as a supervisory agent responsible for managing accounts and overseeing a number of clerks, claims, however, that Springfield Terminal did not extend a bona fide offer because upon his acceptance of its offer of a clerk position he was assigned to perform secretarial work. Levesque also states that after the lease transaction Springfield Terminal brought in someone to perform his former responsibilities as a supervisory agent who had never been employed by Portland Terminal. Affidavit of David M. Levesque && 2-5, Exh. A-26 to Plaintiff's Memorandum. The defendant contends that, in the absence of any allegation as to *when* Springfield Terminal hired a non-Portland Terminal worker to fill his former position, Levesque has

¹³ *See* Affidavit of David E. Mahon, attached to Second Amendment to Plaintiffs' Responses and Supplement to Defendant's First Set of Interrogatories (appended to Defendant's Memorandum).

failed to show that Springfield Terminal did not fulfill its obligations under the Act. I disagree. Viewing the facts in the light most favorable to the plaintiff, I conclude that Levesque's affidavit raises an issue of fact as to whether Springfield Terminal made a bona fide job offer and whether it offered employment to a third party whose rights were junior to his. Accordingly, I conclude that judgment as to David Levesque should be deferred pending the ICC's ruling.

In summary, I recommend that the defendant's motion for summary judgment be **GRANTED** as to the following plaintiffs: James R. Ashe, Daniel P. Barnett, Lloyd Beal, Dorothy L. Begin, Leonard Brown, Murray Brown, Calvin Caler, Robert Cameron, Michael J. Connolly, Clarence Dill, Vincent P. Dostie, Ashley Dumont, Arthur W. Ferland, Paul Gallant, Gregory F. Geagan, Ronald Googins, Peter Greene, Richard Higgins, Norman Jackson, John Jones, William Kopacz, Elden C. McKeen, Philip E. Maddocks, Robert F. Mahon, John Maxwell, Robert Messer, Francis J. Michaud, David L. Mitchell, Douglas A. Morris, III, Donna E. O'Bryan, Millard H. Palmer, Leon F. Peasley, Jr., Lawrence Pettingill, Walter L. Scott, William F. Smith and Carroll H. Staples, and **DENIED** as to Margaret A. Berry and Marion Dawson. I further recommend that ruling as to the remaining plaintiffs included in the defendant's motion be deferred pending the ICC's ruling.¹⁴

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

¹⁴ Because the memoranda submitted by the parties do not fully address the effect of the Harris award (or, of course, the anticipated ICC clarifying decision) on the determination of priorities pursuant to the Act, this issue should be fully briefed before the court rules on the entitlement of the remaining plaintiffs included in the defendant's motion to relief under the Act. The parties shall inform the Clerk of the ICC's decision within five days of receipt thereof and the Clerk shall thereupon schedule a status conference to be held as soon as my calendar permits.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 16th day of August, 1990.

David M. Cohen
United States Magistrate