

SHEA & GARDNER
1800 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036-1872

(202) 828-2000
FAX: (202) 828-2195

ROBERT T. BASSECHES
BENJAMIN W. BOLEY
RALPH J. MOORE, JR.
MARTIN J. FLYNN
STEPHEN J. POLLAK
DAVID BOOTH BEERS
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DAVID P. HUITEMA
AUSTIN D. GERKEN, JR.
RACHEL S. SHAPIRO
JOHN T. DEVLIN
CHARLES D. BRECKINRIDGE

SENIOR COUNSEL
WARNER W. GARDNER
OF COUNSEL
RICHARD T. CONWAY
ANTHONY A. LAPHAM
R. JAMES WOOLSEY
FRANKLIN D. KRAMER
LAWRENCE J. LATTO
ERIC C. JEFFREY
MICHELE A. ROBERTS
PAUL R. FRIEDMAN
FRANCIS M. SHEA (1905-1989)

June 3, 2002

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St., N.W.
Room 715
Washington, DC 20423

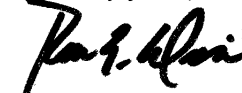
Re: Finance Docket No. 33942 (Sub-No. 1) (Arbitration Review)
USX Corporation – Control Exemption – Transtar, Inc.

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of two documents: (1) the Petition of the National Railway Labor Conference for Leave to Intervene and Submit a Brief in Support of Petitioner Tracks Traffic and Management Services, Inc., and (2) the Brief of the National Railway Labor Conference. I also enclose a diskette containing copies of both documents in Word 2000 format.

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

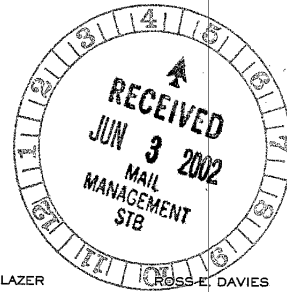
Very truly yours,



Ross E. Davies

Enclosures

cc: Jeffrey S. Berlin
Mitchell M. Kraus



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Office of the Secretary

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Public Record

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Office of the Secretary

SURFACE TRANSPORTATION BOARD

JUN 04 2002

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

Part of
Public Record

USX CORPORATION – CONTROL EXEMPTION – TRANSTAR, INC.
(ARBITRATION REVIEW)



**PETITION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR
LEAVE TO INTERVENE AND SUBMIT A BRIEF IN SUPPORT OF
PETITIONER TRACKS TRAFFIC AND MANAGEMENT SERVICES, INC.**

The National Railway Labor Conference ("NRLC") respectfully petitions the Surface Transportation Board for leave to intervene in this case and, should the Board grant review of the issues presented by Tracks Traffic and Management Services, Inc. ("TTMS"), to submit a brief in support of TTMS. The NRLC is an association that represents the nation's Class I freight railroads and numerous other freight carriers in collective bargaining with the rail unions and with regard to labor relations issues that affect the railroads as an industry.

The Board permits third parties to intervene "when the petitioner addresses issues reasonably pertinent to the issues already presented and which do not unduly broaden them." 49 C.F.R. §§ 1112.4(a), 1113.7; see also, e.g., South Orient R.R. – Abandonment, STB Fin. Dkt. No. AB-545, 1999 STB Lexis 180, at *4, *25 (Mar. 22, 1999). As the Board recently explained in a case in which a union sought to intervene and file a brief:

"Although the BMW is not a party, it has a substantial interest in the outcome of this proceeding because it involves an issue of the extent of eligibility for labor protection benefits under our New York Dock conditions. This decision could provide an important precedent for future proceedings in which BMW members may be directly affected." NS – Control – Norfolk & Western Ry., STB Fin. Dkt. No. 29430 (Sub-No. 21), 1999 STB Lexis 706, at *2 (Dec. 8, 1999).

In this case, TTMS filed a petition with the Board seeking review of an arbitration award ("Fletcher Award") rendered under Article I, § 11 of New York Dock Ry. – Control – Brooklyn Eastern Dist. Terminal, 360 I.C.C. 60 (1979). TTMS's petition has presented the following issues for review by the Board:

"[W]hether an employee may qualify as a 'displaced employee' eligible to receive a displacement allowance under *New York Dock* based solely on the fact that his actual earnings in a given month fall short of his pre-transaction TPA." TTMS Petition at 11-12.

and

"[W]hether TTMS' obligations under the [New York Dock] protective conditions were altered by the carriers' agreement to furnish TPA data on demand." TTMS Petition at 12.

NRLC's membership has a substantial interest in these issues. An award based on the proposition that either a dip in monthly earnings or the issuance of a TPA by itself automatically qualifies an employee for a New York Dock displacement allowance would be a radical departure from almost 25 years of precedent and practice under New York Dock and would create added costs not warranted or intended under the standard protective conditions. This practice and precedent represent the universal understanding that the purpose of New York Dock is not to confer some new benefit upon employees, but rather to protect them from adverse effects directly caused by a transaction. A ruling that detaches benefits from this fundamental purpose by looking only to differences in level of compensation – or to the issuance of a TPA – would not merely dramatically alter the character of New York Dock protection but would do so at an incalculably high cost. That cost would be measured not only in dollars, but also in the consequent thwarting of otherwise beneficial restructuring.

Intervention by the NRLC would satisfy the Board's requirement that an intervenor address issues "reasonably pertinent to the issues already presented" because its brief is devoted to industry practices and precedent directly related to issues already presented in TTMS's petition. Moreover, the NRLC's participation in this case would not "unduly broaden" the issues before the Board because the NRLC seeks only to inform the Board of the industry practices and precedent relevant to the issues presented.

We should note that the brief that we append analyzes the two issues presented on the assumption that the Board has granted review of those issues as framed by the Petitioner. It does not address the contention of the Respondent Transportation Communications International Union ("TCU") that the first issue cannot be the basis for review because it is not raised by the opinion of the arbitrator. That is, the TCU asserts that the arbitrator did not rule that the compensation differential alone established a causal connection between the transaction and the adverse impact upon the employees, but held rather that no such showing was necessary in this particular case because of the Implementing Agreement and its negotiating history. See TCU Response at 11-12.

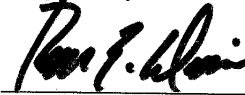
The NRLC does not think it appropriate, in its role as a petitioning intervenor, to take a position on the difference of opinion between TTMS and the TCU, the parties to the case, as to how the award should be read in this regard. If the Board were to deny review, the NRLC's members would, of course, argue in future cases that the award cannot fairly be cited in support of an attempt to erase the requirement of a demonstration of causal connection. However, TTMS's petition presents an appropriate opportunity for the Board's reaffirmation of the necessity of establishment of a causal connection

between the transaction and the alleged harm. Such a reaffirmation will avert vexatious and meritless litigation in the future.

For these reasons, the NRLC respectfully requests that the Board grant this petition for leave to intervene to and to file the appended brief so that it may effectively represent the interests of its members.

Joanna Moorhead
NATIONAL RAILWAY LABOR CONFERENCE
1901 L St., N.W.
Washington, DC 20036
(202) 862-7200

Respectfully submitted,



Ralph J. Moore
Donald J. Munro
Ross E. Davies
SHEA & GARDNER
1800 Mass. Av., N.W.
Washington, DC 20036
(202) 828-2000

Attorneys for the National Railway Labor Conference

June 3, 2002

CERTIFICATE OF SERVICE

I certify that I have this day, June 3, 2002, served copies of this Petition of the National Railway Labor Conference for Leave to Intervene and Submit a Brief in Support of Petitioner Tracks Traffic and Management Services, Inc. upon all parties of record in this proceeding, by hand delivery to:

Jeffrey S. Berlin
Sidley Austin Brown & Wood LLP
1501 K St., N.W.
Washington, DC 20005

and

Mitchell M. Kraus
General Counsel
Transportation Communications International Union
3 Research Pl.
Rockville, MD 20850


Ross E. Davies

SURFACE TRANSPORTATION BOARD

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

USX CORPORATION – CONTROL EXEMPTION – TRANSTAR, INC.
(ARBITRATION REVIEW)

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE

INTRODUCTION AND SUMMARY

The National Railway Labor Conference (“NRLC”) is an association that represents the nation’s Class I freight railroads and numerous other freight carriers in collective bargaining with the rail unions and with regard to labor relations issues that affect the railroads as an industry.¹ We submit this brief in order to address two important issues raised by Tracks Traffic and Management Services, Inc. (“TTMS”) in its petition for the Board to review and set aside an arbitration award (“Fletcher Award”) rendered under Article I, § 11 of New York Dock Ry. – Control – Brooklyn Eastern Dist. Terminal, 360 I.C.C. 60 (1979).

First, TTMS has presented the following issue for review by the Board:

“[W]hether an employee may qualify as a ‘displaced employee’ eligible to receive a displacement allowance under *New York Dock* based solely on the fact that his actual earnings in a given month fall short of his pre-transaction TPA.” TTMS Petition for Review (“TTMS Pet.”) at 11-12.²

¹ NRLC members employ more than 95% of the nation’s unionized freight rail employees.

² An employee’s “TPA” is his or her “test period average” – a measure of the employee’s average monthly earnings and average hours worked prior to a displacement caused by a transaction covered by the New York Dock employee protective conditions. An employee who is “placed in a worse position” as “a result of” a covered transaction (and meets certain other conditions not relevant here) is considered to be a “displaced employee” entitled to a displacement allowance under the terms of New York Dock. The displacement allowance is calculated by subtracting the employee’s available income in the current month from his or her TPA monthly earnings number. If the current-month earnings are less than the TPA monthly earnings, then the employee receives a displacement allowance equal to the difference between the two. For more detail on TPAs, see TTMS Petition at 3, 5, 13-14, 16-17.

This is an important issue for the railroad industry because a mistaken supposition that a dip in monthly earnings by itself automatically qualifies an employee for a New York Dock displacement allowance potentially for six years would be a radical departure from almost 25 years of precedent and practice under New York Dock. To be valid, a claim for a New York Dock displacement allowance must satisfy two requirements: (a) that an employee be placed in a "worse position" on the job after a New York Dock-covered transaction, and (b) that any such worsened position be in fact a "result of" that transaction (*i.e.*, "causation").³ An erroneous ruling on this subject could effectively eliminate the causation requirement, enabling employees who have suffered no economic harm from a transaction to nonetheless receive New York Dock displacement pay. Such a ruling would detach New York Dock from its fundamental purpose and impose substantial and wholly unwarranted costs upon the carriers. The threat to transactions found to be in the public interest would be real.

Second, TTMS has also presented the following issue for review by the Board:

"[W]hether TTMS' obligations under the [New York Dock] protective conditions were altered by the carriers' agreement to furnish TPA data on demand." TTMS Pet. at 12.

This issue is important to the rail industry for the same reasons that the first issue is because it raises from another angle the same concern for preserving causation as a factor in the determination of New York Dock eligibility. "Precertification" or "automatic certification" entitles employees to New York Dock benefits without a showing of causation. Precertification has occurred only in a limited set of circumstances and then in virtually every case only by agreement between the parties. The

³ There are other requirements that an employee must satisfy to be entitled to New York Dock benefits, but they are not relevant in this case.

consequences may be severe and, accordingly, the agreement to bestow such a benefit should be clearly and unequivocally expressed if precertification is intended. That is the practice in the industry. Permitting arbitrators to effectively create precertification by reading such a term into implementing agreements without clear evidence that the parties intended to eliminate the causation requirement would expand the scope and consequence of standard protective provisions and disrupt established patterns of negotiations and, again, unduly increase the costs to carriers of providing New York Dock benefits.

ARGUMENT

I. Entitlement To A New York Dock Displacement Allowance Requires A Showing Of Causation – Not A *Per Se*, Income-Based Rule

Under New York Dock an employee eligible for displacement pay is one “who, as a result of a transaction, is placed in a worse position with respect to his compensation and rules governing his working conditions.” Article I, §§ 1(b), 5. The allegedly “displaced employee” bears the initial burden of production with respect to both of the basic requirements spelled out in § 1(b) – causation and “worse position”:

“In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon.” § 11(e).

If the employee satisfies his or her burden of production, “[i]t shall then be the railroad’s burden to prove that factors other than a transaction affected the employee.” § 11(e).

Thus, under § 11(e) it is not enough for an employee to show a worsened position and point to a New York Dock-covered transaction when the carrier shows some other cause for the alleged adverse effect:

“If the carrier successfully shows that the employee’s injury was caused by factors other than the transaction, then New York Dock benefits are not accorded. In other words, ... it is well settled that if the employee is injured by external

causes (such as reductions in rail service stemming from events other than the transaction itself), then New York Dock benefits do not apply.” Atlantic Richfield Co. – Control – Butte, Anaconda & Pacific Ry., 5 I.C.C.2d 934, 947 (1989); see also BMWE v. ICC, 920 F.2d 40, 44 (D.C. Cir. 1990); Maine Central R.R. – Lease (Arb. Rev.), Fin. Dkt. No. 29720 (Sub.-No. 1A), 1989 ICC Lexis 192 (July 21, 1989).

There is, accordingly, no room for an interpretation under New York Dock finding that an employee is automatically entitled to a displacement allowance simply because he shows “that his actual earnings in a given month fall short of his pre-transaction TPA.” See TTMS Pet. at 11-12. The correct and consistent reading of New York Dock is that no employee is entitled to a displacement allowance if “the carrier successfully shows that the employee's injury was caused by factors other than the transaction.” Atlantic Richfield, 5 I.C.C.2d at 947; see also Burlington Northern, Inc. – Control and Merger – Santa Fe Pac. Corp., 10 I.C.C.2d 661, 758-59 (1995). This principle has been reinforced by numerous arbitration decisions involving labor protective provisions going back to the 1936 Washington Job Protection Agreement (“WJPA”).

II. Under Industry Practice Entitlement To A Displacement Allowance Requires A Showing Of Causation

Railroads do not currently base New York Dock displacement determinations on whether an employee's income in a given month drops below his or her TPA. To the contrary, the carriers follow procedures that track the requirements of New York Dock – including the causation and “worse position” requirements at issue here. Id.

Generally, the carriers begin by obtaining § 11(e) information submitted by the employee – information “identify[ing] the transaction and specify[ing] the pertinent facts of that transaction relied upon.” § 11(e). They require that such information – including

information on both causation and “worse position” – be presented to the carrier in writing. See, e.g., Exhibit A (CSXT form); Exhibit B (NS form); Exhibit C (UP form).

With the employee’s claim information in hand, the carriers look first to causation. As a result of this analysis, many claims are resolved on the property, while others are resolved in arbitration and, in limited circumstances, in the courts.⁴ Regardless of the stage at which a disputed claim is resolved, however, when causation is at issue the question is not whether it need be established at all but rather what, in fact, was the cause of the employee’s drop in income.⁵ See Appendix for a collection of cases in which protection was denied because, although there was a diminution of compensation, it was not caused by the transaction but rather by something else – for example, a decline in business caused by the closing of a major shipper, or an employee’s failure to take reasonable steps to protect his seniority, or the completion of a project, or the effects of a new collective bargaining agreement. To accord protection in such cases simply because there had been a reduction in compensation would collide with the language of New York Dock, unnecessarily expand the scope and consequence of standard labor protective conditions, and defeat the purpose of the underlying balance of cause and effect.

Thus, unless an employee shows that a drop in pay was caused by a covered transaction, he or she is not eligible for a New York Dock displacement allowance. There is no basis in law or practice for such an interpretation.

⁴ Because an employee is “displaced” for purposes of eligibility for a New York Dock displacement allowance only if the employee satisfies both requirements, the carriers’ regular practice is to end an investigation and deny a claim whenever an employee fails to satisfy either the causation or the “worse position” requirement.

⁵ At most, the parties dispute how proximate the cause must be. See, e.g., Western Railroads – Agreement Arb. Rev., 1988 ICC Lexis 312. *6-7 (Sept. 30, 1988) (employee cannot overcome a carrier’s proof of causation by relying on some “remote earlier connection” to a transaction).

III. Providing TPAs Upon Request Does Not Imply “Precertification”

The second issue presented by TTMS is “whether TTMS’ obligations under the [New York Dock] protective conditions were altered by the carriers’ agreement to furnish TPA data on demand.” TTMS Petition at 12. More particularly, the issue raised by TTMS is whether provision of TPAs on demand amounts to precertification of eligibility for New York Dock benefits. Id. at 24.

For the reasons set forth by the Petitioner, provision of TPAs is not alone sufficient to impose precertification on parties who have not explicitly agreed to precertification. And we emphasize that it is settled practice in the rail industry that precertification is not implied. The carriers and the rail unions are familiar with the terms necessary to create a precertification agreement, and they use them when they intend to precertify New York Dock eligibility. See, e.g., Union Pac. Corp. – Control and Merger – Southern Pac. Rail Corp., 1 S.T.B. 233, 451-52 & n.218 (1996) (unions support merger in exchange for carrier’s explicit commitments to “automatic certification” of certain employees); Exhibit D (UP letter committing to “automatic certification” of certain employees in exchange for union support for the UP/SP merger); Exhibit E (arbitration award rejecting union’s contention that “there is no need to reach a voluntary agreement in order to achieve automatic certification” and emphasizing the “value” of automatic certification); see also, e.g., Exhibit F (BNSF agreement providing for employees to be “automatically certified”); Exhibit G (CSXT/NS letter confirming that certain employees would be “automatically certified”); Exhibit H (NS letter providing for employees to be “automatically certified”); Exhibit I (UP agreement providing for “automatic certification” of certain employees); Exhibit J (UP letter providing TPA data with a

reminder that “[i]nclusion on this list, however, does not imply the employees are certified for protective benefits”).

IV. Either Interpretation Could Impose Serious And Unexpected Costs That Would Subvert The Public Interest In Beneficial Consolidations

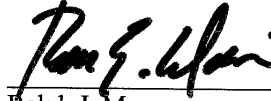
While it is not possible to quantify the potential damage to the railroads that would result from the adoption of either of the rules identified in TTMS’s petition, it would unquestionably be serious. But there is another aspect of the public interest that is particularly implicated – the securing of the benefits of past consolidations and the enabling of future transactions that promise important public benefits. This Board has repeatedly rejected unions’ efforts to alter the terms of New York Dock to convert those public benefits into private gains for their membership. The current system of labor protection is designed to accord adequate protection to employees without depriving the transactions of their potential benefits. A contrary application would shatter that system as it has been long understood and accepted. Rejection of any such rule would insure against such an unintended result.

CONCLUSION

The “intention underlying the [New York Dock] conditions [is] to ensure that employees are no worse off (at least during the protected period) after a consolidation than they would be *had the consolidation never taken place.*” ATDA v. ICC, 54 F.3d 842, 850 (D.C. Cir. 1995) (emphasis in original). Adoption of a *per se*, income-based rule of the sort described in TTMS’s petition – or of a rule equating the issuance of TPAs with precertification – would subvert this intention and unduly burden the carriers and the consolidation process.

For these reasons, if the Board concludes that the Fletcher Award imposes such rules on New York Dock determinations, it should review and set aside the Award.

Respectfully submitted,



Joanna Moorhead
NATIONAL RAILWAY LABOR CONFERENCE
1901 L St., N.W.
Washington, DC 20036
(202) 862-7200

Ralph J. Moore
Donald J. Munro
Ross E. Davies
SHEA & GARDNER
1800 Mass. Av., N.W.
Washington, DC 20036
(202) 828-2000

Attorneys for the National Railway Labor Conference

June 3, 2002

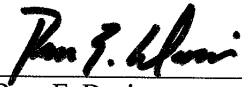
CERTIFICATE OF SERVICE

I certify that I have this day, June 3, 2002, served copies of this Brief of the National Railway Labor Conference upon all parties of record in this proceeding, by hand delivery to:

Jeffrey S. Berlin
Sidley Austin Brown & Wood LLP
1501 K St., N.W.
Washington, DC 20005

and

Mitchell M. Kraus
General Counsel
Transportation Communications International Union
3 Research Pl.
Rockville, MD 20850



Ross E. Davies

EXHIBITS

EXHIBITS

	<u>Tab</u>
Request for Entitlement to Benefits under <u>New York Dock</u> , CSX Transportation	A
Request for Entitlement to Benefits, Norfolk Southern Railway Company	B
Request for Test Period Average ("TPS") Form, Union Pacific Railroad	C
Letter from J.J. Marchant, Sr. Asst. Vice President, Labor Relations, UP, to R.P. McLaughlin, President-BLE (Mar. 8, 1996)	D
<u>UTU v. UP</u> , STB Fin. Dkt. No. 32760 (Yost Apr. 14, 1997)	E
Agreement Between the Burlington Northern and Santa Fe Railway Company and the Brotherhood of Railroad Signalmen	F
Letter from K.R. Peifer, Vice President, Labor Relations, CSXT, and R.S. Spenski, Vice President, Labor Relations, NS, to Charles L. Little, International President, UTU (June 2, 1998)	G
Side Letter No. 2, Finance Docket No. 33388, from R.S. Spenski, Vice President, Labor Relations, NS, to Robert W. Goodwin, et al., General Chairmen, BLE (Sept. 21, 1998)	H
Merger Implementing Agreement between the Union Pacific Railroad Company, Southern Pacific Transportation Company and the United Transportation Union	I
Letter from Marilyn J. Ahart, UP, to D.L. Hakey, Vice President – UTU and L.L. Overton, General Chairman – UTU (May 16, 2001)	J

A

CSX TRANSPORTATION

Completed forms should be forwarded to:

1 of 2

(b) What position do you currently hold?

Position: _____ Location: _____

Rate of pay: _____ hour/day

(c) At the time of your displacement, did you exercise your seniority to obtain the highest paying position available to you? _____

If the answer is no, please explain: _____

3. Identify what occurred that resulted in your being placed in a worse position or deprived of employment:

4. Explain in detail how your work situation changed and caused you to be adversely affected. (Use additional sheet if necessary.)

I HEREBY CERTIFY THAT THIS INFORMATION IS TRUE AND CORRECT:

(Signature)

(Date)

B

NORFOLK SOUTHERN RAILWAY COMPANY
and its rail carriers

This Entitlement to Benefits Form is to assist the Employee and the Company in determining whether the Employee is entitled to benefits. We wish to do this as promptly as possible in order to expedite the processing of valid claims. You may help by completing the form with as many helpful facts as will assist the Company in its initial determination as to whether you have been adversely affected.

Mr. Louis F. Miller, Jr.
Assistant Director Labor Relations
Norfolk Southern Corporation
223 East City Hall Avenue
Norfolk, VA 23510-1728

Immediate Supervisor _____

- Rate of pay: _____ /day
hour Wage Grade _____ (if applicable)

(b) What position do you currently hold?

Position _____ Location _____

Rate of pay _____ /day/hour Wage Grade _____ (if applicable)

(c) What is your Employee Maintenance Rate (EMR)? _____ (if applicable)

(d) At the time of your displacement, did you exercise your seniority to obtain the highest paying position available to you? _____

4. Identify what occurred that resulted in your being placed in a worse position or deprived of employment:

5. Explain in detail how your work situation changed and caused you to be adversely affected. (Use additional sheet if necessary.)

6. Compensation Data:

List the amount of compensation you received immediately prior to the month in which you were affected. Certain earnings, such as lump sum payments, stock purchase, and employee protective payments, should be excluded. (Use back of sheet if necessary.)

Month	Year	Compensation	Month	Year	Compensation
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

I HEREBY CERTIFY THAT THIS INFORMATION IS TRUE AND CORRECT:

(Signature)

(Date)

C

FACSIMILE COVER SHEET

DATE:

PAGES (INCLUDING THIS COVER PAGE):

TO: SUE WIMMER
COMPANY: UNION PACIFIC RAILROAD
FAX: 402-997-2165

FROM:
COMPANY:
PHONE:
FAX:

REQUEST FOR TEST PERIOD AVERAGE ("TPA") FORM

- Name (PRINT) _____
- Social Security Number _____
- Your Current Craft _____
- Position Number Prior to Abolishment or Displacement _____
- Position Title Prior To Abolishment or Displacement _____
- Location Prior To Abolishment or Displacement _____
- Rate of Position Prior To Abolishment or Displacement _____
- Date of Your Position Abolishment _____
- Date of Displacement, if applicable _____
- Displaced by Whom, if applicable _____
- Position Number to which you will (or have) exercised seniority _____
- Position Title to which you will (or have) exercised seniority _____
- Position Location to which you will (or have) exercised seniority _____
- Rate of Position to which you will (or have) exercised seniority _____
- Seniority Date _____
- Employment Date (if different from seniority date) _____
- Transaction involved _____

This is to request the test period average of my earnings for twelve (12) months prior to my job abolishment or my displacement. I understand that to be eligible for protective benefits, my job must have been abolished or I must have been displaced as a result of a Transaction covered by the Protective Agreement or Conditions. (The foregoing information is necessary in order for Timekeeping to process your test period average. This form must be completely filled out.)

Employee Signature _____ Date _____

D

UNION PACIFIC RAILROAD COMPANY

J. J. MARCHANT
SR. ASST. VICE PRESIDENT/
LABOR RELATIONS

1415 DOGGE STREET
OMAHA, NEBRASKA 68179



March 8, 1996

Mr. R. P. McLaughlin
President - Brotherhood of
Locomotive Engineers
Standard Building
1369 Ontario Street
Cleveland OH 44113

Dear Sir:

This refers to our discussions concerning the issues of New York Dock protection and the certification of adversely affected BLE employees.

As you know, Union Pacific, in its SP Merger Application, stipulated to the imposition of the New York Dock conditions. The Labor Impact Study which Union Pacific filed with the Merger Application reported that 251 engineers would transfer and that 772 engineer jobs would be abolished because of the implementation of the Operating Plan.

Within the New York Dock conditions, Section 11 addresses disputes and controversies regarding the interpretation, application or enforcement of the New York Dock conditions (except for Sections 4 and 12). Under Section 11, perhaps the two most serious areas for potential disputes involve whether an employee was adversely affected by a transaction and what will be such employee's protected rate of pay.

In an effort to eliminate as many of these disputes as possible, Union Pacific makes the following commitment regarding the issue of whether an employee was adversely affected by a transaction: Union Pacific will grant automatic certification as adversely affected by the merger to the 1023 engineers projected to be adversely affected in the Labor Impact Study and to all other engineers identified in any Merger Notice served after Board approval. Union Pacific will supply BLE with the names and TPA's of such employees as soon as possible upon implementation of approved merger. Union Pacific also commits that, in any Merger Notice served after Board approval, it will only seek those changes in existing collective bargaining agreements that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement changes(s).

Union Pacific commits to the foregoing on the basis of BLE's agreement, after merger approval, to voluntarily reach agreement for implementation of the Operating Plan accompanying the Merger Application.

Even with these commitments, differences of opinion are bound to occur. In order to ensure that any such differences are dealt with promptly and fairly, Union Pacific makes this final commitment: If at any time the affected General Chairman or the assigned International Vice President of the BLE believes Union Pacific's application of the New York Dock conditions is inconsistent with our commitments, BLE and Union Pacific personnel will meet within five (5) days of notice from the General Chairman or the International Vice President to attempt to resolve the dispute. If the matter is not resolved, the parties will agree to expedited arbitration with a written agreement within ten (10) days after the initial meeting. The Agreement will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of Award(s).

In view of Union Pacific's position regarding the issues of New York Dock protection and the certification of employees, I understand that the BLE will now support the UP/SP merger.

Sincerely,

A handwritten signature in black ink, appearing to read "John J. ...", with a long horizontal flourish extending to the right.

E

ARBITRATION PROCEEDING

United Transportation Union
and
Union Pacific Railroad Company, et al.
Control and Merger - Southern Pacific
Transportation Company, et al.

STB Finance Docket
No. 32760

Findings and Award
Pursuant to Art. I,
Section 4, New York
Dock Conditions

Appearances:

For the Organization:

Byron A. Boyd, Jr., Assistant President
Clinton J. Miller III, General Counsel
J. Previsich, General Chairman

For the Carrier:

W. S. Hinckley, General Director Labor Relations
Dick Meredith, Asst. Vice President-Employee Relations, Planning
Catherine J. Andrews, Assistant Director Labor Relations
Mark E. Brennan, Operating Department

FINDINGS:

The parties to this dispute are the United Transportation Union and the Union Pacific System/Southern Pacific System. In Finance Docket No. 32760, the U.S. Department of Transportation, Surface Transportation Board (STB) approved the merger of the two systems which included various rail entities.

In accordance with New York Dock provisions the Carrier served notices on the Organization's General Chairmen covering two geographical areas referred to by the Carrier as the Salt Lake Hub and the Denver Hub. The parties in their submissions detailed the negotiating dates which covered approximately a 120 day period. The parties were unable to reach an agreement and a request was made for arbitration in accordance with New York Dock. The parties were unable to jointly select an arbitrator and through a joint letter to the National Mediation Board requested that one be appointed. By letter dated February 21, 1997 the undersigned was appointed by the National Mediation Board.

This arbitration is somewhat unique in that in addition to the normal terms and conditions of arbitration, under New York Dock, the Organization requested arbitration of what is known as the

"commitment letter". This letter was signed by the Carrier and addressed to the Organization's President and provided for certain commitments with regards to the entire merger process beginning with the Carrier's filing with the STB. It is the Organization's position that the Carrier did not live up to the commitments and as a result the issues raised therein should be arbitrated.

Two separate arbitration presentations were made beginning on March 25, 1997, one covering the commitment letter and the other the terms and conditions to govern the two Hubs. Since these two hearings are so intertwined, they shall be dealt with in this one award.

COMMITMENT LETTER

The purpose of the letter was to 1. Limit the Organization's exposure in the merger to items "necessary" to completing the merger, 2. Gain protection certification under New York Dock for a number of employees, and 3. Give affected General committees an opportunity to develop a seniority system for the merged areas.

In exchange, the Carrier wanted 1. the UTU's support for the merger and operating plans, 2. the Organization's recognition that some changes were "necessary" in the merger and, 3. a seniority system that was not illegal, administratively burdensome or costly.

It is apparent that the writer and the addressee of the commitment letter understood the benefits of a simpler merger process than the parties had previously undertaken: however, the negotiators on both sides failed to see the same benefits and in essence pushed the envelope too far. Both parties included items in their proposals that went beyond what was necessary. While the Organization was the moving party in requesting arbitration over the letter, their proposals included several unnecessary items such as changing work rules, cherry picking work rules, certification beyond the number in the commitment letter in lieu of relocation and a seniority system that was administratively burdensome and potentially more costly. However, when the Carrier's proposals, which included an unnecessary 25 mile zone and crew consist changes are brought before this arbitrator, it is not difficult to say that anything beyond what was contemplated in the commitment letter will not be used to escape any commitment to provide for automatic certification as provided later in this award, because the parties failed to make a voluntary agreement.

It is apparent to this arbitrator that not all the parties to the negotiations are aware or understand the value the Organization received by the letter. Some members of the Organization's

negotiating team apparently feel there is no need to reach a voluntary agreement in order to achieve automatic certification and have made demands that most certainly will not lead to such a voluntary agreement. On the other hand, as mentioned above the Carrier has reached beyond the limits that would be acceptable to creating a voluntary agreement.

Neither party should take comfort in future negotiations that this award provides for future automatic certification. The commitment letter is an example of responsible recognition of the needs of both parties and for the first round of merger negotiations/arbitration this arbitrator simply will not substitute his judgement for those behind the commitment letter.

TERMS AND CONDITIONS

One of the key areas of dispute deals with what is "necessary" to accomplish the merger. In reviewing previous mergers and the need to coordinate employees and operations at common points and over parallel operations, it is proper to unify the employees and operations under a single collective bargaining agreement and single seniority system in each of the two Hubs. This does not mean the Carrier has authority to write a new agreement, but the Carrier's selection of one of the existing collective bargaining agreements to apply to all those involved in a Hub as proposed in this case is appropriate.

While selecting one existing collective bargaining agreement puts many issues to rest, both parties recognized in the letter that other changes may be necessary for a merger to accomplish a smooth flow of operations. These changes, however, were not to be monetary but operational. Such operational changes would include the combining of yards into single terminals, consolidating pool freight, local and road switcher operations and combining extra boards into fewer extra boards that would cover the more expansive operations of the two Hubs.

Seniority is always the most difficult part of a merger. There are several different methods of putting seniority together but each one is a double-edged sword. In a merger such as this one that also involves line abandonments and alternate routing possibilities on a regular basis, the tendency is to present a more complicated seniority structure as the Organization did. What is called for is not a complicated structure but a more simplified one that relies on New York Dock protection for those adversely affected and not perpetuating seniority disputes long into the future. The Carrier's proposals fairly address the issue in both Hubs.

There are two issues that must be addressed with regards to crew consist. The first is the special allowance/productivity fund issue and the second is the Carrier's request for the least restrictive yard/local provisions to overlay the Eastern District agreement. The second is easier to deal with. If the Carrier believed that another agreement would better fit this area, it had the opportunity to select that agreement for this area in total. Since it did not, this arbitrator will not give a separate crew consist provision to them. The Eastern District agreement covers this area with respect to crew size and work in both yard and road service.

The special allowance/productivity funds must be coordinated. This arbitrator does not see any undue advantage to the Carrier in its proposal to pay out the existing funds and create a new one. Those who would have been eligible for a productivity fund and special allowance had they worked under the Eastern District agreement since their entry into train service shall be entitled to them under the new plan. Those who sold their special allowances/productivity funds previously are not entitled to a windfall now and would not be eligible for those payments regardless of their seniority date.

Without the commitment letter, the Carrier is not required to certify any employees as protected. The letter identified a number of employees to be protected and the Carrier's notices, as amended, identified a larger number. Since the Carrier's proposal exceeded the commitment letter, it should protect the larger number referenced in its notices. If the Eastern District General Chairman and Carrier are not able to agree within 30 days of this Award who the specific employees are, then it shall be the employees whose assignments are involuntarily changed until the number in the notices is reached. If both proposals were proper and were not over reaching, as they were here, then this arbitrator would not have imposed this provision.

I have identified the major issues in more detail above and now turn to the proposals. In reviewing the proposals, this Board finds that the Carrier's proposals, including questions and answers, for each Hub, submitted to this panel are appropriate for inclusion as part of this Award except for the following:

Salt Lake City proposal:

1. Article III A (2) and (3) concerning the metro complex.
2. Article IV B (1) concerning the 25 mile zone.
3. Article VI protection is amended per above.
4. Article VIII E. Concerning the least restrictive crew consist.

5. All questions and answers referring to these eliminated sections.

Denver Hub proposal:

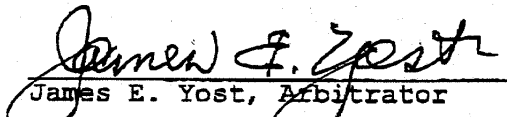
1. Article IV B (1) concerning the 25 mile zone.
2. Article VI protection is amended per above.
3. Article IX E concerning the least restrictive crew consist.
4. All questions and answers referring to these eliminated sections.

Copy of Carrier's proposed implementing agreement for the Salt Lake Hub and the Denver Hub are attached hereto and made a part of this Award.

This arbitrator is convinced from the facts of record that the changes contained in the Carrier's proposals as modified by the exceptions noted herein are necessary to effectuate the STB's approved consolidation and yield enhanced efficiency in operations benefiting the general public and the employees of the merged operations.

This Award is final and effective immediately. Should the Organization and the Carrier desire to continue negotiations over other elements then they should so proceed. These negotiations should be between the Eastern District General Chairman and the Carrier. These would be voluntary and not subject to Section 4 New York Dock arbitration if they do not prove fruitful.

Signed this 14th day of April 1997.


James E. Yost, Arbitrator

F

SUPPLEMENT 4

AGREEMENT
Between
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
And
THE BROTHERHOOD OF RAILROAD SIGNALMEN

This Agreement is intended to provide protection for employees assigned to BN or ATSF mobile gangs on consolidated seniority districts.

Signal Department employees on regularly assigned positions on signal gangs on the former ATSF Illinois, Kansas, New Mexico and Texas seniority districts on June 1, 2000, will be automatically certified as eligible for displacement or dismissal allowances on the effective date of this Agreement.

This Agreement is effective July 1, 2000.

(Signatures not reproduced)

June 2, 1998

Mr. Charles L. Little
International President
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107

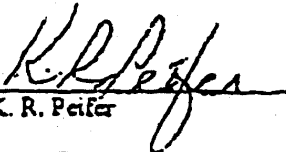
Dear Mr. Little:

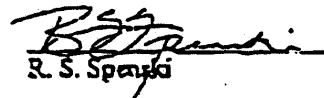
This has further reference to the application of Finance Docket No. 33388 and ongoing discussions covering the implementation process. CSX and NS recognize that the selection of forces required pursuant to the protective conditions expected to be imposed in this case (New York Dock) involve the former Conrail employees making application for new positions to be created by CSX, NS or Conrail (in the case of the Shared Asset Areas).

In line with the commitments made in our letters to you dated January 15, 1998, and for the efficient transition covering the selection of forces and the implementation of the various Operating Plans involved in this transaction, test period averages, indicating entitlement to New York Dock benefits, subject to its terms and conditions, will be provided to former Conrail employees who become employees of CSXT or NS in connection with the voluntary implementing agreements discussed in said letters. Such employees will thereby be automatically certified as adversely affected without being required to identify or establish a causal connection to the transaction.

For purposes of applying these test period averages for said former Conrail employees, the twelve-month period immediately preceding April 1, 1997 will be used.

Very truly yours,


K. R. Peifer


R. S. Spenski

cc: B. A. Boyd, Jr., Assistant President

H

September 21, 1998

Side Letter No. 2

Mr. Robert W. Godwin, General Chairman
Brotherhood of Locomotive Engineers
810 Abbott Road, Suite 200
Buffalo, New York 14220

Mr. W. E. Knight, General Chairman
Brotherhood of Locomotive Engineers
P. O. Box 279
Wheelersburg, Ohio 45694

Mr. S. D. Speagle, General Chairman
Brotherhood of Locomotive Engineers
P. O. Box 4509
Decatur, Illinois 62521

Mr. R. C. Wallace, General Chairman
Brotherhood of Locomotive Engineers
P. O. Box 16039
Asheville, North Carolina 28816

Gentlemen:

This has further reference to the application of Finance Docket No. 33388 and ongoing discussions covering the implementation process. NS recognizes that the selection of forces required pursuant to the protective conditions expected to be imposed in this case (New York Dock) involves the former Conrail employees making application for new positions to be created by CSX, NS or Conrail (in the case of the Shared Asset Areas).

In line with the commitments made in the letters to you dated February 18, 1998, and for the efficient transition covering the selection of forces and the implementation of the various Operating Plans involved in this transaction, test period averages, indicating entitlement to New York Dock benefits, subject to its terms and conditions, will be provided to engineers in NS's Lake, Eastern and Central Region Hubs and other former Conrail engineers who become employees of NS in connection with the voluntary implementing agreements discussed in said letters. Such employees will thereby be automatically certified as adversely affected without being required to identify or establish a causal connection to the transaction.

For purposes of applying these test period averages for the above referenced employees, the twelve month period immediately preceding April 1, 1997 will be used.

Very truly yours,

R. S. Spenski

R. S. Spenski
Vice President Labor Relations
Norfolk Southern Railway Co.
Norfolk & Western Railway Co.
Cincinnati, New Orleans and Texas
Pacific Railway Company

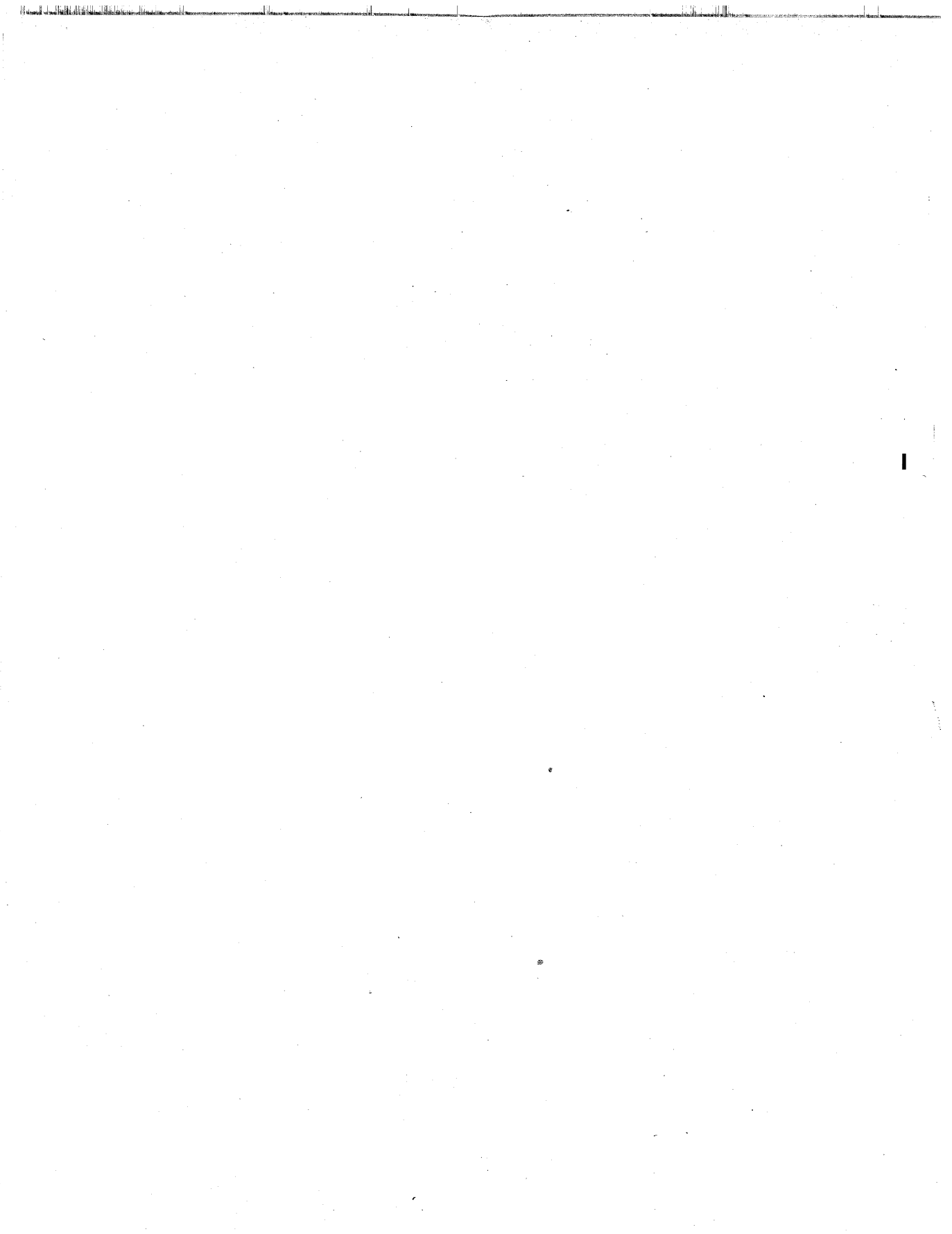
Agreed:

R. W. Godwin
R. W. Godwin, General Chairman

S. D. Speagle
S. D. Speagle, General Chairman

W. E. Knight
W. E. Knight, General Chairman

R. C. Wallace
R. C. Wallace, General Chairman



**MERGER IMPLEMENTING AGREEMENT
(Dallas Ft. Worth (DFW)Hub)**

between the

**UNION PACIFIC RAILROAD COMPANY
SOUTHERN PACIFIC TRANSPORTATION COMPANY**

and the

UNITED TRANSPORTATION UNION

In Finance Docket No. 32760, the U.S. Department of Transportation, Surface Transportation Board ("STB") approved the merger of the Union Pacific Corporation ("UPC"), Union Pacific Railroad Company/Missouri Pacific Railroad Company (collectively referred to as "UP") and Southern Pacific Rail Corporation, Southern Pacific Transportation Company ("SP"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp., and The Denver & Rio Grande Western Railroad Company ("DRGW") (collectively referred to as "SP"). In approving this transaction, the STB imposed New York Dock labor protective conditions.

In order to achieve the benefits of operational changes made possible by the transaction, to consolidate the seniority of all employees working in the territory covered by this Agreement into one common seniority district covered under a single, common collective bargaining agreement,

IT IS AGREED:

I. DALLAS FT. WORTH HUB

- A. A new seniority district entitled the Dallas Ft. Worth Hub ("Hub") shall be created that encompasses the following area: Toyah (including) to Mesquite (including); Childress (including) to Ft. Worth (including) on the trackage rights; Winfield (not including) to Ft. Worth (including) on the trackage rights; Wichita (not including) to Taylor (not including) and Hearne/Valley Jct. (including); Dallas (including) south to Ennis (including); Plano Jct southwest to Ft. Worth and Ft. Worth northeast to McAlester. (This includes all main and branch lines, industrial leads and stations between the points identified).
- B. Employees with home terminals within the DFW Hub may work to points outside the Hub without infringing on the rights of other employees in other Hubs and employees outside the Hub may work to points inside the Hub without infringing on the rights of employees inside the DFW Hub. The Hub

provided herein, the system and national collective bargaining agreements, awards and interpretations shall prevail. None of the provisions of these agreements are retroactive. The Carrier has selected the Union Pacific (Texas and Pacific UTU Agreement last reprinted December 15, 1991) and the Union Pacific (Texas and Pacific Firemen Agreement effective September 1, 1949) as the collective bargaining agreements for this Hub.

- H. The Carrier will provide copies of the designated collective bargaining agreement to those trainmen who do not have a copy at the earliest possible date, but no later than by date of implementation of this Agreement.
- I. T & P rules governing the filling no bid conductor vacancies shall be amended to provide that no bid vacancies shall be filled by force assigning the junior conductor on the extra board that protects the no bid assignment.

VII. PROTECTION

- A. Due to the parties voluntarily entering into this agreement the Carrier agrees to provide New York Dock wage protection (automatic certification) to all trainmen who are listed on the DFW Hub Merged Rosters and working an assignment (including a Reserve Board) during the period between July 15, 1998 and the implementation date of this agreement. Employees on medical or other leave or discipline will be placed on protection upon return to service. This protection will start with the effective (implementation) date of this agreement for all covered employees. The trainmen must comply with the requirements associated with New York Dock conditions or their protection will be reduced for such items as layoffs, bidding/displacing to lower paying assignments when they could hold higher paying assignments, etc. Protection offsets due to unavailability will be governed by New York Dock provisions.
- B. This protection is wage only and hours will not be taken into account.
- C. Trainmen required to relocate under this agreement will be governed by the relocation provisions of New York Dock. In lieu of New York Dock provisions, a trainman required to relocate may elect one of the following options:
 - 1. Non-homeowners may elect to receive an "in lieu of" allowance in the amount of \$10,000 upon providing proof of actual relocation.
 - 2. Homeowners may elect to receive an "in lieu of" allowance in the amount of \$20,000 upon providing proof of actual relocation.

3. Homeowners in Item 2 above, who provide proof of a bona fide sale of their home at fair value at the location from which relocated, shall be eligible to receive an additional allowance of \$10,000.
 - (a) This option shall expire five (5) years from date of application for the allowance under Item 2 above.
 - (b) Proof of sale must be in the form of sale documents, deeds, and filings of these documents with the appropriate agency.
 4. With the exception of Item 3 above, no claim for an "in lieu of" relocation allowance will be accepted after three (3) years from date of implementation of this agreement.
 5. Trainmen receiving an "in lieu of" relocation allowance pursuant to this implementing agreement will be required to remain at the new location, seniority permitting, for a period of two (2) years.
 6. Under no circumstances shall a trainman be permitted to receive more than one (1) "in lieu of" relocation allowance under this implementing agreement. If they have received one in connection with another Hub implementing agreement they shall not be entitled to one under this agreement.
 7. Where the Carrier moves assignments from one location to another then employees from the old location who bid in the new assignments will be treated as being required to relocate.
- D. There will be no pyramiding of benefits.
- E. The time frame to be used for calculating test period averages ("TPA") for this Agreement will be November 1, 1995 through October 31, 1996. Trainmen who were employed after this time period shall use the twelve month period prior to implementation. If a trainman is currently covered by an interim protection TPA due to the merger then the trainman may elect to retain that TPA. When TPA's are mailed to the trainmen they must respond within thirty days from the date of the letter if they elect to retain the interim or other current TPA (This interim TPA may be adjusted if the trainmen is eligible for a productivity fund payment and participates in that program). Monies paid as productivity funds, whether as a lump sum or as part of a trip, shall not be counted as part of a TPA or used as an offset to TPA's. The TPA for union officers will be based on the two trainmen above and two trainmen below the officer with regular work records on the pre-merger roster or their regular TPA, whichever is larger.

- F. Those former SPEL, SSW and other trainmen coming under the provisions of the crew consist productivity fund who have received "up-front" payments will be afforded the following options:
1. Retain the higher TPA with up-front crew consist monies included and for the period of time under that guarantee, waive participation in the productivity fund for the protection period, or
 2. Accept a recalculated TPA with up-front crew consist monies removed, and participate fully in the productivity fund with no use of such disbursements as an offset against protection.
- G. National Termination of Seniority provisions shall not be applicable to trainmen hired prior to the effective date of this agreement

VIII. FAMILIARIZATION

- A. Trainmen will not be required to lose time or "ride the road" on their own time in order to qualify for the new operations. Trainmen will be provided with a sufficient number of familiarization trips in order to become familiar with the new territory. Issues concerning individual qualifications shall be handled with local operating officers. The parties recognize that different terrain and train tonnage impact the number of trips necessary, and the operating officer assigned to the merger will work with the local managers and Local Chairmen in implementing this Section. Issues concerning individual qualifications shall be handled with the local Operating Officer and Local Chairman. If not resolved at the local level, then the matter shall be referred to the General Chairman and Labor Relations for further handling.
- B. Employees hired subsequent to the effective date of this document will be qualified in accordance with the current CBA that will cover the Hub.

IX. CREW CONSIST

- A. Except as provided below, the crew consist agreement of the CBA selected by the Carrier shall govern.
- B. Trainmen who come under the coverage of the UP (T&P) Crew Consist Agreement shall be considered eligible to share in the post-merger productivity fund if their seniority date (12-1-1988) on their former Carrier would have qualified them for such status had they worked under the UP (T&P) Agreement since their entry into train service.
- C. Trainmen who come under the coverage of the UP (T&P) Crew Consist Agreement shall be considered eligible to receive special allowance payments

UNION PACIFIC RAILROAD COMPANY



1416 DODGE STREET
OMAHA, NEBRASKA 68179

May 16, 2001

Mr. D. L. Hakey
Vice President - UTU
10817 Kolemey Drive
Beaumont, TX 77705-9068

Mr. L. L. Overton
General Chairman - UTU
400 Randal Way, Suite 102
Spring, TX 77388

Gentlemen:

In reference to the implementation of interdivisional service at Beaumont TX and resulting labor protection under Article XIII of the UTU 1972 National Contract.

As requested, I have enclosed a listing of those employees who may potentially have been affected by this transaction. Included on the listing are the average earnings and hours of the employees for the twelve-month period preceding the implementation of service.

Inclusion on this list, however, does not imply the employees are certified for protective benefits. In accordance with Article XIII, to be certified for protective benefits employees must have been adversely affected by the transaction.

Sincerely,

A handwritten signature in black ink, appearing to read "Marilyn J. Ahart". The signature is fluid and cursive, with a large, stylized initial 'M'.

Marilyn J. Ahart

APPENDIX

APPENDIX

<u>Case</u>	<u>Tab</u>
<u>BRS v. CSXT</u> , Fin. Dkt. No. 33399 (Meyers May 15, 2001) New York Dock claims denied where reduction of overtime was caused by creation of new positions, by elimination of unnecessary overtime work in response to budgetary constraints, and by seniority-based distribution of overtime under a collective bargaining agreement. "The critical question is whether there is a reasonably direct causal connection, or nexus, between the merger and the drop in the Claimants' overtime opportunities."	1
<u>BMWE v. CSXT</u> (Zumas Mar. 26, 1990) Employees' failure to show "causal nexus" under <u>Oregon Short Line</u> (which is practically the same as <u>New York Dock</u>) between an abandonment and allegedly worsened conditions of employment precluded an award of protective benefits.	2
Letter from N.B. Grissom, Director Labor Protection, CSXT, to J. Czuczman, International Vice-President, Transportation Workers Union (Sept. 19, 2001) <u>New York Dock</u> claim denied where loss of overtime was caused by decline in business due to weather and closing of a major local shipper. "[T]he Organization must prove that action of CSXT placed these employees in a worse position as a <i>direct result</i> of the transaction. The Organization must show a causal nexus between the abandonment and any alleged harm to the <i>individual</i> ."	3
<u>Int'l Longshoremen's Union v. NS</u> , STB Fin. Dkt. No. 33388 (Simon June 14, 2000) The union representing a group of employee-claimants negotiated a new collective bargaining agreement as part of the pre-transaction implementing agreement process. Those employees suffered "worse position[s]" as a result of employer actions taken pursuant to that agreement. The employees' worsened positions were caused by the new collective bargaining agreement, rather than by a transaction covered by <u>New York Dock</u> .	4
<u>NS v. BRS</u> (Mittenthal Sept. 18, 2001) Several employees suffered worsened employment conditions as a result of employer actions taken in response to "[r]evenue and cost disappointments." The employees' worsened positions thus were caused not by a preceding <u>New York Dock</u> transaction, but rather by the later "changed circumstances" for the business that result in the "disappointments."	5

<u>ATDD v. NS</u> (Twomey Mar. 18, 2002)	6
“[E]very action initiated subsequent to [a covered transaction] is not, for that reason alone, to be considered to have taken place ‘pursuant to’ the authorized transaction,” and thus employees who were put in a “worse position” by the exercise of management rights that existed independently of any covered transaction to fill open positions and reorganize work were not displaced for purposes of <u>New York Dock</u> .	
<u>BMWE v. ICC</u> , 920 F.2d 40, 44 (D.C. Cir. 1990)	7
Claim denied under <u>Mendocino</u> conditions (that are “virtually identical” to <u>New York Dock</u>) because claimant’s furlough was “caused by a diminution in [the carrier’s] business,” not by a transaction. “To the extent that the arbitrator rejected an extreme ‘but for’ analysis, under which even the most attenuated connection between a transaction and an employee displacement would entitle the employee to benefits, he correctly followed [ICC] precedent.”	
<u>Missouri Pac. Railroad Co. v. ATDA</u> (Zumas July 31, 1981)	8
Displacement caused by business considerations, not transaction.	
<u>Conrail v. IBEW</u> (Seltzer Dec. 16, 1985)	9
Displacement caused by line and shop closings, not transaction.	
<u>UTU v. Conrail</u> (Yagoda June 18, 1985)	10
Displacement caused by completion of project, not transaction.	
<u>ATDA v. Seaboard System</u> , PLB 3820, Award No. 2 (Weston Aug. 24, 1985)	11
Displacement caused by employee’s “failure to take reasonable steps and precautions to exercise seniority and protect his status,” not transaction.	
Letter from L.J. Finnegan, Assistant Vice President, Labor Relations, Conrail, to A.P. Santoro, General Chairman, TCU (Oct. 24, 2001)	12
Employee was not entitled to <u>New York Dock</u> because “[t]he changes which resulted in the abolishment of [the employee’s] position were made to enhance departmental efficiency by eliminating duties that were no longer necessary. These changes had no causal connection to a transaction as defined in <u>New York Dock</u> .”	
<u>BMWE v. Conrail</u> (Marx Dec. 1, 1992)	13
“Fluctuation of levels of compensation and movement of territory are normal characteristics of maintenance of way employment. The fact that some Claimants had their work levels altered or their headquarters points moved does not prove adverse affect nor does it show the causal nexus between the transaction and the adverse effect that is required before imposing NYD protection benefits.” (citation omitted).	

UTU v. San Diego & Arizona Eastern Railway Co. (Vernon July 20, 1984)

14

"It is well established in such matters [of New York Dock claims] that a causal nexus must be apparent between the transaction and the employee's employment situation. This causal nexus must be direct and more than speculative or merely proximate. Based on this record [of evidence that the worsened employment situation was caused by a decline in business] we are unable to find the necessary causal connection between the transactions referred to in the Implementing Agreement and the Claimant's employment situation."

**BEFORE AN ARBITRATION BOARD
ESTABLISHED PURSUANT TO
ARTICLE I, SECTION 11, OF THE
NEW YORK DOCK PROTECTIVE CONDITIONS**

FINANCE DOCKET NO. 33399

**PETER R. MEYERS, CHAIRMAN AND NEUTRAL MEMBER
360 East Randolph Street, Suite 3104
Chicago, IL 60601
312-616-1500**

**PARTIES) BROTHERHOOD OF RAILROAD SIGNALMEN
) (further Seaboard Coastline RR)
) and
)
DISPUTE) CSX TRANSPORTATION COMPANY**

OPINION AND AWARD

Dated: May 15, 2001

Appearances for the Organization

C. A. McGraw--International Vice President, BRS
Brotherhood of Railroad Signalmen
601 West Golf Road, Box U
Mt. Prospect, IL 60056

Appearances for the Carrier

Neil B. Grissom--Director, Labor Relations-CSX
CSX Transportation
6735 Southpoint Drive S. J670
Jacksonville, FL 32216-6177

This matter came to be heard before Neutral Member Peter R. Meyers on the 18th day of April 2001 at the offices of CSX Transportation, 500 Waters Street, Jacksonville, Florida. Mr. C. A. McGraw presented on behalf of the Organization, and Mr. Neil B. Grissom presented on behalf of the Carrier.

Introduction

In July 1998, the Surface Transportation Board ("STB") approved a transaction in which CSX Transportation, Inc. (hereinafter "the Carrier" or "CSXT") acquired part of the Consolidated Rail Corporation ("Conrail"). The STB imposed *New York Dock Conditions* for any affected employees. In December 1998, the Carrier and the Brotherhood of Railroad Signalmen (hereinafter "the Organization") entered into an Implementing Agreement under Article 1, Section 4, of the *New York Dock Conditions*. As part of this Implementing Agreement, fifteen former Conrail signalmen transferred from Conrail's Signal Shop in Columbus, Ohio, which was eliminated, to the Carrier's Signal Shop in Savannah, Georgia, and their seniority was dovetailed into the Signal Shop Seniority Roster at that location.

The Claimants, all of whom were assigned to signal department positions in the Savannah Signal Shop prior to the CSXT-Conrail merger, complained that available overtime opportunities had been reduced as a result of the merger. The Organization thereafter filed claims on behalf of the Claimants, contending that the Carrier improperly denied them a displacement allowance, pursuant to the protective benefits of the *New York Dock Implementing Agreement*.

Because these different claims involve substantially the same facts, issues, and contentions, they were consolidated. The arbitration provision of *New York Dock* was invoked, and this matter then came to be heard, pursuant to Article I, Section 11, of the

New York Dock Conditions, before the CSXT - BRS New York Dock Section 11 Arbitration Committee, Peter R. Meyers, Neutral Member, on April 18, 2001, in Jacksonville, Florida. The parties also filed written briefs in support of their respective positions.

Question at Issue Posed by the Carrier

Were the employees identified below adversely affected as a direct result of the Conrail transaction and, thus, entitled to *New York Dock* protective benefits as provided for under Surface Transportation Board Finance Docket 33388?

Case No. 1 - Claims on behalf of L. Haydon, K.R. Lamb, C.E. Stone, L.G. Estep, R.S. Graham, T.E. Pittman, Jr., J.A. Cassidy, C.M. Leverette, and C.D. Whitfield. Carrier's File No. 15 (99-212). General Chairman's File No. SCL 1899. BRS File Case No. 11342-SCL.

Case No. 2 - Claims on behalf of G.D. Ginevan and W.L. Shuman. Carrier's File No. (15 99-196). BRS File Case No. 11392-B&O.

Case No. 3 - Claim on behalf of R.C. Jones. Carrier's File No. (15 99-166). General Chairman's File No. 99-SAV-8. BRS File Case No. 11398-L&N.

Case No. 4 - Claim on behalf of R.S. Gribble. Carrier's File No. (15 99-165). General Chairman's File No. 99-SAV-11. BRS File Case No. 11399-L&N.

Case No. 5 - Claim on behalf of R.A. Voyles. Carrier's File No. (15 99-164). General Chairman's File No. 99-SAV-10. BRS File Case No. 11400-L&N.

Case No. 6 - Claim on behalf of G.C. Lannou, Jr.. Carrier's File No. 15 (99-138). General Chairman's File No. 99-40-SS. BRS File Case No. 11429-C&O.

Case No. 7 - Claim on behalf of G.F. Vincent. Carrier's File No. 15 (99-167). General Chairman's File No. 99-SAV-09. BRS File Case No. 11500-L&N.

Question at Issue Posed by the Organization

Were the employees identified below adversely affected as a direct result of the Conrail transaction and, thus, entitled to *New York Dock* protective benefits as provided for under Surface Transportation Board Finance Docket 33359?

Case No. 1 - Claims on behalf of L. Haydon, K.R. Lamb, C.E. Stone, L.G. Estep, R.S. Graham, T.E. Pittman, Jr., J.A. Cassidy, C.M. Leverette, and C.D. Whitfield. Carrier's File No. 15 (99-212). General Chairman's File No. SCL 1899. BRS File Case No. 11342-SCL.

Case No. 2 - Claims on behalf of G.D. Ginevan and W.L. Shuman. Carrier's File No. (15 99-196). BRS File Case No. 11392-B&O.

Case No. 3 - Claim on behalf of R.C. Jones. Carrier's File No. (15 99-166). General Chairman's File No. 99-SAV-8. BRS File Case No. 11398-L&N.

Case No. 4 - Claim on behalf of R.S. Gribble. Carrier's File No. (15 99-165). General Chairman's File No. 99-SAV-11. BRS File Case No. 11399-L&N.

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Case No. 6 - Claim on behalf of G.C. Lannou, Jr.. Carrier's File No. 15 (99-138). General Chairman's File No. 99-40-SS. BRS File Case No. 11429-C&O.

Case No. 7 - Claim on behalf of G.F. Vincent. Carrier's File No. 15 (99-167). General Chairman's File No. 99-SAV-09. BRS File Case No. 11500-L&N.

Relevant Contract Provisions

NEW YORK DOCK CONDITIONS

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which

are being considered elsewhere, are as follows:

1. Definitions. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" mean an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee who position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

...

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under the applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes [sic].

...

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under

existing agreement, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

...

11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article 1, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

...

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Factual Background

In a decision dated July 23, 1998, the Surface Transportation Board ("STB") approved a transaction in which the Carrier and the Norfolk and Southern Railway Company ("NSR") each acquired part of the Consolidated Rail Corporation ("Conrail"). The STB imposed *New York Dock Conditions* for any affected employees.

In December 1998, the Organization, the Carrier and its railroad subsidiaries, the NSR and its railroad subsidiaries, and Conrail entered into an Implementing Agreement pursuant to Article 1, Section 4, of the *New York Dock Conditions*. Among other things, the Implementing Agreement provided for the seniority dovetailing of former Conrail employees who transferred from Conrail's Columbus, Ohio, Signal Shop, which was eliminated, to the Carrier's Signal Shop in Savannah, Georgia. A total of fifteen former Conrail signalmen did transfer from Columbus, Ohio, to the Savannah Shop, and their seniority was dovetailed into the Carrier's Signal Shop Seniority Roster at that location.

The Claimants all were assigned to signal department positions in the Savannah Signal Shop prior to the CSXT-Conrail merger. Certain of the former Conrail employees who transferred to the Savannah Signal Shop had greater seniority than one or more of the Claimants. Upon the dovetailing of these former Conrail employees into the

Savannah Signal Shop Seniority Roster, one or more of the Claimants did drop down on the Seniority Roster. After the merger, the Claimants continued to work at the same positions, at the same location, and performed the same type of work as they did before the transaction. There was, however, a reduction in the Claimants' overtime opportunities, and therefore their overall compensation, following the merger. Because of this reduction in the amount of available overtime, the Claimants now contend that they are entitled to protective benefits under the *New York Dock Conditions*.

The Organization's Position

The Organization initially contends that the Claimants became "displaced employees," as defined under the *New York Dock Conditions*, when the Carrier eliminated the Conrail Signal Shop and transferred former Conrail employees to the CSX Signal Shop in Savannah, Georgia. This action resulted in certain work, that Claimants formerly performed on an overtime basis, being assigned to the former Conrail employees. The Organization maintains that these events caused an obvious reduction in work opportunities for the Claimants who had merely continued to work as employees of CSX.

The Organization goes on to assert that the Claimants were adversely affected by the changes that resulted from the merger of CSX and Conrail. Accordingly, the Organization maintains that the Claimants are entitled to receive a Test Period Average ("TPA") and the appropriate displacement allowance. The Organization argues that the

Carrier should be required to calculate the Claimants' TPA and provide them with the required displacement allowances, beginning in June 1999 and continuing for the term of the protective period.

The Organization emphasizes that in connection with the transfer of the former Conrail signalmen to Savannah, there was no concurrent addition of work assigned to the Claimants' positions from any other areas to compensate for work that was removed from them and assigned to the former Conrail employees. The Organization points out that except for the CSXT-Conrail merger, the Carrier could not have taken the work from the CSXT employees and assigned it to former Conrail employees. The Organization therefore argues that there was a direct connection between the merger and the reduction in work opportunities available to the Claimants, thus triggering the application of the *New York Dock Conditions*.

The Organization goes on to contend that because the Carrier removed work from the Claimants' assignments and gave that work to former Conrail employees, the Claimants were placed in a worse position with respect to their compensation. What had been a regular source of overtime compensation was eliminated, thereby establishing the Claimants as displaced employees who are entitled to displacement allowances.

The Organization additionally contends that the Carrier's refusal to provide the Claimants with TPA protection was merely an attempt to frustrate the Claimants. The Organization maintains that a fundamental question in determining an employee's

eligibility for a displacement allowance is whether the employee's compensation was reduced. The Organization emphasizes that it is compensation, not the rate of pay, that determines if the employee was adversely affected. The Organization argues that it is a well-established principle that for an employee to know whether he or she has been adversely affected, a carrier must provide that employee with information about test period earnings. In the instant case, the Carrier steadfastly refused to consider the Claimants' requests for TPA protection; it summarily dismissed the Claimants' assertions that they had been adversely affected without giving proper consideration to the TPA information that the Claimants provided themselves.

The Organization then addresses the Carrier's suggestion that the losses suffered by the Claimants were tied to budget constraints. The Organization emphasizes that the Carrier has offered no proof whatsoever to support its claim that these losses were due to budget constraints. Instead, the record shows that the Carrier acquired 42% of the former Conrail property, while acquiring 70% of Conrail's formal signal work force. The Organization contends that this disproportionate shift in the workload directly led to the instant dispute and caused the adverse effects suffered by the Claimants. The Organization emphasizes that there is no dispute that, following the merger, the Carrier opted to coordinate the work of the two signal shops. The Organization maintains that this provides the causal nexus for this dispute.

The Organization acknowledges that Referees repeatedly have cautioned against

considering every Carrier action following a merger to be a “transaction” under the *New York Dock Conditions*. There must be a connection between the merger and the alleged transaction, and the existence of a causal nexus is the key to establishing that a Carrier action is a *New York Dock* transaction. The Organization asserts that under Section 11, when there is a dispute regarding an employee’s eligibility for benefits, the employee must first establish that the transaction meets the definition of that term under *New York Dock*. The Organization argues that in this case, the Claimants have met this burden. Moreover, the Claimants clearly have shown that they were placed in a worse position after the transaction than before it.

The Organization asserts that the adverse change in the Claimants’ position was possible only because of the direct connection between the CSXT-Conrail merger and the change in the Claimants’ assignments. As a result of this change, the Claimants lost the opportunity to perform work on a portion of their pre-merger assignments, making them displaced employees under the *New York Dock Conditions*. The Organization argues that the Carrier was obligated to calculate TPAs and provide the Claimants with appropriate displacement allowances. The Organization ultimately contends that the Question at Issue that it posed should be answered in the affirmative.

The Carrier's Position

The Carrier contends that there is no proximate causal nexus between the Conrail transaction and facts demonstrating that any of the Claimants are “displaced” employees.

The Carrier emphasizes that the Interstate Commerce Commission, the Surface Transportation Board's predecessor, authoritatively held that the appropriate causal standard in *New York Dock* disputes is "proximate" rather than "but for" causation. The ICC has explained that there must be a direct causal connection between the transaction and the adverse impact on the employee before the employee is entitled to protective benefits; labor protective conditions are designed to cushion employees from the direct impact of a merger, not to insulate employees from all post-merger actions. Accordingly, there must be a showing of a real and discernible causal nexus between the claimed adverse effect and the transaction. The Carrier maintains that there is no such nexus in the instant matter.

The Carrier points out that Claimant Ginevan, for example, contends that he is a displaced employee because eight former Conrail employees who are senior to him were dovetailed into the Signal Shop Seniority Roster at Savannah. The Carrier argues that there simply is no basis for the Organization to contend that because overtime work opportunities are afforded in seniority order, the Claimants have been adversely affected by such action. The Carrier emphasizes that the distribution of overtime is governed by the schedule agreement. The Carrier maintains that the Claimants' positions were not abolished, they were not displaced, and their rates of pay were not reduced. The fact that senior Conrail employees were dovetailed into the Signal Shop Roster ahead of several of the Claimants does not establish that they were adversely affected by the transaction.

Moreover, the Claimants cannot be considered as adversely affected because there now are more employees at the Signal Shop to perform the work, which in turn reduces the necessity for overtime.

The Carrier cites several cases in which Referees have denied labor protective conditions to employees who have claimed they were adversely affected as a result of a transaction because senior employees were dovetailed ahead of them on a seniority roster. The Carrier emphasizes that in the instant case, the former Conrail employees who transferred to the Savannah Signal Shop did not displace anyone. Any subsequent adverse effect that may have occurred from that transfer was the result of the application of the seniority provisions contained in the BRS/CSXT agreements.

The Carrier goes on to argue that there were other supervening factors that had an impact upon the amount of overtime available to the Claimants, and these other factors were not a direct result of the Conrail transaction. The Carrier points out that in late 1998 and early 1999, fourteen additional positions were established in the Signal Shop, which resulted in the transfer of seven employees from field locations to the Signal Shop and the hiring of seven new employees. The Carrier emphasizes that this obviously increased the straight-time hours worked at the Signal Shop, with a corresponding reduction in the number of available overtime opportunities. Moreover, during the same time period, the Carrier began reducing unnecessary overtime because of budgetary constraints that were imposed in response to business pressures. The Carrier therefore

contends that there was a confluence of events unrelated to the transaction that had an impact on the Claimants' overtime earnings.

The Carrier goes on to argue that none of the actions that are alleged to have adversely affected the Claimants were taken pursuant to STB approval. The transfer of the fifteen former Conrail employees to the Savannah Signal Shop did not result in any CSXT employee being "displaced" or "dismissed," nor were the Claimants' rates of pay reduced as a result of these transfers. The Carrier contends that the Organization clearly has not met its burden of proving that the Claimants are entitled to protective benefits. Accordingly, the Carrier argues that the Question at Issue that it proposed should be answered in the negative.

Decision

This Committee has carefully reviewed all of the evidence and testimony in the record, as well as the written briefs submitted by the parties. As is typical in this type of dispute, the Organization bears the burden of proof here. The Organization is attempting to show that the Claimants are entitled to the protective benefits set forth in the *New York Dock Labor Conditions*. Appendix III, Article 11(e) of the *New York Dock Conditions* expressly provides that the Organization must make an initial showing that identifies the transaction and the pertinent facts relating to the transaction upon which it relies. Essentially, the Organization must show that the Claimants were adversely affected by the transaction at issue and that they are entitled to the protective benefits of the *New*

York Dock Conditions under the factual circumstances of this case. To satisfactorily make this showing, the Organization must establish the existence of a relationship, or nexus, between the cited transaction and any proven adverse effect. If the Organization successfully makes this showing, then the Carrier, to defend itself against the claim, must establish that factors other than the transaction affected the Claimants.

There is no dispute that a transaction, as that term is defined in the *New York Dock Conditions*, occurred when the Carrier, through a merger, acquired control over portions of Conrail. The evidence further makes clear that fifteen former Conrail employees transferred to the Carrier's Savannah Signal Shop in connection with the merger, thereby increasing the employee complement at this facility. Moreover, the Claimants unquestionably experienced a drop in their overall compensation after the merger, due to a reduction in overtime opportunities. The record also demonstrates that none of the Claimants were displaced or dismissed from their positions of employment, and none of them were subjected to a reduction in their rates of pay. The sole adverse impact that the Claimants allege here is that they each have suffered a drop in their opportunities to work overtime.

The critical question is whether there is a reasonably direct causal connection, or nexus, between the merger and the drop in the Claimants' overtime opportunities. If the loss of overtime was "caused" by the CSXT-Conrail merger, then the Claimants may properly be characterized as having been adversely affected by this transaction and thus

entitled to protective benefits under the *New York Dock Conditions*. If no such causal connection can be established, then the Claimants are not entitled to any benefits.

The Organization relies on the fact that fifteen former Conrail employees transferred to the Savannah Signal Shop in the wake of the merger and were dovetailed into the Shop's Seniority Roster. The Organization asserts that these events, a direct result of the merger, caused the Claimants' overtime opportunities to drop, and that this constitutes the causal nexus between the merger and the adverse impact upon the Claimants.

Obviously if fifteen employees are added to a shop, and there is no corresponding increase in available work, then the mere presence of the additional employees will reduce available overtime for all. Similarly, if these additional employees are dovetailed into the shop's seniority roster and overtime is offered on a seniority basis, then any employees who are lower on the list will receive fewer overtime assignments. But does this mean that the Claimants suffered an adverse impact as a direct result of the merger? An analysis of the evidentiary record demonstrates that the answer to this question must be "no."

Those of the Claimants who are lower on the seniority list than some or all of the former Conrail employees who transferred to the Savannah Signal Shop have experienced a loss of certain overtime opportunities simply because they have less seniority than the former Conrail employees and now occupy a lower spot on seniority

roster. The seniority-based distribution of overtime is governed by the collective bargaining agreement between the Carrier and the Organization, and this factor in the reduction of the Claimants' overtime opportunities obviously is not related to the CSXT-Conrail merger.

It also must be noted that the mere presence of these former Conrail employees means that a greater number of straight-time hours are being worked at the Savannah Signal Shop, with more work being completed during straight-time hours. The effect of this aspect of the situation is magnified by the Carrier's creation of fourteen new positions at the Savannah facility; half of these new positions were filled by employees who transferred to the Savannah Signal Shop from various field locations, and the other half were filled by newly hired employees. The Carrier's creation of these new positions also is significant in that this action is completely separate from the merger. As with the presence of the former Conrail employees, the addition of fourteen new positions at the Savannah Signal Shop unquestionably resulted in a decrease in overtime work opportunities for all employees at the shop. The drop in the Claimants' overtime opportunities is due, at least in part, to this step, which has no connection to the CSXT-Conrail merger.

There is yet another factor that explains some part of the Claimants' reduced overtime opportunities. The Carrier has pointed out that budget constraints, again unrelated to the merger, caused it to eliminate unnecessary overtime work at the

Savannah Signal Shop and to reduce the amount of wiring work performed by employees at the Savannah facility. Obviously, these moves adversely affected all employees at the Savannah Signal Shop, particularly those who are lower on the seniority roster.

Therefore, the evidentiary record conclusively demonstrates that the adverse impact experienced by the Claimants has not been directly caused by the CSXT-Conrail merger. Instead, the addition of new employees and employment positions to the Savannah Signal Shop, the fact that some of these newly added employees have more seniority than the Claimants, and the elimination of unnecessary overtime and certain signal work because of budget constraints all combined to cause a reduction in the Claimants' overtime opportunities. None of these factors properly can be described as establishing a causal nexus between the merger and the adverse impact upon the Claimants. Instead, all of these are nothing more than post-merger actions and events. Moreover, some of these post-merger occurrences have absolutely no relationship at all, whether direct or indirect, to the CSXT-Conrail merger, although they did contribute to the reduction in overtime opportunities at the Savannah Signal Shop. The simple fact that the merger occurred therefore did not result in lost overtime opportunities for the Claimants. Instead, the evidentiary record makes clear that the Claimants probably would have experienced such a loss even if the merger never had occurred.

The Organization therefore has failed to establish the existence of a causal nexus between the transaction at issue, the merger involving the Carrier and Conrail, and the

subsequent drop in the overtime opportunities available to the Claimants, which had an adverse effect upon their overall compensation. Because there is no such causal nexus, there is no basis for awarding the Claimants any remedy under the terms of the *New York Dock Conditions*.

Award

The Question at Issue posed by the Carrier is answered in the negative.

The Question at Issue posed by the Organization is answered in the negative.

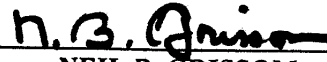
The Claimants are not entitled to protective benefits under the provisions of the *New York Dock Conditions*.



PETER R. MEYERS
Chairman and Neutral Member

C. A. MCGRAW
Organization Member

DATED: _____



NEIL B. GRISSOM
Carrier Member

DATED: 5/21/01

In the Matter of Arbitration)
Between)

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES)

and)

CSX TRANSPORTATION, INC.)

OPINION AND AWARD

Before an Article I, Section 11
Arbitration Committee,
Nicholas H. Zumas, Chairman

BACKGROUND

The undersigned Neutral was selected as Chairman of an Arbitration Committee established pursuant to Article I, Section 11 of Appendix I of I.C.C. Finance Docket No. AB-36 (Sub. No. 2) (hereinafter "Oregon Short Line" or "OSL"). Hearing was held February 9, 1990, in Washington, D.C., at which time exhibits were offered and made part of the record and oral arguments were heard. The parties presented pre-hearing submissions. The Brotherhood of Maintenance of Way Employes (hereinafter "BMWE" or "Organization") was represented by Neil J. Marquar; and CSX Transportation, Inc. (hereinafter "CSX" or "Carrier") was represented by Cathy Szeremi.

STATEMENT OF FACTS

On April 3, 1987, CSX served notice of its intent to abandon 34.82 miles of track between C&O Junction, Kentucky and Stanford, Kentucky on or about July 1, 1987. There was no notice served on the BMWE; notice was served on the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU), which represented employees that CSX acknowledged would be affected by the abandonment.

___ The section of track to be abandoned was maintained by Claimants. Claimants are members of the Lebanon Section Gang. (There is a separate gang known as the Lebanon Junction Section Gang that is referred to in the BMW's claim.)

Claimants have been headquartered at Lebanon, the same location. Since the abandonment, they have worked in different territories, including that of the Lebanon Junction Section Gang. Claimants' positions were not abolished, nor have the individual claimants been dismissed or displaced by other employees whose positions were abolished. There is no evidence of change in Claimants' compensation since the abandonment. Claimants have worked regularly since the abandonment, although some have been furloughed during the winter. The BMW states that the Lebanon Gang was abolished on January 8, 1988, but presents no documentation of this.

Appendix I, Section 1 of OSL provides:

1. Definitions.--

- (a) "Transaction" means any action taken pursuant to authorizations of this Commission to which these provisions have been imposed.
- (b) "Displaced employee" means an employee of a railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
- (c) "Dismissed employee" means an employee of a railroad who, as a result of a transaction is deprived of employment with a railroad because of the abolition of his position or the loss thereof as the result of a transaction.
- (d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom: provided, however, that the protective period for benefits under section 6 of this article for any particular employee shall not

continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of a railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provision of section 7(b) of the Washington Job Protection Agreement of May 1936.

ISSUE

The question to be resolved is whether Claimants were affected by the abandonment approved by the I.C.C. If so, then the labor protection benefits claimed should be properly computed and awarded.

POSITION OF THE ORGANIZATION

The BMWE contends that Claimants are entitled to labor protection benefits similar to those received by employees represented by the BLE and the UTU. The BMWE contends, by implication, that Claimants were adversely affected by the abandonment of the track near Lebanon as required by OSL. The BMWE objects to Claimants continuing to work out of Lebanon on other territories following the abandonment, and asks rhetorically why Claimants would remain at a location in which the track is no longer in service. The BMWE asserts that it has shown that the Lebanon Section Gang was abolished, and that between the time of the approval of the abandonment and the abolishment of the gang, the Claimants continued to be headquartered at their same location, Lebanon, Kentucky, while working on other territories.

POSITION OF THE CARRIER

CSX contends that the BMWE has the burden of proving that Claimants are entitled to labor protection benefits under OSL, and that the BMWE has failed to do so. CSX maintains that the BMWE has not proved Claimants were adversely affected by the abandonment. The Carrier contends that Claimants have continued to work at the same compensation, subject to normal seasonal furloughs, as they did before the abandonment and cites Claimants' personnel records as proof of these facts. CSX contends that since the BMWE has failed to meet its burden of proving adverse affect, that the burden has not shifted to CSX to prove that factors other than the abandonment affected Claimants. Nevertheless, the Carrier maintains that Claimants were not placed in a worse position as to their employment as a result of the abandonment.;

The Carrier also contends that it was not required to notify the BMWE of the abandonment because none of its members would be affected by the abandonment. Finally, CSX argues that the BMWE is accusing it, in effect, of not abolishing jobs, whereas what CSX did was preserve Claimants' jobs.

FINDINGS AND CONCLUSIONS

It is well settled that the burden of proving entitlement to OSL labor protection benefits rests with the Organization. The Organization must prove that actions of the Carrier placed Claimants in a worse position as a

result of the abandonment approved by the I.C.C. The Organization must show a causal nexus between the abandonment and harm to Claimants.

In the matter before the Committee, the BMWE has failed to sustain its burden of proof. First, the BMWE has not shown any adverse effect on Claimants, and second, it has not shown the relationship of that effect to the abandonment. The persuasive evidence in the record proves quite the contrary. Claimants continued to work their previous assignments at the same location doing the same type of work after the abandonment, as adjusted for the seasonal nature of their work. There is no showing that Claimants were dismissed or displaced. Even assuming that the Organization is correct in its assertion that Claimants' gang was abolished in January 1988, the evidence included in the personnel records clearly demonstrates that Claimants have continued working regularly. There is no claim that they had to relocate or undergo any disruption in their employment. Having failed to prove the adverse effect on Claimants, the BMWE cannot prove its relation to the abandonment as required by OSL. Therefore, the required causal nexus does not exist, and the Organization fails in both prongs of its burden of proof.

AWARD

This Board finds that the employee protective conditions of Oregon Short Line are not applicable to Claimants herein.

Date: 3-26-90


Nicholas H. Zumas
Chairman and Neutral



Labor Relations
6735 Southpoint Dr. S. 3670
Jacksonville, FL 32216-6177

N. B. Grissom, Director Labor Protection
(904) 279-6489
FAX (904) 279-6345

September 19, 2001

Mr. J. Czuczman
International Vice-President
Director Railroad Division
Transport Workers Union of America
80 West End Avenue
New York, NY 10023

Attention: G. Maslanka, IR

Dear Mr. Maslanka:

This refers to conference held August 9, 2001, concerning the Organization's continuing appeal for New York Dock benefits on behalf of J. P. Oddi, ID 789041, and P. B. Rivers, ID 789042, working as carmen at Watertown, New York facilities.

As stated earlier in my February 5, 2001 letter, the Organization must prove that action of CSXT placed these employees in a worse position as a direct result of the transaction. The Organization must show a causal nexus between the abandonment and any alleged harm to the individual. The Organization has failed to meet this burden of proof in the request and appeal process. It merely continues to paint assertions with a broad brush.

There has been no demonstrated adverse effect on these individuals, and the record fails to show the relationship of any adverse effect upon them directly linked to the transaction. Your perfunctory appeal and subsequent boiler-plate letters on each employee neither mentioned any pertinent facts nor provided any evidence as support relative to either employee's work performance in the period from June 1, 1998 through May 31, 1999, and after Split day, i.e., June 1, 1999. Simply citing gross yearly earnings for three calendar years from WFIS (Work Force Information System) is not sufficient proof of adverse affect in respect to compensation. As mentioned earlier, it is a normal cycle for employees to have gross yearly earnings which fluctuate by thousands of dollars each calendar year.

Such rise and fall in annual compensation may occur as a personal matter for the employee or business-related impacts unassociated with a transaction. As a personal matter, the vacillation may have occurred as a result of an employee's illness, or purely a desire not to work as much as before. As business related impacts, the changes could occur by traffic increases or declines as a result of the national or local economic activity, or it could have occurred because there was a change in management policies or local supervision.

Further, these employees have not had "substantially diminished work opportunities" as you have asserted. Both Conrail and CSXT have a policy and long-standing practice of using outside contractors to perform wrecking and other such work. Such work is not a primary duty of carmen. As discussed in conference, the Organization had filed schedule agreement grievances about outside vendors doing wrecking service on Conrail which were not successfully progressed (See PLB-4410, Award Nos. 43, 44, and 45). Likewise, the work of adjusting or transferring loads is the same story. Simply put, this is shared work and the carmen continue to perform such work when needed. The Organization has not proven otherwise.

Pointedly, no supervisor can recall either employee doing a locomotive traction motor change over the last three year period. Despite numerous conferences, the record remains bereft of any count or exact dates these two employees participated in rerailling, adjusting loads, or the transferring of loads.

Also, the Organization asserted these employees have experienced a loss of earnings due to the classification of work penalty payment lost as a direct result of the Conrail transaction. No evidence has been presented in this respect.

A review of the record indicates that claimants Oddi and Rivers have continued to work the same jobs at Watertown, NY after the transaction as before it. Neither was their positions abolished nor were they displaced. They have not suffered a reduction in their daily rate of pay as a result of the "red circle" rate of pay provision. Their primary duties remain. Mr. Oddi works as a Lead Carman and Mr. Rivers works as a Carman/Welder. These jobs encompass the following classification of work:

Carmen's work shall consist of building, maintaining, dismantling (except all-wood freight train cars); painting, upholstering and inspecting all passenger and freight cars, both wood and steel; planing mill, cabinet and bench carpenter work; pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; carmen's work in building and repairing motor cars, lever cars, hand cars and station trucks; building, repairing, removing and applying locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards, tender frames and trucks; pipe and inspection work in connection with air brake equipment on freight cars; applying patented metal roofing; operating punches and shears, doing shaping and forming; work done with hand forges and heating torches in connection with carmen's work; painting with brushes, varnishing, surfacing, decorating, lettering, cutting of stencils and removing paint (not including

use of sand blast machine or removing in vats); all other work generally recognized as painters' work under the supervision of the locomotive and car departments except the application of blacking to fire and smoke boxes of locomotives in engine houses; joint car inspectors, car inspectors, safety appliances and train car repairers; oxyacetylene, thermit and electric welding on work generally recognized as carmen's work; and all other work generally recognized as carmen's work.

Specifically, no change occurred at this location as a result of the June 1999 transaction. CSXT simply assumed this Conrail location and trackage without any change. Watertown, NY is located approximately 60 miles north of Syracuse, NY on a secondary line that handles shipments from local industries consisting of lumber, pulp, and paper. Also, traveling over this line is interchange revenue traffic from the Canadian National. None of this business has been negatively impacted by the transaction.

If these employees have had diminished overtime earnings subsequent to becoming CSXT employees, it is not because of the transaction but rather due to the fact that there have been other business influences unrelated to the acquisition. The winter weather conditions over the last two years have been less severe than the winter of 1998; hence, this good weather has reduced the need for overtime service. Also, local traffic and shipments of lumber, pulp, and paper have declined as a result of the downturn in the National economy. A Watertown shipper, Champion Paper, went out of business in the early part of this year, so car inspections and repairs are down at this facility. CSXT's economic circumstances worsened as part of the declining National economy, forcing the railroad to make operational and financial adjustments unrelated to the transaction. Claimants' supervisor, Frank Bumboulo - General Foreman, runs an even tighter budget in respect to overtime service at his facilities.

The fact that these employees are not performing as much casual and unassigned overtime work today as they did in the past, does not qualify them as "displaced employees" and, thus entitle them to New York Dock protection.

In conclusion, there has been no evidence and/or information presented during conference which would serve to change or modify our previous decisions. Respectfully, these requests are again denied in their entirety.

Very truly yours,

N. B. Grissom

SURFACE TRANSPORTATION BOARD

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION (AFL-CIO), LOCAL NO. 1913,

Union,

and

NORFOLK SOUTHERN RAILWAY COMPANY,

Carrier.

)
)
)
) Pursuant to Section 11 of the
) New York Dock Conditions

)
) STB Finance Docket No. 33388

)
) Ashtabula, Ohio Coal Dock
)
)
)

OPINION AND AWARD

Date of Hearing: May 10, 2000

Location of Hearing: Washington, D.C.

Date of Award: June 14, 2000

Appearances:

For the Carrier:

Harold R. Mobley, Assistant Vice President, Labor Relations
A. J. Licate, Director, Labor Relations
Greg Edwards, Assistant Director, Labor Relations
Jeffrey H. Burton, Esq., General Solicitor

For the Union:

Clarence Turnquist, President, Local 1913
Dwight E. Johnson, Vice President, Local 1913
Harold A. Ross, Esq., Ross & Kraushaar Co., L.P.A.

Background:

On July 20, 1998, the Surface Transportation Board ("STB") entered
a decision in *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and*

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Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail, Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, which approved, with certain conditions, the acquisition of control of Conrail ("CRC") by CSX and the Norfolk Southern Railway ("NSR" or "Carrier"), and the division of the assets of Conrail between CSX and NSR. Among those conditions, the STB imposed the conditions set forth in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), *aff'd sub. nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) ("*New York Dock Conditions*"), for the protection of the employees of the carriers involved, including those of Conrail.

On the closing date, June 1, 1999, CSX, NSR and Conrail assumed operational control over former Conrail lines and facilities consistent with the STB's decision. On that date, all longshoremen employed at Conrail's Ashtabula Docks became employees of NSR. At all times relevant to this dispute, these employees have been represented by the International Longshoremen's Association, Local 1913 ("the Union"). In anticipation of the closing, the NSR and the Union, on April 12, 1999, entered into an implementing agreement in satisfaction of Article I, Section 4 of the *New York Dock Conditions*, and to permit the Ashtabula Coal Dock to be operated in accordance with the NSR normal operating procedures. In conjunction with the implementing agreement, the NSR and the Union negotiated and agreed to a new collective bargaining agreement to govern the rates of pay and working conditions of the production and maintenance employees at the Ashtabula Coal Dock. This collective bargaining agreement was referenced in Article II of the implementing agreement as follows:

ARTICLE II

Those CRC employees who become NSR employees under this implementing agreement will be available to perform service on a coordinated basis subject to the Collective Bargaining Agreement (CBA) attached hereto, between NSR and the International Longshoremen Association, Local 1913.

The new collective bargaining agreement changed, *inter alia*, the rates of pay for longshoreman positions at the Coal Dock. Within the implementing agreement, however, the parties agreed to the following provision which effectively red circled the rates of the CRC employees for a period of time. That provision reads as follows:

ARTICLE IV

An employee who was in active service under the ILA agreement at the Ashtabula Coal Dock facility on the effective date of this implementing agreement, and who, on that date held a position with a Conrail rate that was higher than the corresponding new NSR rate will be "red circled" and will continue to receive for a period of six years or his or her length of service, whichever is less, any applicable higher Conrail rate (for the position which he or she is working) so long as such employee a) continues to hold a regular or relief assignment at the Ashtabula Coal Dock; b) occupies a position with an NSR rate that is less than the rate (as would otherwise have been adjusted by subsequent general wage increases) of the Conrail position he or she held on the effective date of the implementing agreement; and c) occupies the highest rated position available to him or her. [The applicable red circle rate for an employee who was on the extra list on the effective date of the implementing agreement employee *[sic]* will be equal to the average of all positions he or she worked during November, 1998.]

Additionally, within the new collective bargaining agreement, the parties negotiated the following provision:

ARTICLE XXII - GRANDFATHERED EMPLOYEES

Section 1 - A Grandfathered Employee is an employee who was in active service under the ILA agreement at the Ashtabula Coal Dock facility on the effective date of the NSR/CR/ILA implementing agreement if that individual is within his or her Grandfathered Period as defined herein.

The Grandfathered Period for an employee who had less than 6 years service under the CR-ILA agreement on the effective date of the implementing agreement will be equal to

his or her length of service under the CR-ILA agreement on the effective date of the implementing agreement.

The Grandfathered Period for an employee who had 6 years or more service under the CR-ILA agreement on the effective date of the implementing agreement will continue while that individual is covered by the NSR-ILA collective bargaining agreement and amendments thereto.

Section 2 - Should the number of employees working on one or more shifts that are being worked be less than the number that would have been required under the previous CR-ILA agreement, and there are Grandfathered Employees who cannot hold a position, a sufficient number of available Grandfathered employees will be used to augment the work force, on one or more of the shifts being worked, up to the number of such Grandfathered employees or the number of positions previously required by the CR-ILA agreement, whichever is less. [For purposes of this Section 2 only, the number of positions previously required under the CR-ILA Agreement will be considered to be: for first shift, 23 positions in navigation season, 21 positions out of navigation season; for second and third shifts, 15 positions in navigation season, and 13 positions out of navigation season, when those shifts are worked.]

Section 3 - Notwithstanding anything to the contrary in this agreement, the Carrier may not establish positions which do not have Saturday/Sunday rest days if a Grandfathered employee who can hold a position is unable to hold a position with Saturday/Sunday rest days.

Section 4 - Notwithstanding anything to the contrary, a Grandfathered employee assigned to a 1st, 2nd, or 3rd shift position with Saturday-Sunday rest days will, if his or her shift is worked on Saturday or Sunday, be given the opportunity to work on such Saturday or Sunday.

Section 5 - Grandfathered employees will rotate between shifts effective at 7 a.m. on the first Sunday of each month. First shift grandfathered employees will rotate to third shift, second shift grandfathered employees to first shift, and third shift grandfathered employees to second shift (or, in the case of a two shift operation, first shift grandfathered employees will rotate to second shift and second shift grandfathered employees will rotate to first shift). Rotation will only take place to the extent that there are grandfathered employee [sic] working on all three shifts (or on both shifts if only two shifts are working). If there are more grandfathered employees on one shift than another, only the lesser number of employees could rotate. Moreover, rotation will only take place between grandfathered employees who hold positions with the same bulletined primary duties.

On May 17, 1999, NSR issued a bulletin advising that all (57) Conrail Agreement bid job positions would be abolished with the close of business on May 31, 1999. The bulletin further

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advised that effective June 1, 1999, the dock would operate under the Norfolk Southern in accordance with its new collective bargaining agreement with the Union. The same day, the Carrier issued a second bulletin advertising 53 new positions. These positions were awarded on May 25, 1999, and began work on June 1, 1999.

In June 1999, longshoremen at the coal dock began filing claims for benefits with the NSR, asserting they were placed in a worse position with respect to their compensation. In all, 51 employees filed claims, asserting they were placed in a worse position as to conditions of employment or deprived of employment on June 1, 1999, because their Conrail jobs had been abolished and they received different jobs with increased duties from NSR. In addition, the employees alleged their compensation would decline as a result of reduced earnings, elimination of shift differentials, elimination of overtime, a reduction in holiday and vacation pay, and other changes to premium pay. The NSR has denied these claims, asserting the employees had not been placed in a worse position with respect to their compensation nor have they been deprived of employment as a result of a transaction as defined in *New York Dock*.

Unable to reach resolution of these claims, the parties agreed to submit the dispute to arbitration pursuant to Section 11 of the *New York Dock* Conditions. The Union named General Chairman Clarence E. Turnquist as its member of the Arbitration Committee, and the NSR named Harold R. Mobley as its member. The parties jointly selected Barry E. Simon to serve as the Chairman and Neutral Member of the Committee. Hearing was held on this matter on May 10, 2000, in the offices of the National Mediation Board in Washington, D.C.

Issues Presented:

The Union states the issues before the Arbitration Committee as follows:

1. Are the fifty-one claimant longshoremen represented by the organization at Norfolk Southern Railway's Ashtabula Dock displaced employees within the meaning of the *New York Dock* employee protective conditions?
2. Shall the Carrier be required to determine the claimants' test period averages as of the date affected and allow their claim for *New York Dock* displacement allowances with enhancement of pension and fringe benefits and interest until paid?

The Carrier states the issue as follows:

1. Were the 46 claimants represented by the International Longshoremen's Association at Ashtabula Docks, Ohio placed in a worse position with respect to compensation as a direct and proximate result of the transaction on June 1, 1999?

Position of the Union: The Union advises that the *New York Dock* Conditions set the level of protective benefits afforded to employees who are adversely affected by an acquisition or consolidation of railroads. It submits that the key portions of *New York Dock* that must be considered by the Committee are Sections 1(a), as to the meaning of "transaction," 1(b) defining "displaced employee," and 5 describing "displacement allowances," the formula for determining the allowance, and when the allowances are to be paid. It argues that a proper interpretation and application of these provisions requires a finding that the claimants are displaced employees entitled to the allowances provided in the *New York Dock* Conditions.

Under Section 1(b) of the Conditions, the Union says there are two issues, namely (1) whether there has been the consummation of a transaction within the meaning of Section 1(a), and

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(2) whether a claimant was directly or indirectly affected by the transaction which has "placed him in a worse position with respect to either his compensation or rules governing his working conditions." In this regard, the Union refers to *Transportation-Communications International Union (BRAC) and Missouri Pacific Railroad Company and Union Pacific Railroad Company*, Award No. 5 (LaRocco, March 1, 1988). In this case, argues the Union, the transaction was the acquisition and control by NSR of portions of Conrail, including the Ashtabula, Ohio Coal Dock.

The Union asserts each claimant was either directly or indirectly affected by the acquisition when, on May 31, 1999, Conrail's operation of the Dock was concluded and all the jobs were abolished, and then, on June 1, 1999, claimants were assigned to new jobs with new titles and different and additional duties under new working rules and working conditions. It avers that these working conditions were more onerous than those in effect when Conrail owned and operated the Dock. Furthermore, says the Union, some or all of the claimants had reductions in compensation as of the first day of NSR operations and thereafter. Accordingly, the Union concludes that claimants are displaced employees within the meaning of Section 1(b) of the Conditions.

The Union rejects NSR's argument that claimants were not affected by a transaction because they secured, or could have secured, equal or higher paying positions in the exercise of their seniority rights. Citing *Transportation Communications International Union (BRAC) and Norfolk Southern Corporation*, Award No. 1 (Roukis, April 19, 1989), the Union argues the appropriate measure is total monthly compensation, rather than hourly rates. That Board held:

Pursuant to Article I, Section 5(a), an employee displaced by a transaction who is unable to secure a position producing compensation not rate of pay, equal to or exceeding the compensation he received in the position from which he is displaced shall be paid a monthly

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displacement allowance during the protective period. Said allowance shall equal the difference between the monthly compensation in the retained position and the average monthly compensation of the position from which displaced. Further the allowance is determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months immediately preceeding [sic] the transaction.

In this case, says the Union, claimants' monthly test period averages were substantially greater than the rates of pay due to overtime and other factors. The Union further cites Docket No. 62 before the Committee established by Section 13 of the Washington Agreement of 1936, in a dispute between the Brotherhood of Railway and Steamship Clerks and the Chesapeake and Ohio Railway, with Referee Bernstein, as being the authoritative source on displacement allowances, and holding, "The Agreement makes 'compensation' the test of 'worse(ned) position' and the test period formula provides the normal and usual yardstick of compensation." The Carrier's red circled rate, concludes the Union, is not a valid ground for denying displacement allowances to the claimants.

The Union further denies that the provisions of the new collective bargaining agreement, negotiated simultaneously with the implementing agreement, override the protections contained in the order of the Surface Transportation Board. It denies the Carrier may negotiate itself out of the payment of protective allowances.

The Union acknowledges that decisions of the courts and the Surface Transportation Board have recognized that collective bargaining agreements may be superseded when it is necessary to accomplish the involved mergers and to obtain the economy and efficiency of those transactions, but asserts the quid pro quo for those changes is the assurance that employees would not be placed in a worse position with respect to their compensation. To effectuate such changes, asserts the

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Union, the Carrier must show that "the modification is necessary in order to secure to the public some transportation benefit."

The Union cites *Norfolk & Western Railroad Co. v. Nemitz*, 404 U.S. 37 (1971), dealing with the validity of a post-consolidation collective bargaining agreement that had substantially abrogated certain compensation protections guaranteed the employees under a prior agreement that had been adopted by the Interstate Commerce Commission. The Union notes the Court rejected the Carrier's argument that the agreement was permissible under the last sentence of Section 5(2)(f), holding, "An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order." According to the Union, the abolishment of the monetary protections of the *New York Dock Conditions* through collective bargaining provisions would be contrary to the STB's recent decisions, and would not be authorized by statute or judicial decision.

With regard to the computation of test period averages, the Union argues that compensation should include all elements, including regular, recurring or casual overtime, holiday pay, weekend pay, shift differentials and other such compensation.

For the reasons stated, the Union asks the Committee to answer the questions presented in the affirmative.

Position of the Carrier: The Carrier first asserts the Union has failed to establish that claimants have been affected by a transaction. It notes that on each of their monthly claim forms, when asked to explain how they were adversely affected, claimants referred to a provision in the

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new collective bargaining agreement as being different from the old agreement. None, says the Carrier, explained how the new agreement placed them in a worse position with respect to their earnings as the result of the transaction. Because the first of these claims were submitted less than a month from the effective date of the implementing and collective bargaining agreements, the Carrier questions how any of them could have been adversely affected. According to the Carrier, most, if not all, of the changes would not be implemented for a year or more after the effective date of the new agreement. Further, the Carrier asserts that any potential adverse impact was either reduced or eliminated by the "grandfathering" provisions of Article XXII of the new agreement. Under this provision, explains the Carrier, all longshoremen in active service on the date of NSR assuming control of the Ashtabula Dock are insulated from many of the changes in the agreement, and, for instance, would continue to have Saturday and Sunday rest days, as well as the opportunity to work overtime on their rest days. Additionally, notes the Carrier, grandfathered employees would continue to receive the same rates of pay they had received under the Conrail agreement for up to six years, depending upon their length of service. For this reason, the Carrier denies the claimants can be considered "displaced employees," as that term is defined in the *New York Dock Conditions*.

The Carrier reminds the Committee that the Union has the burden of proof in establishing a causal nexus between a transaction, as defined in the protective conditions, and any adverse effect experienced by the claimants. It denies that this burden has been satisfied in this case. The Carrier asserts there has been no consolidation of separate work forces, coordination, transfer of work or any other action on Carrier's part, since its assumption of control of the Coal Dock, that would meet the definition of a "transaction," i.e., an action taken pursuant to authorization of the Surface

Transportation Board. Rather, says the Carrier, the only change occurring at Ashtabula that has affected the longshoremen has been the negotiation of a new collective bargaining agreement pursuant to the Railway Labor Act. As the negotiation of this agreement was not pursuant to STB authorization, and did not require prior approval of the STB, the Carrier argues it was not a transaction entitling claimants to the protective benefits of *New York Dock*. In this regard, the Carrier cites several awards where employees were found not to be entitled to protective benefits because they were adversely affected by collective bargaining agreements that did not require the approval of the Interstate Commerce Commission.

The Carrier further denies claimants are entitled to *New York Dock* benefits as a result of losing mandatory overtime on the first shift on Saturdays. This loss, says the Carrier, resulted from the negotiation of the new agreement. It further denies that weekend overtime ceased after the consummation of the Conrail transaction. It submits evidence that weekend overtime continued to exist between June 1, 1999, and February 2000, albeit to a lesser degree. The Carrier submits this reflects a decline in business rather than a change in the operation of the dock on weekends. It avers there had been a 12.9% decline in business during this period as compared to the previous year. The Carrier additionally asserts that several of the claimants herein have refused to perform weekend overtime work when it was available to them.

The Carrier concludes that the Union's claim is nothing more than an attempt to secure a windfall for the claimants. Each December, notes the Carrier, the Ashtabula Dock shuts down for the winter when Lake Erie becomes unnavigable. From the third week in December to April first, according to the Carrier, the second and third shifts are not working and many of the employees are

furloughed. The first shift, supplemented by a few employees from the other shifts, says the Carrier, perform maintenance work during this period. The Carrier calculates that the furloughed employees would receive a windfall during the winter season in the form of monthly dismissal allowances if they were afforded *New York Dock* benefits.

For these reasons, the Carrier asks that the claims be denied.

Discussion: The question in this dispute is whether claimants are entitled to protective benefits afforded under the *New York Dock* Conditions imposed by the Surface Transportation Board when it authorized the acquisition and control of certain of the assets of Conrail by CSX and NSR. Fundamental to this question is the definition of "displaced employee," which, under *New York Dock*, means "an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions." This definition contains two tests. The first test is whether the employee has been placed in a worse position with respect to compensation and rules governing working conditions. The second test is whether such an effect has been the result of a transaction. Both tests are at issue in this case. If the facts in this case fail to meet one of the tests, claimants would not be considered displaced employees even if the other test is satisfied. Having determined that one test is not satisfied, however, it would be unnecessary for the Committee to continue its inquiry. Thus, the Committee's inquiry may begin with either test.

It is well established that the employee has the initial burden of proof under Article I, Section 11(e)¹ to establish a causal nexus or link between the transaction authorized by the Interstate Commerce Commission or its successor, the Surface Transportation Board, to which the labor protective conditions are applicable and the adverse effect suffered by the employee. Only if and when the employee meets that burden is the Carrier obligated to bring forth evidence satisfying its burden under Article I, Section 11(e). See *Brotherhood Railway Carmen and Norfolk and Western Ry. Co.*, Award No. 4 (LaRocco, October 10, 1986).

The *New York Dock* Conditions define "transaction" as any action taken pursuant to authorizations of this Commission to which these provisions have been imposed." In adopting this definition, the Interstate Commerce Commission accepted language suggested by the Railway Labor Executives Association ("RLEA"). The Commission offered the following explanation for this language:

The labor organizations also request that the definition of the term "transaction" in Article 1, section (1)(a), be modified to encompass the same situations as the complementary term "coordination" does in WJPA. These terms are the triggering mechanisms of Article 1, section 4 and sections 4 and 5 of WJPA, respectively. Since Article 1, section 4 here is intended to incorporate the full protections of sections 4 and 5 of WJPA, the term "transaction" should be redefined to set the notice, negotiation, and arbitration provisions in motion in the same situations as does the term "coordination". We also note that the broad definition is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 *et seq.*, because the event actually affecting the employees might occur at a later date than the initial transaction, yet still pursuant to our approval (consolidation of employee rosters, etc.). In all these situations, employees should be given notice and the right to negotiation and arbitration; therefore, we will modify the term "transaction" so that it will

¹This provision states: "In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee."

apply to any action taken pursuant to a Commission authorization upon which these conditions are imposed. . . .

It is significant that the RLEA's proposal contained the following preface:

The scope and purpose of this Appendix is to provide for fair and equitable arrangements to protect the interests of employees of railroads affected by actions taken pursuant to authorizations or approvals of this Commission to which this Appendix has been imposed. Therefore, fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of this Appendix.

While it is true that a transaction occurred when the Carrier consummated its acquisition of certain assets of Conrail, including the Ashtabula Coal Dock, it was not this event that the Union contends adversely affected the claimants. A change in ownership, without any further action, would not be sufficient in any case to entitle employees to the protective benefits of *New York Dock*. Virtually all arbitration decisions involving claims for protective benefits arise out of a merger, an abandonment in the case of *Oregon Short Line Conditions*, or a trackage rights agreement in the case of *Mendocino Coast Conditions*. The existence of that initial transaction, however, is generally insufficient to demonstrate the necessary causal nexus to the adverse effect suffered by the employees. Clearly, if the Carrier had acquired the Coal Dock and had retained the extant collective bargaining agreement, any loss of earnings by the employees would have to be attributed to some external cause not within the purview of the *New York Dock Conditions*. For instance, if the new owner introduced work methods or equipment that required fewer employees or resulted in less overtime, any adverse effect would not be attributable to the transaction.

Thus, some other transaction must have occurred to provide that causal nexus. In this case, the Union points to the abolishment of the positions that existed under the Conrail agreement on May 31, 1999, and the establishment of the new jobs under the NSR agreement on June 1, 1999.

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It was this event, according to the Union, that resulted in a reduction in earnings as well as more onerous working conditions, as reflected in the employees' job descriptions with expanded duties. To prevail in its case, therefore, the Union must first establish that this event meets the definition of "transaction."

While the Carrier entered into a new collective bargaining agreement with the Union, and its purpose for doing so was to harmonize the agreement with its other maritime facilities, the longshoremen at Ashtabula remain a separate and distinct bargaining unit. Ashtabula is the only facility where employees are represented by the Union, and the new collective bargaining agreement covers only this facility. There has been no merger of seniority rosters nor a consolidation of seniority districts. Similarly, there is no allegation work has been consolidated with other facilities, or transferred to or from other facilities.

The test uniformly applied by arbitrators is whether the action taken by the Carrier required approval of the Interstate Commerce Commission or the Surface Transportation Board. In Award No. 1 of Special Board of Adjustment, Brotherhood of Locomotive Engineers and Norfolk and Western Ry. Co., (Arthur T. VanWart, January 30, 1984), the Carrier had implemented the provisions of Article III, Section 5 of the UTU July 19, 1972 National Manning Agreement subsequent to the merger of the Norfolk and Western Railway and the Southern Railway. In denying *New York Dock* protective benefits, the Board held:

That Carrier prior to June 1 or September 11, 1982 had not implemented the provisions of Article III of Section 5 of the UTU July 19, 1972 National Manning Agreement did not preclude it from placing said provisions into effect. Such action did not require approval of the Interstate Commerce Commission in order to place same into effect.

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Therefore, the cases of these individuals and the change in the employment status of these Claimants is outside the protective pale of the employee protective conditions imposed in Finance Docket No. 29430. The Employees failed to establish the causal nexus between the change in the employment status of all of the instant Claimants and the Norfolk-Southern consolidation.

Similarly, in *Chicago, Milwaukee, St. Paul and Pacific RR. Co. and United Transportation Union* (Vernon, May 17, 1982) where the Carrier had abolished an assignment and established a new assignment with different characteristics, effected employees were denied the protective benefits of the Milwaukee Road Restructuring Act. Arbitrator Vernon held:

The second reason that the Arbitrator finds that the instant situation is not covered by Section 1(d) is because the Carrier's action is one that could have been taken without ICC approval. We take notice that historically protection agreements are used to provide protection from decisions and the impact of decisions for which ICC approval is needed. The instant situation is one for which ICC approval would not be necessary. The arguments of the Carrier have convinced us of this. See for example Arbitrator Zumas's Award in *Norfolk & W. Ry v. Brotherhood of Locomotive Engineers*, Arbitration under *New York Dock II* conditions, decided February 1, 1982.

The creation of the new jobs, as well as any other changes introduced by the Carrier, in this case stemmed from the adoption of a new collective bargaining agreement. From all outward appearances, this agreement was reached in accordance with the provisions of the Railway Labor Act. It was neither required by the Surface Transportation Board nor subject to their review and approval. To be sure, no action was sought or taken by the STB in connection with this agreement. It was a change that Conrail could have made had the transaction with CSX and NSR not occurred. This was, therefore, not a transaction as defined in the *New York Dock* Conditions. We reach this conclusion notwithstanding the fact the agreement was made concurrently with an implementing agreement.

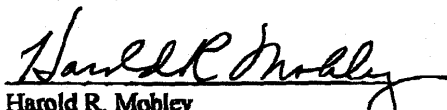
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1913
NORFOLK SOUTHERN RAILWAY COMPANY
NEW YORK DOCK ARBITRATION COMMITTEE
PAGE 17

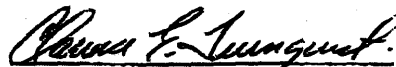
We do not accept the Union's argument that it was coerced or deceived by the Carrier into making this agreement. In the field of labor relations, it is presumed that collective bargaining agreements are freely entered into by parties of equal standing. Except in extraordinary circumstances, not present here, we must respect the bargaining process, especially when an agreement is put out to the membership for ratification.

Finding the Union has failed to prove the existence of a transaction to which there is a causal nexus, it is unnecessary for this Committee to determine if claimants were actually placed in a worse position with regard to wages and conditions of employment.

Award: The Statements of Issue of both the Union and the Carrier are answered in the negative.


Barry E. Simon,
Chairman and Neutral Member


Harold R. Mobley
Carrier Member


Clarence E. Turnquist
Employee Member

Dated: June 14, 2000
Arlington Heights, Illinois

BEFORE
AN ARBITRATION BOARD
ESTABLISHED PURSUANT TO SECTION 3 OF THE
RAILWAY LABOR ACT AND SECTION 11 OF THE
NEW YORK DOCK PROTECTIVE CONDITIONS

NORFOLK SOUTHERN RAILWAY (NSR)

-and-

BROTHERHOOD OF RAILROAD SIGNALMEN (BRS)

-and-

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS (IBEW)

BACKGROUND

This dispute concerns a force adjustment made by the Norfolk Southern Railway (NSR) in January 2001 in its Northern Region, namely, that part of the Northern Region that encompasses the former Conrail (CR) territory now operated by NSR. Management eliminated 21 Electronic Specialist/Electronic Technician (ES-ET) jobs and four Communication jobs. It believes this was a legitimate response to rising costs and stagnant revenues and was permissible under the pertinent Collective Bargaining Agreement (CBA) and Implementing Agreements. The Brotherhood of Railroad Signalmen (BRS) disagrees. It urges that this force adjustment violated these Agreements and that NSR also failed to serve a required notice under Article I, Section 4 of the New York Dock (NYD) conditions when it eliminated these jobs and transferred their work to others. The International Brotherhood of Electrical Workers (IBEW) intervened and supports the BRS claim. NSR denies any such violations.

Some history is essential to an understanding of this dispute. The Surface Transportation Board (STB) approved the acquisition of CR by NSR and CSX in July 1998. NSR assumed control of its portion of CR, some 7,000 track miles, in June 1999. This became part of its Northern Region. NSR also controlled Norfolk & Western Railway (NW) which is adjacent to and intersects its new CR property. The jobs in question concerned signal work on systems for directing and monitoring train movements and communication work on systems for transmitting voice and data between points.

Prior to this June 1999 takeover, CR and NW handled signal work somewhat differently. Both employed Signal Maintainers, BRS-represented employees, for almost all of the signal work with each Maintainer responsible for a specific geographic area. Both employed Electronic Specialists at dispatch centers to perform electronic work related mainly to traffic control computers and their interfaces. But CR also had Electronic Specialists at the major hump yards while NW relied on Signal Maintainers for that work. CR ordinarily scheduled Electronic Specialists round-the-clock, that is, three shifts a day and seven days a week. On NW, however, Electronic Specialists were scheduled only on one shift, five days a week, and were called in as needed on the other shifts.

CR also had Electronic Technicians to support Signal Maintainers, roughly one Technician being scheduled for each six to ten Maintainers. The Technician assisted the others in trouble shooting and repairing electronic components and in training them for this work as well. On NW, however, no Technicians (or any similar classification) was used to train the Maintainers. Instead, Maintainers were trained from the beginning to trouble shoot and repair electronic components. CR also had an Inspector with respect to signal work. NW had no such classification.

CR and NW, on the other hand, dealt with communication work in much the same way. That work was essentially the province of IBEW-represented employees. And, as already noted, the signal work was largely the province of BRS-represented employees. There was, however, a small amount

of crossover work at CR. That is, a few BRS people did some communication work and a few IBEW people did some signal work.

* * *

Before the STB made its decision in July 1998, NSR and CSX submitted "operating plans" which spelled out how they intended to integrate their new CR properties into their operations. NSR planned to extend its existing standards, methods and practices for signal and communication work to its CR area. It anticipated the need for changes in its work force arrangements and its CBAs.

STB applied the NYD conditions to the takeover. The carriers, NSR and CSX, were therefore obliged to arrive at an Implementing Agreement with BRS and IBEW. They were to do so through negotiation or, if necessary, binding arbitration before the acquisition of CR could be carried out. The parties had begun such negotiations even before the STB ruling. After much negotiation and after appointment of a neutral referee to resolve their differences, NSR and BRS finally entered into an Implementing Agreement in November 1998. Among other things, they agreed that the CR property taken over by NSR would be governed by the terms of the NW/BRS Agreement as modified by various other understandings.

Another Implementing Agreement was executed in December 1998 between the affected carriers (NSR, CSX and CR) and the affected unions (BRS and IBEW). It provided that communication work on the CR property run by NSR would be governed by the terms of the NW/IBEW Agreement. It provided further that six BRS-represented employees then performing communication work would be covered by the NW/IBEW Agreement, would nevertheless be on the BRS seniority roster, and would remain on their communication jobs "until such time as they vacate the position or it is abolished". It also provided that six IBEW-represented employees then performing signal work on the CR property run by NSR would be governed by the terms of the NSR/BRS Agreement and would be "grandfathered" in this same fashion.

NSR designated the area it had acquired from CR as its Northern Region although, for purposes of collective

bargaining, it is known as the Eastern Region-North (ERN). The parties' Implementing Agreement stated that "the [A]greement in effect on NSR between BRS and [NW]...would also apply on the Eastern Region-North". It stated too that "where the rules in the [A]greement refer to NW classification(s), the rules apply in the same manner to the parallel classification(s) on the Eastern Region-North". It stated further that rather than continue to refer to the existing NW/BRS Agreement, along with the Implementing Agreements, the NW/BRS Agreement would be reformatted and thereafter referred to as the ERN Agreement for NSR and BRS.¹ And the latter ERN Agreement created a single Electronic Specialist/Electronic Technician classification to take the place of what had been separate Specialist/Technician classifications.

One of the Implementing Agreements addressed some wage rate disparities arising from the fact that CR had higher rates than NW for corresponding classifications. It protected CR employees against a loss of pay through a red-circle arrangement. That was true even if the CR employee was forced, through an exercise of seniority, to move into a lower-rated classification.

* * *

NSR began operating its new CR property on June 1, 1999. It says it started to experience serious operational and financial challenges in 2000. Revenue growth ceased. Costs increased. At some point, Management decided that substantial force reductions were necessary in the Maintenance of Way and Mechanical Departments. Later, in January 2001, it determined that signal maintenance forces were not staffed for optimal operation. It eliminated 21 Electronic Specialist/Electronic Technician jobs on the ground that they "were no longer essential to its operations" and that the "resultant exercise of seniority would fill more essential vacancies in the Signal Maintainer classification". It also eliminated four of the remaining five communication jobs held by "grandfathered"

¹ The CR property in question had been part of ERN seniority district for BRS.

BRS-represented employees.² The details of these eliminations and their relationship to the issues before this Board will be discussed later in this opinion.

* * *

BRS protested the job eliminations, urging they were a violation of the ERN Agreement and the Implementing Agreements. It also alleged that Management had improperly failed to serve notice under Article I, Section 4 of the NYD conditions. Its argument was rejected by NSR. When the parties were unable to resolve their differences, both matters were appealed to arbitration under the pertinent language of the ERN Agreement and NYD. A single Board of Arbitration was formed to deal with both matters. It consists of Robert G. Lockery, NSR-appointee, Floyd E. Mason, BRS-appointee, and Richard Mittenthal, Neutral Chairman.

Pre-hearing briefs and exhibits were filed with the Board on July 6, 2001. A hearing was held at the National Mediation Board offices in Washington, D.C., on July 16. NSR was represented by Jeffrey H. Burton, General Solicitor; BRS was represented by William L. Phillips, General Counsel. Post-hearing information sought by the Chairman was submitted to the Board on July 27 and 30. Reply briefs were filed on August 20. IBEW intervened in this case and filed a written "third party" position in early August supporting the BRS claim.

The parties presented separate statements of the questions before the Board. At the Chairman's urging, those questions were amended in one respect at the hearing. They now read:

² One of the original six "grandfathered" communication people had vacated the job. And one remained on the job after Management's force adjustment.

RLA Board

NSR Questions:

1. Did the Carrier violate its obligations under the Eastern Region-North Agreement regarding its action taken in January 2001 with respect to 21 Electronic Specialist/Electronic Technician positions?

2. Did the Carrier violate its obligations under the Eastern Region-North Agreement regarding its action taken in January 2001 with respect to four BRS-represented Communications positions?

BRS Questions:

1. Did the Carrier violate the collective bargaining agreement regarding its action taken in January 2001 with respect to Electronic Specialists and the transfer of their work to Signal Maintainers?

2. Did the Carrier violate the collective bargaining agreement regarding its action taken in January 2001 with respect to four Communications positions and the transfer of their work to IBEW-represented positions?

NYD Panel

NSR Questions:

1. Did the Carrier violate its obligations under the Implementing Agreement(s) regarding its action taken in January 2001 with respect to 21 Electronic Specialist/Electronic Technician positions?

2. Did the Carrier violate its obligations under the Implementing Agreement(s) regarding its action taken in January 2001 with respect to four BRS-represented Communications positions?

BRS Questions:

1. Did the Carrier's action taken in January 2001 regarding Electronic Specialist positions and the transfer of their work to Signal Maintainers require the Carrier to serve a Notice under Article I, Section 4 of the NYD conditions? If so, what shall the remedy be?

2. If the answer to question 1 is "no", did the Carrier violate the parties' Implementing Agreements through its action in January 2001 regarding Electronic Specialists and the transfer of their work to Signal Maintainers? If so, what shall the remedy be?

3. Did the Carrier's action taken in January 2001 regarding BRS-represented Communications positions require the Carrier to serve a Notice under Article I, Section 4 of the NYD conditions? If so, what shall the remedy be?

4. If the answer to question 3 is "no", did the Carrier violate the parties' Implementing Agreements through its action in January 2001 regarding BRS-covered Communications positions and the transfer of such work to IBEW positions? If so, what shall the remedy be?

DISCUSSION AND FINDINGS

There are essentially four separate issues before this Board. The first is whether the elimination of four communication jobs held by BRS-represented employees was a violation of the NSR/CR/BRS/IBEW Implementing Agreement. The second is whether the elimination of eight Electronic Specialist/Electronic Technician jobs at dispatch centers and hump yards was a violation of the NSR/BRS ERN Agreement. The third is whether the elimination of thirteen ES-ET jobs assigned to field operations was a violation of this ERN Agreement. The fourth is whether NSR violated the NYD

conditions by eliminating these positions and transferring the work to others or by failing to serve a notice under Article I, Section 4 of NYD.

Each of these matters will be considered separately.

* * *

I. Communication Jobs

Communication jobs are spread throughout four Divisions (Dearborn, Harrisburg, Lake, and Pittsburgh) on the ERN property. They were almost all held by IBEW-represented employees. The only exception was a group of six BRS-represented employees who were "grandfathered" into their jobs through an Implementing Agreement. Article I(b) of that Agreement, apparently incorporated in the ERN Agreement, read in part:

...the individuals identified...will be grandfathered to their existing communications positions...[and] will remain on their respective seniority rosters. Each listed individual will remain on their communications position, not subject to displacement. They will remain on their position until such time they vacate the position or it is abolished. As each of the positions is vacated, it will become an IBEW position. (Emphasis added)

Management discovered that many of communication employees had "overlapping territories". It found it could eliminate the overlap and create a more efficient operation by consolidating certain radio work in the Division radio shops and by reassigning the entire work force in three of four Divisions. Given these changes, it decided to eliminate a number of communication jobs. Among them were four of the six "grandfathered" BRS jobs. A fifth had been vacated earlier. And the sixth was unaffected by the changes and continued to be filled by a BRS-represented employee. The four eliminated jobs in question represented one of three communication positions in the Pittsburgh

Division, two of six such positions in the Enola-Harrisburg area, and one of four such positions in the Abrams area, the latter two areas being in the Harrisburg Division.

NSR contends that these four employees had a right under the Implementing Agreement to remain on their communication positions only "until such time...[as] it is abolished". It claims Management had a right to "abolish" these positions and it did so as a result of certain operating improvements and widespread territorial adjustments.

This argument is not convincing. One need only look to Rule 406 of the ENA Agreement to see that NSR has misconstrued the nature of the job eliminations in this case. What NSR describes as a job "abolishment" is really no more than a "force reduction". These are separate and distinct concepts. Throughout Rule 406 the parties speak of what happens when certain Management actions occur - "when [work] force is reduced or positions are abolished..."; "when force is reduced, positions are abolished, or displacements occur..."; and so on. A "force reduction" is a Management decision to work with fewer employees in a given classification; a "position...abolished" is a Management decision to discontinue the use of a given classification or totally eliminate particular work being done by a particular position.

The communication jobs in question were part of a "force reduction".³ One or more employees in the communication classification were removed. Instead of having thirteen communication employees in the areas mentioned above, there are now nine or fewer. The "force reduction" was at least four. But the communication classification remains in effect. The work done by the four employees in question continues to be done by others. To say, as NSR does, that the "positions [were] abolished" ignores the evidence and the true nature of Management's action.

³ Even NSR's pre-hearing brief (page 15, footnote 7) describes these events as a "force reduction".

We find that because the communication classification was not "abolished", because the former BRS-represented employees did not "vacate" their jobs, and because their work continues to be performed by others, Management had no right under the Implementing Agreement to remove them from their "grandfathered" jobs. Its action was a violation of the Agreement.

* * *

II. Electronic Specialist/Electronic Technician Jobs- Dispatch Centers and Hump Yards

Some ES-ETs work in the dispatch centers of ERN. They are of course BRS-represented employees. They oversee the traffic control computer and its interfaces and perform routine checks on such equipment. They make sure the backup systems are operational. They coordinate equipment and component repairs in the centers. They assist field forces in the latter's performance of tests and inspections by serving as a go-between with the Dispatcher. They also assist field forces with troubleshooting as necessary when problems occur in the field. Some ES-ETs work in the hump yards. Their duties are much the same as what ES-ETs do in the dispatch centers. They oversee humping operations from their computer room. They make routine checks of the computer and its interfaces; they make sure the backup systems are operational; they coordinate repairs; they assist field forces with the troubleshooting of field problems as necessary; and so on.

Prior to January 2001, these ES-ETs were scheduled three shifts a day, five or more days a week. That was their schedule under CR as well. Then in January 2001, NSR discontinued some of the tests and inspections and, more important, eliminated the third shift and the relief shift. It thereby reduced the ES-ET schedule from 15 or more shifts per week to 10 shifts. The routine checks are now performed on first and second shifts. And when system failures occur or field forces require assistance on the discontinued shifts, one (or more) of the ES-ETs is called in on an overtime basis for such work. Management also gave further

training to field forces (i.e., Signal Maintainers) so that their troubleshooting skills were improved and they would need less assistance from ES-ETs. Given these changes, it concluded that the workload in these areas could be adequately handled with fewer ES-ETs. It eliminated eight such jobs.

BRS contends that Management has "abolished the ES-ET positions...for the purpose of assigning the work to lower-rated classifications". It insists this kind of "abolishment" is expressly prohibited by the ERN Agreement.

This argument is not persuasive. In view of what has already been stated in part I, it seems clear that no "position" was "abolished" here. The ES-ET classification remains in effect. ES-ETs continue to work in dispatch centers and hump yards on first and second shifts and are occasionally called in for overtime work during third shift hours. The only change is that there are now fewer ES-ETs at these locations. Management has effected a "force reduction" as a result of certain operational changes, principally a large decrease in scheduled shifts from 15 or more to 10 per week. No claim has been made that the remaining ES-ETs have been subjected to an excessive workload. Nor is there any convincing proof, with respect to the eight ES-ETs in question, that their work has been transferred to Signal Maintainers. Rather, the evidence suggests that the work done by these eight employees is for the most part now being done by ES-ETs on first and second shifts. Some portions of that work were discontinued. And although one can argue that some portion may now be done by Signal Maintainers, the fact is that repair and troubleshooting have been performed by Signal Maintainers for years. With additional training some Signal Maintainers no doubt now perform more troubleshooting than they once did. But given the overlap between these classifications, it cannot fairly be said on the present record that the ES-ET work in dispatch centers and hump yards is being done by Signal Maintainers.

Management has the right to determine the size of its ES-ET work force. The ERN Agreement plainly contemplates

reductions in force. Nowhere does it state that there must be a certain number of ES-ETs or a certain number of shifts scheduled each week. One of the Implementing Agreements states (Article II, Section 1) that "all employees holding a regular assignment will continue to hold that regular assignment unless or until changes are made under the...displacement rules or other applicable provisions" of the Agreement. "Changes" were made under the Agreement and eight ES-ET jobs were eliminated as a consequence of those changes. There was no violation of the ENA or Implementing Agreements.

* * *

III. Electronic Specialist-Electronic Technician Jobs, Field or "Line of Road" Work

Some ES-ETs are involved in field or "line of road" work, assisting Signal Maintainers in troubleshooting and repairing electronic equipment used in signal systems. Examples of such equipment are grade-crossing warning devices, hot box detectors, and electronic interlocks. Ordinarily, one ES-ET was assigned to support six to ten Signal Maintainers. These ES-ETs also trained Signal Maintainers to become more skilled and hence able to work without the support of an ES-ET. Also certain periodic inspections done by ES-ETs were discontinued because Management believed they were no longer necessary. Given these changes, Management concluded that the number of ES-ETs could be reduced. It eliminated thirteen such jobs in January 2001.

BRS contends that Management has transferred higher-paid ES-ET work to lower-paid Signal Maintainers. It insists that such work is still being performed and that Management has "abolished the ES/ET positions...for the purpose of assigning the work to lower-rated classifications". It urges that this kind of "abolishment" is expressly prohibited by the ERN and Implementing Agreements.

The main difficulty with this argument is that the ES-ET and Signal Maintainer classifications overlap to a

considerable degree. The classification descriptions in Rules 100 and 105 reveal the extent of the overlap. An ES-ET is responsible for "inspection, maintenance, testing, adjusting, repairing and replacing electronic signal equipment and devices..." A Signal Maintainer is responsible for "inspection, test, adjustment, repair and maintenance of all signals, interlockers and other signal apparatus and devices..." And many of these "apparatus and devices" are electronic in nature. Perhaps the difference between these classifications, with respect to "line of road" work, is that an ES-ET handles the more complicated devices, does the more demanding troubleshooting, and assists the Signal Maintainers when they have need of assistance. These ES-ETs, unlike those in dispatch centers and hump yards, continue to be scheduled round-the-clock, three shifts a day and seven days a week.

BRS' argument seems to rest on Rule 310 (Preservation of Rates) which reads:

The classification of an employee does not preclude a signal employee from performing the duties of another classification. When employees are required to fill the place of other employees receiving a higher rate of pay they shall receive the higher rate; but if required to fill temporarily the place of another employee or position receiving a lower rate, their rate will not be changed.

Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of the rules in this agreement. (Emphasis added)

The first paragraph of Rule 310 poses no problem. A Signal Maintainer can, despite his classification, be assigned to "the duties of another classification". If he is assigned higher-rated ES-ET work, he "shall receive the higher rate". If he is regularly called upon to do ES-ET work and if such work becomes his principal assignment,

then after 30 days a temporary ES-ET position would have to be bulletined for bids and after six months a permanent ES-ET position would have to be bulletined for bids. The difficulty, as stated earlier, is the long-standing overlap between these classifications. Notwithstanding the post-hearing information submitted, it is still far from clear what exactly is the line of demarcation between them.

The second paragraph is the crux of BRS' claim. It alleges that "established [ES-ET] positions have been "discontinued" and "new ones", Signal Maintainers, "created...[to] cover...the same class of work for the purpose of reducing the rate of pay or evading the application of the [R]ules in this Agreement". There has been a force reduction among ES-ETs in "line of road" work. We shall assume, for purposes of this dispute, that these positions were "discontinued" within the meaning of Rule 310. But it seems plain that no "new" positions were created in their place. NSR work force figures show 253 Signal Maintainers before the January 2001 adjustment and 254 Signal Maintainers today. The elimination of thirteen ES-ETs does not appear to have created new Signal Maintainer positions although it may well have prevented a reduction in the number of Signal Maintainer positions.

Given the elimination of certain ES-ET field duties, given the lesser reliance on ES-ETs by Signal Maintainers because of improvements in the latter's skills, and given the historic overlap between these classifications, it is difficult to identify, much less quantify, the ES-ET field work that has been assigned to Signal Maintainers. A portion of that work is probably no different from what Signal Maintainers have always done. We suspect some exclusive ES-ET field work may have been transferred. But suspicions are not proof. Signal Maintainers should be aware of their rights under Rule 310. To the extent to which they are performing ES-ET work, they are entitled to be paid the higher rate for such work. To the extent to which that higher-rated work has become the principal part of their job, Management must at some point bulletin such ES-ET jobs for bids. The pursuit of such rights by the Signal Maintainers themselves will avoid any improper reduction in rates or any improper evasion of Rule 310.

We cannot find a violation of Rule 310 or the ENA Agreement on the present state of the record.

* * *

IV. New York Dock Questions

BRS insists that the job eliminations were a "transaction" within the meaning of the NYD conditions and that therefore the employee protective provisions of NYD, including the notice requirement, should have been applied here. NSR disagrees.

The principles relevant to this kind of controversy have been discussed in many prior arbitration awards. A "transaction" is defined by NYD as "any action taken pursuant to authorization of this Commission [now, the STB] on which these [protective] provisions have been imposed". The "action taken" was of course NSR's job eliminations in January 2001. The "authorization of the [STB]" was its approval in July 1998 of NSR's acquisition of a large portion of the CR property. The term "pursuant to" reveals that for a NYD "transaction" to be said to have occurred here, there must be a causal connection between the NSR acquisition in July 1998 and the NSR job eliminations in January 2001.

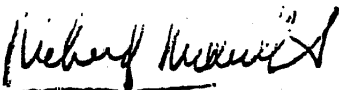
The evidence fails to establish such a causal connection. NSR appears to have been confronted by revenue and cost disappointments which together prompted a need for a force reduction. Certain work was discontinued; shifts were eliminated; work territories were rearranged; skill levels were improved; and so on. Such changed circumstances - and the resultant job eliminations - had nothing to do with the original STB order approving the NSR acquisition. Nor did the job eliminations involve the transfer of work from ERN (i.e., the former CR property) to other NSR properties. No doubt had CR, absent the acquisition, been faced by these changed circumstances it too would have effected a force reduction. Every action initiated subsequent to an acquisition cannot, for that reason alone, be considered to have been taken "pursuant to" the acquisition. Clearly, the job eliminations were not a NYD "transaction" and NSR was not required to provide another Article I, Section 4 notice. There was no NYD violation.

AWARD

BRS' complaint with respect to the removal of BRS-represented employees from their communication jobs is granted. Those employees should be returned, if they wish, to their communication jobs. They - and any other employees adversely affected by this violation - should be made whole for their loss of earnings or other benefits.

BRS' complaints with respect to the elimination of Electronic Specialist/Electronic Technician jobs and with respect to New York Dock conditions are denied, subject to the following paragraph.

The parties are directed to determine the tasks that have historically distinguished Signal Maintainer work from Electronic Specialist/Electronic Technician work. They shall also attempt to determine the point at which the performance of exclusive ES-ET work, along with the overlap work, constitutes a traditional ES-ET job. The Board will retain jurisdiction and the parties may return to the Board for a final decision on these issues if they cannot agree.



Richard Mittenthal
Neutral Chairman



Robert G. Lockery
NSR Appointee
Concurring on II, III and IV
Dissenting on I



Floyd E. Mason
BRS Appointee
Concurring on I
Dissenting on II, III and IV

Dated: September 18, 2001.

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between

AMERICAN TRAIN DISPATCHERS
DEPARTMENT (ATDD)

OPINION
AND
AWARD

-and-

NORFOLK SOUTHERN RAILWAY
COMPANY (NSR)

Abolishment of Assistant Chief Train
Dispatcher Positions at Harrisburg,
Pittsburgh and Dearborn

Pursuant to Article I, Section 11 of the
New York Dock Conditions

Members of the Committee

Employer Member: David W. Volz, Vice President, ATDD
Carrier Member: Louis Miller, Jr., Assistant Director, Labor Relations
Neutral Member: David P. Twomey

The above-entitled matter came to be heard before the Arbitration Committee on December 12, 2001 at the Carrier's Offices in Norfolk, Virginia. Pre-hearing briefs were submitted by the parties by December 3, 2001.

I.

QUESTIONS AT ISSUE

ADTA Questions:

1. (A) Did the carrier violate Article I, Section 4 of the New York Dock conditions when it failed to provide at least 90 days advance written notice of its intention to abolish the ACTD Unit Train Operations and ACTD Desk B positions in the Pittsburgh train dispatching office on February 14, 2000, and to negotiate an implementing agreement to cover that action?

tract reverted to private hands, the public would stand to lose its right to use the land, even if no development took place.

We reverse the district court's laches ruling for a different reason. The court remarked that the Society had considered only one side of the environmental harm issue. The district court itself, however, similarly limited its consideration. The court was sensitive to the harm that might occur if the Dyke Marsh tract were to revert to private ownership, but it did not consider the environmental *benefit* that might result if the Exchange Agreement were voided and the Potomac Greens development blocked.

In principle, the court could have evaluated the public or environmental harms and benefits even-handedly if it had considered not just the harm of losing a portion of Dyke Marsh, but also the benefits that successful suit would bring. As a practical matter, however, the court could not have reliably estimated the environmental benefit of voiding the Exchange Agreement and stopping the Potomac Greens development without, in effect, writing its own EIS. We do not impose on the district court the task of rebalancing the environmental harms and benefits on remand. Laches is a doctrine that prevents courts from reaching the merits of a case; here, however, a fair application of the district court's balancing method would have required that court to do more than rule on the merits of plaintiffs' allegations—it would have required the district judge to undertake the very action plaintiffs originally sought from NPS.

We thus return to the consideration precedent marks as crucial. In both of the briefs that the Society filed in this court, it contended that in every environmental case where a court grounded summary judgment on the defense of laches, the harm-generating activity plaintiffs sought to pre-

vent had already begun to occur, typically because construction of the project plaintiffs sought to block was underway. Since appellees had cited no contrary decision, nor had we discovered one in our own research, we asked federal appellees at oral argument whether one existed. They were unable to identify such a case.¹⁰ Here, no construction has begun on the interchange or on the Potomac Greens complex; the damage that plaintiffs sought to prevent thus has not begun to occur. The defense of laches, we hold, must be rejected under the circumstances this case presents.

CONCLUSION

We vacate the district court's mootness dismissal of the Society's challenges to the 1981 and 1983 interchange design approvals, reverse its ruling that the Society's challenges to the 1970 Exchange Agreement were barred by laches, and remand for further proceedings consistent with this opinion.

It is so ordered.



BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents.

No. 89-1580.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 13, 1990.

Decided Nov. 30, 1990.

Railroad union petitioned for review of Interstate Commerce Commission (ICC) de-

RF & P of any opportunity it would have had to develop the Dyke Marsh tract. Moreover, since any claim that RF & P might have to the Dyke Marsh land presupposes an almost eleven-year delay in invalidating the Exchange Agreement, RF & P can hardly complain that it has been prejudiced in this respect by the Society's tardiness in challenging that Agreement.

10. Counsel for the federal appellees cited *Clark v. Volpe*, 461 F.2d 1266 (5th Cir.1972). The first sentence of that opinion, however, states: "[P]laintiffs seek to enjoin the construction, already in progress when suit was filed, of Interstate Highway 610 through City Park in the City of New Orleans." *Id.* at 1266 (emphasis added).

cisions denying review of arbitrator's ruling, which rejected employee's claim for benefits under employee protective conditions which arose in connection with lease of rail line. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that arbitrator's finding that employee's furlough was not caused by lease transaction, precluding application of protective conditions, was not subject to ICC review.

Petition denied.

1. Commerce $\S$ 85.7

Generally, in cases on employee protective conditions, arbitration decisions regarding questions of causation, calculation of benefits and other factual matters are binding and final, and only in very limited circumstances does Interstate Commerce Commission (ICC) review final arbitration awards settling disputes under protective conditions. 49 U.S.C.A. $\S$ 11347.

2. Commerce $\S$ 85.7

Railroad union failed to establish that employee's permanent furlough was result of rail line lease transaction, as required to entitle employee to benefits of protective conditions required by Interstate Commerce Commission (ICC); nothing in record suggested that but for lease, employee would have remained in his position despite business slowdown. 49 U.S.C.A. $\S$ 11347.

3. Commerce $\S$ 85.7

Interstate Commerce Commission (ICC) review of arbitration awards under employee protective conditions is confined to arbitral decisions implicating recurring or otherwise significant issues of general importance regarding interpretation of labor protective conditions. 49 U.S.C.A. $\S$ 11347.

4. Commerce $\S$ 85.7

Final resolution of factual matters in cases on employee protective conditions, particularly questions of causation, is committed to arbitral judgment and is outside scope of Interstate Commerce Commission (ICC) review. 49 U.S.C.A. $\S$ 11347.

5. Commerce $\S$ 85.7

Arbitrator's finding that railroad employee's furlough was not caused by lease transaction, precluding application of employee protective conditions, was not subject to Interstate Commerce Commission (ICC) review; arbitrator's construction of lease implementing agreement as incorporating threshold requirement of adverse effect drew its essence from agreement. 49 U.S.C.A. $\S$ 11347.

6. Commerce $\S$ 85.7

To extent that arbitrator in employee protective conditions case rejected extreme "but for" analysis, under which even most attenuated connection between rail line lease transaction and employee displacement would entitle employee to protective conditions benefits, arbitrator correctly followed Interstate Commerce Commission (ICC) precedent. 49 U.S.C.A. $\S$ 11347.

7. Commerce $\S$ 85.7

Section of Interstate Commerce Act requiring imposition of labor protective conditions when rail carrier is involved in transaction for which Interstate Commerce Commission (ICC) approval is sought was not inconsistent with ICC's failure to adopt "but for" standard of causation between transaction and adverse employment decision in denying protective conditions benefits to employee. 49 U.S.C.A. $\S$ 11347.

8. Commerce $\S$ 85.7

Court of Appeals could find no basis upon which to question arbitrator's reading of agreement implementing employee protective conditions in connection with lease of rail line as incorporating threshold requirement of adverse effect from lease transaction before employee could recover benefits of protective conditions.

Petition for Review of an Order of the Interstate Commerce Commission.

Richard S. Edelman, with whom John O'B. Clarke, Jr., Washington, D.C., was on the brief, for petitioner.

Clyde J. Hart, Jr., Atty., I.C.C., with whom Robert S. Burk, Gen. Counsel, Henri F. Rush, Deputy Gen. Counsel, and John J.

McCarthy, Jr., Deputy Associate Gen. Counsel, I.C.C., and James F. Rill, Asst. Atty. Gen., Robert J. Wiggers, John J. Powers, III, Attys., U.S. Dept. of Justice, were on the brief, for respondents. Laurence H. Schecker, Atty., I.C.C., also entered an appearance for respondents.

Paul R. Berger, with whom John H. Broadley, Washington, D.C., was on the brief, for intervenor.

Before MIKVA, EDWARDS and HENDERSON, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

In 1984, the Interstate Commerce Commission ("ICC" or "Commission") authorized the Maine Central Railroad Company ("MEC") to lease a section of rail line to the Twin State Railroad Corporation. Under the terms of the authorization, MEC was required to implement certain employee protective conditions, known as the *Mendocino Coast* conditions, on behalf of workers adversely affected by the lease transaction. This case arises from a claim by Norman Bilodeau, a former MEC employee, for *Mendocino Coast* protective benefits. An arbitrator rejected Mr. Bilodeau's claim on the grounds that he was not adversely affected by the lease transaction. The Brotherhood of Maintenance of Way Employees ("BMW" or "union") now challenges two ICC decisions denying review of the arbitrator's ruling.

[1] As a general rule, in cases on employee protective conditions, arbitration decisions regarding questions of causation, calculation of benefits and other factual

matters are binding and final. Only in very limited circumstances does the ICC review arbitration awards settling disputes under employee protective conditions. The arbitration award at issue here does not fall within the narrow class of rulings subject to ICC reconsideration; therefore, the Commission properly declined to review the arbitrator's decision rejecting Mr. Bilodeau's claim. Because we can find no legal error in either the arbitrator's award or the Commission's affirmance thereof, we reject the petition for review.

I. BACKGROUND

In May 1984, the Commission approved the lease and operation by Twin State Railroad Corporation of a MEC rail line running from St. Johnsbury, Vermont to Whitefield, New Hampshire.¹ Under section 11347 of the Interstate Commerce Act,

[w]hen a rail carrier is involved in a transaction for which approval is sought under ... this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under Section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

49 U.S.C. § 11347 (1988).² To satisfy the labor protective conditions of section 11347 in this case, the ICC imposed the so-called *Mendocino Coast* conditions.³ In relevant part, the conditions require the provision of benefits to any employee "who, as a result of a transaction[,] is placed in a worse

benefits) to such employees under existing collective-bargaining agreements or otherwise; ... (3) the protection of such individual employees against a worsening of their positions with respect to their employment; 45 U.S.C. § 565(b) (1988).

1. *Guilford Transp. Indus., Inc.—Control—Boston & Maine Corp.*, Finance Docket No. 29720 (Sub-No. 1) (served May 22, 1984); *Guilford Transp. Indus., Inc.—Control—Delaware & Hudson Ry.*, Finance Docket No. 29772 (served May 22, 1984).

2. The incorporated section of the Rail Passenger Service Act provides, in part, that the "fair arrangement" to which section 11347 refers shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and

3. See *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 354 I.C.C. 732 (1978), modified, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Execs. Ass'n v. United States*, 675 F.2d 1248 (D.C.Cir.1982).

position with respect to his compensation and rules governing his working conditions."⁴

In June 1984, MEC issued notice of the lease and of its anticipated effect on certain employee positions. See *Maine Cent. R.R.—Lease (Arbitration Review)*, Finance Docket No. 29720 (Sub-No. 1A), slip op. at 1 (served Dec. 8, 1988) ("1988 Decision"), reprinted in Joint Appendix ("J.A.") 102. MEC and BMW E then negotiated an implementing agreement detailing the application of the *Mendocino Coast* conditions to MEC employees. Under section 2(b) of the implementing agreement,

[a]ny employee who is affected pursuant to a transaction . . . and any employee who is displaced by an exercise of seniority as a result of the transaction, will be treated as an employee placed in a worse position with respect to his compensation.

See *Maine Cent. R.R.—Lease (Arbitration Review)*, Finance Docket No. 29720 (Sub-No. 1A), slip op. at 3 (served July 28, 1989) ("1989 Decision"), reprinted in J.A. 139, 141.

Until November 1984, Mr. Bilodeau worked for MEC as a trackman in Whitefield, New Hampshire. When the lease was implemented, however, a more senior employee whose job had been abolished moved into Mr. Bilodeau's position. Mr. Bilodeau in turn "bumped" into a machine operator position by exercising his own seniority rights, suffering no loss of compensation as a result. See *1988 Decision* at 2, reprinted in J.A. 103.

Mr. Bilodeau's new job was abolished several months later, and Mr. Bilodeau bumped into a trackman position in Maine, 150 miles away. When that job too was abolished, Mr. Bilodeau exercised his seniority once more to move into a different trackman position. In March 1986, Mr. Bilodeau was furloughed and simultaneously recalled to an extra position. At no time during this series of job transfers did Mr. Bilodeau experience any reduction in earn-

ings. *Id.* Finally, in July 1986, Mr. Bilodeau was permanently furloughed when his job was abolished. *Id.*

MEC denied Mr. Bilodeau's subsequent claim for *Mendocino Coast* benefits on the grounds that Mr. Bilodeau's furlough was caused by a business decline stemming from a BMW E strike, rather than by the lease transaction. See *id.* BMW E requested arbitration. The arbitrator found that Mr. Bilodeau was not adversely affected by the lease transaction and therefore had no claim to benefits under the *Mendocino Coast* conditions or the implementing agreement. See J.A. 43. The Commission denied review of the arbitrator's ruling, see *1988 Decision*, and refused the union's request for rehearing, see *1989 Decision*. BMW E now petitions this court for review of the Commission decisions.

II. ANALYSIS

BMW E's principal challenge on appeal is to the arbitrator's finding that Mr. Bilodeau's furlough was not caused by the lease transaction. According to BMW E, Mr. Bilodeau was moved from his original position as a trackman in Whitefield only because of the lease. If Mr. Bilodeau had not been moved in the first instance, then he would not have been furloughed later when MEC's business declined. Therefore, BMW E contends, Mr. Bilodeau's furlough was a result of the lease transaction, and Mr. Bilodeau is entitled to *Mendocino Coast* benefits. See Brief for Petitioner and Intervening Petitioner at 27-28.

[2] BMW E argues that the contrary ruling of the arbitrator, and its affirmance by the ICC, rest on the application of an improper standard of causation. We note, however, that, as a threshold matter, BMW E has failed to establish the factual accuracy of its animating premise: that had Mr. Bilodeau remained in his original trackman position in 1984, he would not have been furloughed as a result of MEC's business decline in 1986. Indeed, the union

folk & Western conditions were in substantial part incorporated by *Mendocino Coast*.

4. *Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978) (Conditions Appendix, art. I, § 1(b)). The *Nor-*

has not even attempted to prove the accuracy of the assertion that Mr. Bilodeau's furlough can be traced somehow to the lease transaction. There is simply nothing in the record to suggest that but for the lease of 1984, Mr. Bilodeau would have remained in his trackman position despite the business slowdown of 1986.

Accordingly, the arbitrator determined that the MEC lease transaction did not adversely affect Mr. Bilodeau. This conclusion was based on two specific arbitral findings critical to the instant case. First, the arbitrator found that Mr. Bilodeau was not "placed in a worse position" as a result of his initial move from the Whitefield trackman position. Because such moves are not uncommon in Mr. Bilodeau's craft and because Mr. Bilodeau suffered no loss of earnings, the arbitrator concluded that Mr. Bilodeau's initial move had not adversely affected either his working conditions or his compensation. *See* J.A. 40.⁵ Second, the arbitrator found that Mr. Bilodeau's ultimate furlough was caused by a diminution in MEC business. J.A. 43. This finding is undisputed. Thus, the arbitrator held that the lease transaction itself did not place Mr. Bilodeau in an adverse position as contemplated by *Mendocino Coast* and the parties' implementing agreement, and therefore denied Mr. Bilodeau's claim for benefits. J.A. 42-43.

[3, 4] Commission review of arbitration awards under employee protective conditions is strictly limited. The Commission confines its review to arbitral decisions implicating "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." *Chicago & North Western Transp.—Abandonment*, 3 I.C.C.2d

5. Intervenor MEC argues for a different approach to evaluating the effects of Mr. Bilodeau's initial displacement. According to MEC, a displacement puts an employee in a "worse position" within the meaning of *Mendocino Coast* if and only if it adversely affects employee contractual rights, such as seniority rights, and regardless of whether such displacements are common industry practice. That Mr. Bilodeau's contractual seniority rights were not abrogated by his move from the Whitefield position is, under MEC's reasoning, dispositive evidence

729, 736 (1987), *aff'd International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir.1988) (the "*Lace Curtain*" decision). Final resolution of factual matters, on the other hand, is committed to arbitral judgment. *Id.* In particular, questions of causation are explicitly placed outside the scope of ICC review. *Id.* at 735 ("We continue to believe that mandatory arbitration is appropriate for the final resolution of causation issues....").

[5-7] Under the standards announced in *Lace Curtain*, Commission review is not warranted in this case. Whether Mr. Bilodeau was adversely affected by the MEC lease transaction, and hence eligible for benefits, is a factual question of causation, committed to the judgment of the arbitrator. We find no merit in BMW's contention that review is appropriate in this case because the arbitrator employed an unduly restrictive standard of causation in making his findings. To the extent that the arbitrator rejected an extreme "but for" analysis, under which even the most attenuated connection between a transaction and an employee displacement would entitle the employee to benefits, he correctly followed Commission precedent. *See, e.g., Atlantic Richfield Co.—Control—Butte, Anaconda & Pac. R.R.*, Finance Docket No. 28490 (Sub-No. 1) (served Mar. 2, 1988); *Southern Ry.—Control—Central of Ga. Ry.*, 317 I.C.C. 729, 730-31 (1963), *aff'd sub nom. Railway Labor Excs. Ass'n v. United States*, 226 F.Supp. 521 (E.D.Va.), *vacated on other grounds*, 379 U.S. 199, 85 S.Ct. 307, 13 L.Ed.2d 338 (1964). And, contrary to BMW's argument, we can discern no inconsistency between the Commission's failure to adopt a "but for" standard of causation and section 11347 of the Interstate Commerce Act.

that he was not adversely affected by the move. *See* J.A. 37, 92. MEC's position on this point finds some support in *United Transportation Union v. United States*, 905 F.2d 463, 468-70 (D.C.Cir.1990). In this case, however, the arbitrator relied in part on his finding that employees like Mr. Bilodeau are commonly subjected to moves. Therefore, we need not resolve the question whether the preservation of contractual rights is by itself sufficient to show the absence of adverse effect.

[8] Nor are we persuaded by BMW's argument that Mr. Bilodeau is contractually entitled to benefits under section 2(b) of the parties' implementing agreement. The arbitrator concluded that the agreement covers only those employees who are adversely affected by a transaction, thus excluding Mr. Bilodeau from its scope. See J.A. 40. Under *Lace Curtain*, the arbitrator's interpretation of the MEC-BMW implementing agreement is entitled to extreme deference; so long as the arbitrator's award "draw[s] its essence" from the implementing agreement, it must be affirmed. See *Lace Curtain*, 3 I.C.C.2d at 735.⁶ In this case, we can find no basis upon which to question the arbitrator's reading of section 2(b) as incorporating a threshold requirement of adverse effect. Even if we disagreed with the arbitrator's construction, however, we could not say that it failed to "draw its essence" from the agreement. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987) ("as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision"); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 599, 80 S.Ct. at 1362 ("so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his"); *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 4-8 (D.C.Cir.1986) (judges have no business second-guessing arbitrators' judgments). Because the arbitration award at issue clearly satisfies this deferential standard, we find no error in the Commission's denial of review.

This court already has approved the arrangement by which the ICC defers questions arising under employee protective conditions to arbitration and strictly limits

its review of the resulting arbitral decisions. See *International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C.Cir. 1988) (affirming *Lace Curtain*). Essentially, the Commission is authorized to use arbitration for dispute resolution without duplicating the work of its arbitrators on appeal. That is precisely what the Commission did in this case, and we can find no reason to disturb its judgment.

III. CONCLUSION

For the reasons set forth above, we find that the arbitration award in this case is not subject to Commission review. Therefore, the Commission decisions are affirmed and the petition for review hereby denied.

So ordered.



DEPARTMENT OF HEALTH AND HUMAN SERVICES FAMILY SUPPORT ADMINISTRATION, Washington, D.C., Department of Health and Human Services Headquarters Office, Washington, D.C. and Department of Health and Human Services Region VII, Kansas City, Missouri, Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, Respondent,

National Treasury Employees Union, Intervenor.

No. 88-1867.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 10, 1990.

Decided Nov. 30, 1990.

Department of Health and Human Services (HHS) sought review of decision by

6. This extremely deferential standard of review is derived from the Supreme Court's "*Steelworkers Trilogy*," establishing very limited judicial review of arbitration awards in the collective bargaining context. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80

S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960).

**BEFORE AN ARBITRATION COMMITTEE ESTABLISHED
UNDER NEW YORK DOCK (II) EMPLOYEE PROTECTIVE CONDITIONS**

In the Matter of Arbitration
Between

Missouri Pacific Railroad Company

And

American Train Dispatchers Association

I.C.C. Finance Docket
No. 27773

OPINION AND AWARD

Background

On May 11, 1981, the National Mediation Board appointed the undersigned Neutral as Chairman of an Arbitration Committee pursuant to the Board's authority under Article I, Section 11 of Appendix III of I.C.C. Finance Docket No. 28250 (hereafter New York Dock (II)). Hearing was held on June 8, 1980 in Washington, D. C. The Missouri Pacific Railroad Co. (hereafter "Carrier") was represented by Nina K. Wuestling, Esq. The American Train Dispatchers Association (hereafter "Association") was represented by Thomas Woodley, Esq. Post-hearing briefs were filed on June 22, 1981; and it was stipulated that the Opinion and Award would be rendered on or before July 31, 1981.

Statement of Facts

In 1924, the Carrier acquired controlling interest of Texas & Pacific Railroad Company (hereafter "T & P".) As a majority-owned railroad, the T & P was one of more than a dozen Carriers that constituted the Missouri Pacific Line, or System. According to the

Carrier, it began an intensive effort to coordinate the activities of its subsidiaries in 1956. This program produced, among other things, the consolidation of several train dispatching offices. It does not appear that any of these train dispatching consolidations combined T & P offices with Carrier offices. In 1967 however, the Carrier and T & P did swap dispatching territories: the train dispatching for Longview, Henderson and Mineola was transferred from Carrier's Houston Office to the T & P's Fort Worth Office; and train dispatching for Alexandria and New Orleans was transferred from the T & P to Carrier. The transfer of territory was accomplished in accordance with the Washington Job Protection Agreement of 1936. Prior to their merger, Carrier operated train dispatching office at Houston and Palestine, Texas; Kansas City, Missouri; and North Little Rock, Arkansas; the T & P had only one train dispatching office at Fort Worth, Texas.

Carrier and T & P had, and continue to have, separate collective bargaining agreements with the Association. The current agreement between the Association and T & P is dated August 24, 1952. The current agreement between the Association and the Carrier is dated November 30, 1962. In 1966, the Carrier and T & P signed, separately, a June 16 Mediation Agreement A-7460 with the Association.

In 1974 the Carrier and T & P filed an application with the Interstate Commerce Commission for corporate merger. The Carrier simultaneously sought merger with the Chicago & East Illinois Railroad Company. According to the Carrier, the corporate merger represented only a change in corporate identity: Carrier and T & P had been operating as a unified entity for about ten years.

On May 4, 1976, the Interstate Commerce Commission approved the Carrier, T & P, and Chicago & East Illinois merger. In its Order, the Interstate Commerce Commission recognized the extent to which Carrier and T & P already operated as unified entities, "with assimilated power and equipment, and common department and personnel." In accordance with the requirements set forth in § 5(2)(f) of the Interstate Commerce Act, as amended (45 U.S.C. § 11347), the merger was approved subject to the application of employee-protective conditions contained in New Orleans Union Passenger Terminal Case, 282 I.C.C. 498 (1952), as modified by the arbitration conditions set forth in St. Louis Southwestern Railway - Pur. - Southern Railway, 242 I.C.C. 498 (1972), and by certain provisions of §405 of the Rail Passenger Service Act (45 U.S.C. 565). Pursuant to a Petition for Reconsideration filed in March, 1979 by the Railway Employees Department, AFL-CIO, the I.C.C. reconsidered the appropriate level of employee protection to be imposed on the merger. Accordingly, it ordered that "all employees affected in this transaction shall be afforded the relief set forth in Appendix III of New York Dock Railway - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979)." The U.S. Court of Appeals for the Second Circuit has characterized the New York Dock conditions as "The most favorable of the labor protective provisions contained in both the New Orleans conditions (as clarified in Southern Control II) and Appendix C-1, adopted pursuant to §405 of the Rail Passenger Service Act of 1970." New York Dock Railway v. U.S., 609 F.2nd 83, 91 (1979).

On January 21, 1981, Carrier served the Association with notice of a proposal to consolidate its dispatching functions now performed

at Palestine, Houston and Fort Worth, Texas into a single new office located at Spring, Texas (a suburb of Houston). This notice was served "pursuant to Article 1, Section 4, of Mediation Agreement A-7460 of June 16, 1966." The Association responded five days later contending that "[s]ince the proposed coordination of the train dispatching facility and operations of part of Missouri Pacific Railroad with those of the former Texas and Pacific Railway is clearly a result of the merger of those two Carriers approved by the I.C.C. in Finance Docket No. 27773, the employee-protective conditions imposed therein [New York Dock II] are applicable."

Issue in Dispute

The Association has characterized the issue for arbitration as follows:

Does the consolidation of the train dispatching functions now being performed in the Fort Worth, Texas office under the scope of the former Texas & Pacific Railway Train Dispatchers Agreement, with those now being performed in the Palestine and Houston, Texas offices under the Missouri Pacific Train Dispatchers' Agreement, as proposed in the Carrier's January 21, 1981 letter and notice (file B 246-471), constitute action taken pursuant to authorizations or approval of the Interstate Commerce Commission in Finance Docket No. 27773, Missouri Pacific Railroad Company - Merger - The Texas & Pacific Railway Company, Etc., thus making applicable the employee protective conditions imposed in that proceeding [New York Dock (II)]?

The Carrier, on the other hand, has posed the following question for arbitration:

Whether New York Dock II employee protective conditions imposed in Missouri Pacific Railroad Company - Merger - The Texas & Pacific Railway Company, Etc., (I.C.C. Finance Docket No. 27773) are applicable to the transfer of the train dispatching office at Fort Worth, Texas?

Applicable Provisions

The parties to this dispute rely on language contained in three separate employee protection documents to support their respective positions. In terms of chronology, the first of these is the Washington Job Protection Agreement of 1936. That Agreement provides allowances to employees affected by a "coordination." A "coordination" is defined to mean "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." (Underscoring added.) This Agreement also expressly provides for coverage during "the period following the effective date of a coordination during which changes consequent upon coordination are being made effective." The Agreement contains procedural assurances and compensatory allowances for a five year period to affected employees.

The June 16, 1966 Mediation Agreement affords protective benefits for train dispatchers who are displaced and deprived of employment as a result of certain specific types of changes within one carrier's operation, including the consolidation or removal of train dispatching offices. The benefits provide for a five year protective period; allowances earned are not recalculated to reflect subsequent wage increases.

It is important to note that the 1966 Mediation Agreement does not apply to "any transactions subject to approval by the Interstate Commerce Commission or to any transactions covered by the Washington Job Protection Agreement of May 21, 1936."

Finally, Appendix III of New York Dock (II) provides certain protections for employees who have been displaced, dismissed, required to relocate, deprived of benefits, and so forth, as a result of a "transaction." A "transaction" is defined as "any action taken pursuant to authorization of this Commission on which these provisions have been imposed." Among the provisions imposed by Appendix III is a six-year protective period, during which a dismissed or displaced employee's allowance is adjusted to reflect subsequent general wage increases.

FINDINGS

Issues of Arbitrability

The Carrier has challenged the jurisdiction of the Arbitration Committee which has been established under the auspices of the National Mediation Board pursuant to Section 11 of Appendix III on two grounds:

First, the Carrier contends that time limits imposed by Section 11(a) of Appendix III were not complied with. That subsection provides, in part:

In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

The Carrier notes that it gave notice to the Association of its intent to move the Texas dispatching offices on January 21, 1981. By letter dated April 8, 1981, the Association served notice of its intent to arbitrate pursuant to Article I, Section 11 of Appendix III. Thus, the Carrier contends that by its untimely invocation of Section 11, the Association has waived its right to arbitrate.

This claim is predicated on reading Section 11's reference to 20 days as a window within which a party must act to invoke arbitration. When examined in the context of the entire document, however, it seems clear that the 20 days was meant to provide a minimum period in which the parties were to attempt to reconcile their differences, and only after the expiration of that period could either party invoke arbitration. Obviously, there is a period of delay in seeking arbitration that would constitute laches, but the two month attempt at settlement here was not unreasonable in light of the importance of the issue.

Second, the Carrier argues that "there is also a substantive issue of whether Article I, Section 11, which creates an Arbitration Committee, also empowers the Committee to decide whether this controversy, applicability of Dock II, is arbitrable." In this regard, Carrier relies on that part of Section 11(a) which authorizes referral to arbitration any dispute "with respect to the interpretation, application or enforcement of any provision" (Underscoring added.) The Carrier would remove from Section 11 coverage the question of the Appendix's overall application to a particular event. */
Application of the term "transaction"

The Carrier contends that Appendix III is inapplicable because the proposed action at issue is not one authorized by the I.C.C. Order nor undertaken pursuant to the I.C.C. Order approving the merger.

*/ In support of this position the Carrier cites Steelworkers v. Warrior Navigation Co., 363 U.S. 574 (1960), for the proposition that questions of arbitrability are for the courts to decide, unless the agreement states to the contrary, and Railroad Yardmaster of America and Chesapeake and Ohio Ry. and Seaboard Coast Line RR. Co., (I.M. Lieberman, March 1981) for the position that Section 11 refers to the arbitration and settlement of disputes which might arise under the parties' agreements implementing Dock II.

Rather, the Carrier claims, the proposed consolidation is a direct result of technological improvements and economic conditions.

In support of this theory, the Carrier introduced evidence regarding the underlying reasons for the move to Spring, Texas. First, the T & P building in Fort Worth, which houses the train dispatching office, had been a financial liability. During the years that attempts were made to sell that building, the Carrier was also acquiring land in the Houston suburb of Spring for a new yard and office park. In 1978 the Fort Worth building was sold with a two year lease-back for office space. In 1981, the office building in Spring was completed and the Carrier was prepared to consolidate its Texas offices at that location. Moreover, the Spring office is equipped with computerized centralized traffic control equipment. The capabilities of this type of equipment are superior to those of the lever type machines currently in use at Fort Worth, Palestine and Houston. Although the new computer system will produce economies, it would not be cost effective to equip all three offices with computer-assisted equipment.

The Carrier thus argues that the proposed consolidation is a result of economic measures and technological improvements that "merely by chance happened to occur after the merger and not the direct result of or in any way connected to the merger."

(Carrier Brief, p. 26). In this connection the Carrier states that it would have consolidated the train dispatching offices even in the absence of a merger.

As a corollary to this argument, the Carrier asserts that it could have consolidated the train dispatching functions without I.C.C. approval and that this fact distinguishes the case at issue

here from other situations in which Appendix III benefits have been applied. The Carrier has emphasized the fact that the Commission construed the merger of Carrier and T & P as "nothing more than a consolidation of corporate entities..."

In its Order, the I.C.C. stated:

The merger application herein does not involve significant changes in the pattern of operation of the MoPac system, but merely represents a simplification of present MoPac corporate structure. The proposed merger is nothing more than a consolidation of the corporate identities of the three applicant railroads, MoPac, T & P, and C & EI. MoPac has controlled the T & P through stock ownership for over 50 years. Texas & Pacific Readjustment, 86 I.C.C. 808 (1924), and has controlled the C & EI through stock ownership for over 10 years, Missouri Pac. R. Co.- Control-Chicago & E.I.R. Co., 327 I.C.C. 279 (1965). MoPac and T & P have been operating as a unified entity with assimilated power and equipment, and common departments and personnel for about 10 years. The C & EI has been operated on an assimilated basis with the other two railroads in the same manner for about 6 years. The operation of these three railroads on an integrated basis means that, unlike a proceeding where one railroad seeks to merge with another unaffiliated railroad, the coordination and combination of departments and personnel of merging railroads will not result in the customary significant economies involved in the elimination of duplicate departments. (Emphasis added), 348 I.C.C. at 419.

The Carrier has contrasted this type of merger with the proceedings involving the Chesapeake & Ohio and the Family Line System (Finance Docket No. 28905). There, the Carrier claims, I.C.C. approval was required to accomplish the wide range of operational changes proposed by the merger carriers, including acquisition of trackage rights and abandonment rights. Thus, decisions to displace employees as a result of the consolidation of yards, interchange operations, and clerical forces are actions taken "pursuant to" Commission authorization and "transactions"

under Appendix III. In this situation, the Carrier claims that I.C.C. authorization was necessary for the merger, but the merger was not necessary to consolidate the dispatching offices. (Carrier Reply Brief, p. 19).

Despite the evidence in the record that the consolidation was a pre-existing plan, the Association argues that the plan's consummation would be "pursuant to" I.C.C. authorization if that action was in accordance with, consistent with, in conformance with or in furtherance of the approval of the I.C.C. Phrased negatively, the Association suggests that a particular act by a Carrier can be viewed as a "transaction" unless that act is not in accordance with the merger plan, not consistent with, presumably, the order of the I.C.C. or not in furtherance of the objectives of the merger. (Association Reply Brief, p. 10). The Association argues that the action here is, indeed, consistent with, in accordance with and in furtherance of the merger since the Carrier hopes to realize, through the planned consolidation, certain "additional economies and efficiencies," one of the purposes expressed in the merger application. Thus, where an action will accomplish an objective sought by the merger, it is an action taken "pursuant to authorization of [the] Commission."

The foregoing construction of the term "pursuant to" does not include as an ingredient the concept of causation. Indeed, the Association suggests that if the Commission had meant to require direct causation it would have phrased the definition of transaction to include the term "caused by". Nevertheless, there is considerable distance between the term "caused by" and the Association's formulation of "not inconsistent with." The former standard would limit trans-

actions to those acts required by I.C.C. merger approval and it is clear that the Commission has not imposed this standard. In this regard, it is just as obvious that the term "transaction" was not meant to be limited to those issues that were expressly covered in the merger application and Order, as the Carrier suggests. The fact, that the I.C.C. did not specifically consider this Carrier's plan to consolidate train dispatching office cannot be viewed as dispositive of the issue here (Carrier Brief, p. 20).

The Carrier's claim that Appendix III conditions apply only to actions which require I.C.C. approval is problematic. To begin, it is not clear from the arbitration cases cited by the Carrier that I.C.C. approval was necessary for the specific actions taken by carriers pursuant to Finance Docket No. 28905. See, for example, BRAC and C&O Ry. and Seaboard Coast Line R.R. (Lieberman, February 28, 1981). That case involved, in part, the coordination of C&O and SCL clerical forces at Richmond, Virginia; it is not clear whether I.C.C. approval was necessary for such coordination or whether it could have been accomplished through the Washington Job Protection Agreement.

It is equally clear, however, that the Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue. Every action initiated subsequent to a merger cannot be considered, ipso facto, to be "pursuant to" the merger. There must be a causal connection. As it relates to the applicability of New York Dock II to a merger, such nexus is implicit in the term "pursuant to." Otherwise, terms such as "in accordance with", "subsequent to", "following" and "changes consequent upon" have no meaning; they become empty

words rattling in a semantic vacuum. For example, in the Southern Ry. - Control - Central of Georgia Ry. case, the Commission stated:

"(T) The 'effect' of subsequent internal technological improvements by either of the (two consolidating) carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions." (Underscoring added). Southern Ry. - Control - Central of Georgia Ry., 317 I.C.C. 729, 732 (1963), aff'd sub nom. Railway Labor Executives Assn. v. United States, 226 F. Supp. 521, (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964).

It is the absence of any such causal nexus in this case that defeats the application of the term transaction.

The Carrier was able to demonstrate that its plan to consolidate the train dispatching offices was made independently of the Commission's merger approval. The decision to convert to a single train dispatching office in Spring, Texas was based on the cost of maintaining the building in Fort Worth, the need to provide centralized traffic control through computers, the need to replace outdated equipment now in use, and the availability of Carrier property in Spring. As the Carrier pointed out, it is only happenstance that the consolidation is to occur after the merger; the decision to consolidate was made well before the merger.

The Association's argument, however, does not rest solely on the definition of transaction, as it is written. The Association also points out that "transaction" has been interpreted to include those situations which would be covered under the term "coordination" in the Washington Job Protection Agreement of 1936. Since the Carrier concedes that the proposed consolidation would have been accomplished under the Washington Job Protection Agreement had it

taken place prior to the merger, the Association argues that action would be a "coordination" and, hence, a "transaction." The Association has cited two statements to support its theory that any act that would be a coordination prior to merger is a transaction after a merger. First, in setting out the substance of Appendix III of Dock II, the I.C.C. stated:

"The labor organizations also request that definition of the term 'transaction' in article 1, section 1(a), be modified to encompass the same situations as the complementary term 'coordination' does in WJPA. These terms are the triggering mechanisms of article 1, section 4 and sections 4 and 5 of WJPA, respectively. Since article I, section 4 here is intended to incorporate the full protections of sections 4 and 5 of WJPA, the term 'transaction' should be redefined to set the notice, negotiation, and arbitration provisions in motion in the same situations as does the term 'coordination.' We also note that the broad definitions is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 et seq., because the event actually affecting the employees might occur at a later date than the initial transaction and arbitration; therefore, we will modify the term 'transaction' so that it will apply to any action taken pursuant to a Commission authorization upon which these conditions are imposed."

New York Dock Railway - Control - Brooklyn Eastern Dist., 360 I.C.C. 60, 70 (1979)

Later, in upholding the legality of the Appendix II conditions, the Second Circuit expressed the following opinion as to the terms used by the I.C.C.:

[8] The definitional provisions contained in the "New York Dock conditions" remain to be discussed. Petitioners' objections to the ICC's definition of the term "transaction" are without merit. Although this definition has no precise ancestor in either the "New Orleans conditions" (as clarified in Southern Control II) or in the Appendix C-1 conditions, it is clear from the definition itself, as well as from the ICC's expressed intention in formulating this definition itself, as well as from the ICC's expressed intention in formulating this definition, that the goal which the ICC had in mind was to encompass in its definition of "transaction" the same situations that were within the parallel term

"coordination" employed in the admitted blueprint for all current employee protective packages, the WJPA. We do not believe that this goal is beyond the statutory authority conferred on the ICC in formulating employee protective conditions pursuant to 49 U.S.C. § 11347. Nor do we believe that the ICC's attempt to achieve this goal strays so far from the mark that the term "transaction" needs redefinition by us.

New York Dock Ry. v. U.S., 609 F.2d 83, 94 (1979).

On the surface it appears as though both the Commission and the Second Circuit have concluded that the terms transaction and coordination are interchangeable. A closer analysis of the statements reveals, however, that neither forum dealt with the situation encountered here: the lack of a causal nexus between the merger and the Carrier's action.

The I.C.C. comments in the New York Dock II case were made in response to the Organizations' concern that the prior definition would not extend protection to actions taken by a Carrier at a later date. The Organizations sought a redefinition that would cover not only the initial transaction but "future related actions made pursuant to [I.C.C.] approval." 360 I.C.C. at 65. The I.C.C. responded to that objection by expressly covering situations where "the event actually affecting the employees might occur at a later date than the initial transaction yet still be pursuant to our approval..." 360 I.C.C. at 70. Both the objection and response deal with the timing of a "transaction" and it is in this context that the Commission equated "coordination" and "transaction." However, neither the objection nor the response supports the proposition that a causal nexus is unnecessary in a transaction. The Second Circuit's opinion does not elaborate on the Commission's earlier analysis and, in light of the Court's express refusal to redefine the term, it must be assumed that the Commission's earlier statements are

to be considered authoritative. Having examined those statements, it cannot be said that the Commission's reference to the term "coordination" was intended to defeat the necessity for a causal nexus.

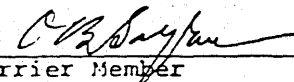
In the sum, the Association has not shown that the proposed consolidation of train dispatching offices is a "transaction" within the meaning of Appendix III, nor has the Association overcome the Carrier's affirmative presentation that the proposed action is not one that was made pursuant to the merger of the Texas & Pacific and Missouri Pacific.

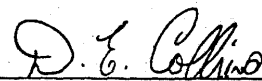
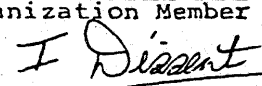
Based on the foregoing, the Committee renders the following:

AWARD

The employee protective conditions of New York Dock II imposed in I.C.C. Finance Docket No. 27773 are not applicable to the proposed consolidation of the train dispatching functions now being performed at Fort Worth, Palestine, and Houston, Texas.

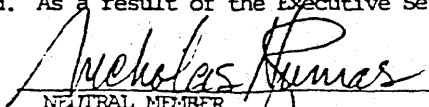

NEUTRAL MEMBER


Carrier Member


Organization Member


Date: July 31, 1981

While the Award was rendered on July 31, 1981, meeting the requirements of Section 11 of New York Dock II, the Arbitrator ruled that the Award would not become effective until an Executive Session, if desired, were held. An Executive Session, at the request of the Union, was held on November 3, 1981. The Arbitrator ruled that the Award would stand as rendered. As a result of the Executive Session the Organization's Dissent is attached.


NEUTRAL MEMBER

DISSENTING OPINION

The Opinion and Award of the Neutral Member is based on his view that there was no "causal nexus" between the merger of the Missouri Pacific Railroad Company ("MoPac") and the Texas and Pacific Railroad Company ("T&P"), as approved by the Interstate Commerce Commission ("ICC"), and the transaction at issue here; namely, the consolidation of the T&P train dispatching functions at Fort Worth, Texas with those of the MoPac offices at Palestine and Houston, Texas, and the movement of those functions to a new facility in Spring, Texas. The Neutral Member mistakenly relies on immaterial facts, ignores other relevant and critical facts, and misapplies the principles set forth in New York Dock Railway—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), affirmed, 609 F.2d 83 (2nd Cir. 1979).

The Award does not adopt the carrier's main assertion that it could have effectuated this consolidation of separate T&P and MoPac train dispatching facilities in the absence of the ICC's order approving the merger of the two railroads. It is well settled that rail carriers are not free to combine separate operations and facilities without ICC approval, even if the carriers have a parent-subsidary relationship. 49 U.S.C. Section 5(2), recodified as, 49 U.S.C. §11343(a). See, New York Central Securities Corp. v. U.S., 287 U.S. 12 (1932); United States v. Lowden, 308 U.S. 229 (1939). Thus, the Award's heavy reliance on MoPac's undocumented 'intention' to consolidate these facilities prior to the merger is immaterial. Clearly, the consolidation

could not have taken place — and did not take place — until after the ICC's decision authorizing the merger.

Indeed, a critically important fact which is glossed over in the Award is the existence of the Association's separate schedule agreements governing the T&P train dispatchers and the MoPac train dispatchers. These separate agreements reserve the train dispatching duties to the T&P and MoPac dispatchers under their respective seniority districts. The only way the carrier could effectively disregard these agreements and implement the consolidation is through the ICC's merger approval — and even then it could only be accomplished through the collective bargaining process. New York Dock II, Appendix III, Art. I, Sec. 2. Simply stated, other than the merger action, there is no other vehicle which permits consolidation of facilities operated by different railroads and governed by separate schedule agreements. The cause and effect relationship in these circumstances could hardly be more clear.

Moreover, the Neutral Member mistakenly agreed with the carrier's contention that its consolidation action was based solely on financial and technological reasons unrelated to the merger. In light of this argument, the consolidation occurring after the merger was viewed merely as a "happenstance."

Consolidations like the one in question here are almost always motivated by a desire to increase operational efficiency, reduce costs and enhance profitability. To allow a carrier to escape his employee protective obligations by pointing to these

often-stated reasons would, in effect, eliminate such protections. Unfortunately, that is precisely the result reached in the instant case.

The deficiencies in the Award are best illustrated by the erroneous reliance on the Southern Ry.—Control—Central of Georgia Ry. case — the only authority cited in the decisional portion of the Award. The Neutral Member, in apparently adopting the argument in the carrier's submission, quoted at length the initial ICC decision which noted that the effectuation of technological improvements by the consolidated carriers there was "...too indirect and remote to be considered a result of the transaction...", and therefore the labor protective conditions did not apply. Southern Ry.—Control—Central of Georgia Ry., 317 I.C.C. 729, 732 (1963), aff'd. sub nom, Railway Labor Executives' Assn. v. United States, 226 F.Supp. 521, (E.D.Va.), vacated on other grounds, 379 U.S. 199 (1964).^{1/}

On remand from the Supreme Court, however, the ICC modified its original decision by expanding the labor protective conditions to cover those situations which the carriers felt were outside the protections described by the ICC in the above-quoted language. Southern Railway Co.—Control—Central of Georgia Ry. Co.,

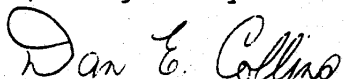
^{1/} In the first sentence of the quoted paragraph, the ICC stated that "[i]t is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of the applicant and the Central or by the shifting of functions from one to the other." 317 I.C.C. at 732. Although this sentence was omitted from the quotation in the Award, it obviously applies to the coordination or shifting of train dispatching functions from the T&P to the MoPac. Of course, the protective conditions have been considerably expanded under New York Dock II.

331 I.C.C. 151 (1967). Regrettably, by incorporating the carrier's contentions into his Award, the Neutral Member failed to consider the ICC's ruling on remand — a ruling which substantially alters the initial decision of the ICC, and which actually supports the Association's position in the instant case.

Finally, the Award is plainly inconsistent with the language and intent of the New York Dock protective conditions. The post-merger consolidation of train dispatcher facilities involves the "consolidation of employee rosters" which is expressly covered by the ICC's decision in New York Dock II. 360 I.C.C. at 70, 75^{2/}

Furthermore, both the ICC and the Second Circuit Court of Appeals found that the broad term "transaction" embodied the same actions covered by the term "coordination" under the Washington Job Protection Agreement (WJPA). 609 F.2d at 95.^{3/} As the Award itself points out, the carrier conceded that the consolidation of the MoPac and T&P train dispatching facilities would be a "coordination" under the WJPA if it had not been for the merger. On the basis of this concession alone, the consolidation should have been found to be a "transaction" as defined in New York Dock II.

For the foregoing reasons, I vigorously dissent.


Dan E. Collins
Organization Member

^{2/} Unfortunately, the quotation of the New York Dock II decision in the Award (p.13) mistakenly omits this important reference to the consolidation of employee rosters.

^{3/} Other Arbitrators have correctly determined that the term "transaction" should be broadly applied to encompass those actions that constitute a "coordination" under the WJPA. Denver & Rio Grande Western R. Co., and Railway Labor Executives' Ass'n., January 9, 1981 (Neil P. Spiers); New York Dock Ry. Co. & Brooklyn Eastern District Terminal and Brotherhood of Locomotive Engineers, December 15, 1980 (Francis X. Quinn).

ARBITRATION PURSUANT TO SECTION 11(a)
OF NEW YORK DOCK CONDITIONS
(I.C.C. FINANCE DOCKET NO. 29486)

PARTIES:

CONSOLIDATED RAIL CORPORATION
(CONRAIL)

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
SYSTEM COUNCIL NO. 7

STATEMENT OF DISPUTE:

1. That under the current Agreement, as amended, particularly by Interstate Commerce Commission Finance Docket 29486, effective May 27, 1981, the Consolidated Rail Corporation fails to grant the New York Dock Labor Protective Conditions as prescribed therein, to certain enumerated employees, who have been adversely affected with respect to their compensation and conditions of employment as a result of the transaction covered in the aforesaid Finance Docket 29486.
2. That accordingly, the Consolidated Rail Corporation be ordered to

grant New York Dock Labor Protective entitlements as provided by the Interstate Commerce Commission Finance Docket No. 29486 to the Claimants for the entire pay period they are adversely affected with respect to compensation or conditions of employment, from the first day of the aforementioned period and as long thereafter as they are due such protective conditions.

BACKGROUND:

On November 29, 1984, the National Mediation Board nominated the undersigned Neutral to sit with the Consolidated Rail Corporation and the International Brotherhood of Electrical Workers, pursuant to Section 11(a) of the New York Dock Conditions, to resolve a dispute involving I.C.C. Finance Docket No. 29486, Delaware and Hudson Railway Company - Purchase Portion - Consolidated Rail Corp.

The Board met in Philadelphia, Pennsylvania on March 6, 1985, and a subsequent executive meeting of the Board was held on April 15, 1985. The Consolidated Rail Corporation (hereafter "CONRAIL") was represented by Robert O'Neil and Janet Goodheart, and the International Brotherhood of Electrical Workers, System Council No. 7, (hereafter "IBEW") was represented by Spartaco Mazzulli and Edward J. Lachowicz.

STATEMENT OF FACTS:

On September 22, 1980, the Delaware and Hudson Railway Company (hereafter D&H), filed an application for authority to acquire and operate the

Conrail line (Scranton-Binghamton) and reiterated a request for temporary authority to operate the line during the pending of the Commission's deliberations. The D&H and Conrail had been in negotiations for approximately two (2) years and the parties entered into an Agreement of Sale dated September 8, 1980. In a letter to the Interstate Commerce Commission also dated September 8, 1980, the D&H made application for temporary emergency operations of the Conrail Line. In the D&H temporary emergency application that Carrier stated that its line was in urgent need of substantial rehabilitation and for reasons of financial need as well as efficiency of operations, immediate operation over Conrail's Scranton-Binghamton Line is both preferred and required by the public interest. The D&H further stated:

"D&H and Conrail have agreed that, if any employees of either party are affected by the grant of authority here requested, each party will bear the cost of protecting its own employees in accordance with conditions customarily imposed by the commission in transactions of this kind."

Conrail asserted that in fact it had ceased operating the Line in 1978.

On September 26, 1980, the I.C.C. by Service Order No. 1486 granted D&H authority to operate over the Conrail Line described in the September 18, 1980 Sales Agreement from 12:01 A.M., September 27, 1980, the effective date of the Order, until its expiration date of 11:59 P.M., January 31, 1981.

On October 7, 1980, Conrail notified employee groups of the D & H Sales Agreement. Service Order No. 1486 expired January 31, 1981, but on January 27, 1981, ICC Finance Docket No. 29486 permitted continued operation of the Line by D & H from February 1, 1981 and imposed the employee protective provisions commonly referred to as the New York Dock Conditions (NYDC) until a final decision was rendered. Finally on May 27, 1981, the ICC approved the D & H purchase of the Line with the imposition of the employee protective conditions (discussed in New York Dock Ry - Control - Brooklyn Eastern District 360 ICC 60 (1979).)

In the meantime, IBEW claimed that on September 27, 1980, Conrail abolished three (3) Communications Maintainers Positions, Communication Construction Foreman, and several other positions which adversely affected seventeen (17) employees. (Eighteen (18) positions were involved, but one employee held two (2) of them).

On February 25, 1983, which was approximately twenty-nine (29) months after D&H began operation of the Line, IBEW initiated a formal claim for the affected employees for the protective entitlements of NYDC. The basis of their claims is alleged to be adverse effects on their compensation and conditions of employment as a result of the transaction covered in Finance Docket No. 29486 of May 27, 1981.

On April 18, 1983, Conrail denied the claim on the basis that the Claimants:

"...were not performing any service on or in connection with the Binghamton to Scranton Line and were not affected by D&H's acquisition of the operation of such line... The closing of the Scranton Engine House in March of 1981 was a continuing part of Conrail's overall plans of consolidation and centralization of forces key locations" .

In addition, Conrail asserted that only six (6) Claimants were headquartered in Scranton and that the Six (6) of them transferred elsewhere. In summary, Conrail asserted that none of the Claimants was "affected by D&H's operation, maintenance and control of the Line effective September 27, 1980 or the authorization contained in I.C.C. Finance Docket No. 29486 or the subsequent sale of the Line."

The carrier also asserted that the claim should be dismissed because of laches and lack of specificity.

DISCUSSION:

1. PROCEDURAL ISSUE:

The Carrier argued preliminarily that the claim should be dismissed because the Organization's February 25, 1983 letter failed to meet the criteria required under 11(e) of NYDC. That section reads:

"In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee."

The Carrier asserted that in violation of the foregoing, the claim was presented by the Organization and not by the "particular employee" alleged to have been affected, the transaction was not identified, the facts of the transaction were not specified, the date of the adverse effect was not indicated, and in any event, that the Organization was guilty of laches. The last point was based on the fact that the claim was filed on February 25, 1983 and relates to a transaction covered in Finance Docket No. 29486, dated May 21, 1981, a span of some twenty-one (21) months. In addition, D&H first started its operation on the Line in September, 1980, well over two (2) years earlier. Finally, the Carrier maintained that some of the named employees are Claimants whom the Organization cannot represent, viz. one is a general foreman, and another is a member of the Signalman craft.

The contention of the Carrier is not without merit. However, the protective conditions concept in Railway Law is particularly attuned to the rights of employees. In the absence of very compelling facts, the panel would not be inclined to find a fatal defect in the Organization's claim letter. Obviously, at some point in time, a period of delay

would constitute laches. Here, the organization and carrier have a running dispute concerning the organization's allegation that the carrier failed to give notice to the employees of the transaction or any changes it contemplated in connection with such transaction. The Carrier countered by reference to its October 7, 1980 notice to the organization of the impending sale of the Line and of the content and provisions of I.C.C. Service Order 1486. This was further discussed on October 8, 1980, and the Carrier maintained that no further notice was required.

The organization's February 25th, 1983 letter refers to the sale by the Carrier to D&H, it identifies the individual employees by name, and seeks the NYDC "for the entire period (the employees) are adversely affected". The Carrier's letter of April 18, 1983 constitutes a formal answer to the claim and covers the history of Conrail's reduction of service from the 1978 closing of the Scranton Yard to discontinuance of virtually all service and eventually leading to the D&H operation of the Line effective December 27, 1980. This suggests that the Carrier was sufficiently informed of the specifics and was prepared to meet the claim. There was also a substantial amount of arbitral law indicating that standard time limit provisions are not applicable to disputes arising under employee protective agreements.

The Board is satisfied that the February 25, 1983 letter constitutes a proper and sufficient claim for benefits under NYDC, and no fault can be assessed against the organization for failing to meet its burden in that regard. It rightfully could stand in for its members in the presentation of the claim. (The issue regarding its authority to present claims for certain non-bargaining unit employees becomes moot in view of the Board's Award on the merits).

2. SUBSTANTIVE ISSUE:

The principle involved here is to protect the interests of employees of railroad carriers who are dismissed, displaced, or adversely affected by a transaction, all of which is defined in Finance Docket No. 28250. The NYDC constitute an obligation of fair treatment for such employees, but it is not an ironclad or automatic right. The Carrier correctly characterizes the process in stating:

"...the approval of the acquisition of the Binghamton-Scranton Line by D&H in Finance Docket 29486 by itself does not grant blanket or unconditional protection to the Claimants. There must have been some other Carrier action directly related to the transaction, which action had a causal or proximate nexus to the sale of the line and which adversely affected the Claimants with respect to their compensation or employment. Absent a causal nexus, there was no 'transaction' which activated the protective conditions of NYDC". (Carrier Brief, pp. 6-7).

In United Transportation Union and San Diego and Arizona Eastern Railway Transportation Company, Chairman and Neutral Member Gil Vernon, clearly defined the meaning of cause and effect:

"...the language of the conditions clearly sets forth that, to be considered protected, an employee must be adversely affected as a 'result' of a transaction. Thus, it is clearly implied that factors other than a transaction which may adversely affect an employee do not turn on the protective provisions. Only adverse effect as a 'result' of a transaction qualifies an employee for protective benefits and no benefits flow from adverse impact due to other causes. Certainly, the Neutral cannot ignore that the use of the word 'result' requires a causal relationship between the transaction and the adverse impact..." (P. 5; July 20, 1984).

Also, Arbitrator Nicholas Zumas, stated in Missouri Pacific Railroad Company and American Train Dispatchers Association:

"...the Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue...there must be a causal connection..." (p. 11; July 21, 1981).

In the Missouri Pacific Railroad Company case, the Carrier

action was consolidation of train dispatching officers. That consolidation occurred after the merger. Nevertheless, the Board concluded that "the decision to consolidate was made well before the merger." (P. 12)

And in New York Dock Railway and Brotherhood of Railway, Airline and Steamship Clerks, Arbitrator Zumas, also stated:

"In order for the protective benefits to apply, however, the displacement or dismissal must be caused by the transaction authorized by the I.C.C. The question here is whether the action taken by the Carrier in April, 1981 was the result of the 1980 coordination or whether the elimination of the positions in question was the result of some other force or factor..." (P. 4; SBA No. 915, April 22, 1983).

Arbitrator, Jacob Seidenberg, in AMTRAK (1979) summarized the issue when he said:

"We find that the prevailing and almost unanimous weight of arbitral authority is that mere loss or reduction in earnings per se does not render or place an employee in the status of a 'displaced employee'. Neither the Congress of the United States nor the Secretary of Labor or the contracting parties to protective benefits agreements, intended to afford absolute and complete financial protection to any railroad employee who might be in some way tangentially adversely affected by a merger, coordination, or as in the instance (sic) case by a statutorially authorized discontinuance of railroad passenger service."

The bottom line issue, therefore, in this case is whether the Carrier's sale of its Binghamton Line to D&H adversely affected Claimants.

The facts are not complicated. In January, 1978, Conrail reduced service on its Binghamton-Scranton Line to a local freight operation and the Scranton Yard was closed. Later, but for occasional on-demand service, virtually all service was discontinued on the Line. The Scranton Diesel Shop remained open. It had no local work to do but handled only overflow work from Conrail's Altoona & Enola Locomotive Repair Facilities.

Early in 1981, the Carrier undertook to reduce its forces because of economic conditions. On March 10, 1981, the Scranton Diesel Shop was closed and eight (8) positions (including a foreman and a laborer) were abolished. Five (5) of the employees obtained positions in Bethlehem, Two (2) in Pittston, and One (1) was transferred to Enola. Those jobs were part of Two Hundred Eighty-Five (285) positions in Locomotive Shops throughout the Carrier's system that were abolished. Prior to the March 10, 1981 closing, Conrail had met with the General Chairman of eight (8) Organizations including IBEW and confirmed the following day by letter that the force reductions were to take place. (Note is made that none of the other seven (7) Organizations had instituted a claim under NYDC until February 21, 1985, when one (1) local Chairman for one (1) union filed a claim for two (2) employees including himself. Conrail referred to it as "a much belated claim" and suggests that that Organization is simply riding the coat-tails of IBEW here.)

There is substantial authority holding that a reduction in business volume is a legitimate defense under NYDC. Thus, Arbitrator Gil Vernon, in United Transportation Union and San Diego & Arizona Eastern Railway Transportation Company, previously referred to, stated:

"It is noted that other arbitrators have held the reduction in business volume is a legitimate defense under New York Dock Conditions..." (Citing Cases: P. 6).

Arbitrator Vernon, goes on to say in that matter "the Neutral finds that the decline in business defense is not only available but a plausible explanation." (P. 7).

Likewise in "The Labor Lawyer", Volume 1, No. 1, Winter 1985, published by the American Bar Association, Section of Labor and Employment Law, the Committee report in this general area states:

"Several labor protection arbitration awards warrant discussion. In Chesapeake & Ohio v. RYA (April 30, 1983), the Board held that the union failed to prove that furloughs were in anticipation of an abandonment, rather than a business decline. In New York Dock Railway Co. v. BRAC (April 22, 1983), the Board accepted the carrier's explanation that business decline was the cause of furloughs." (P.178)

In an earlier volume of "The Labor Lawyer", Volume 1, No. 4, Fall, 1985, the Committee report relating to this general area stated:

"In Railway Labor Executives' Association v. I.C.C., 735 F.2d 691 (2d Cir. 1984), the Second Circuit upheld a Commission order denying employee protective benefits to employees affected by the entire line abandonment in the New York Dock Railway/Brooklyn Eastern District Terminal case. The Court expressed misgivings with the Commission's decision, but deferred to the ICC's general policy not to impose protective conditions in connection with entire line abandonments." (P. 973).

The organization offered for review and consideration the opinion and award of Neutral Member, H. Stephan Gordon, in Delaware and Hudson Railway Company and Brotherhood Railway Carmen of the United States and Canada (March 1, 1984). The case provides an excellent reference, although the carrier/sought to exclude consideration of it on the basis that it was not introduced during the handling of the dispute on the property. The Carrier argued that any evidence or contentions not introduced during the handling of the dispute on the property are not admissible, if it is first presented when the dispute has progressed to the National Railroad Adjustment Board (or other equivalent tribunal). Specifically, it sought to bar from consideration the offer of the interim and final awards in the case, even though it concerns acquisition of Conrail's Binghamton Line by D&H.

In support of its position, the Carrier cited numerous precedents relative to late introduction of evidence. While the principles enun-

ated in those cases may be accurate, they are not applicable here. The awards offered for consideration by the organization do not constitute evidence. Case citations are not akin to the introduction of new facts. Furthermore, the contentions or arguments arising therefrom are not new. They present no surprises and are submitted to buttress or reinforce previously stated positions. As such, the Board had the right to evaluate same.

The D&H and BRC case concerns the same transaction and protective benefit issues as in the instant case. In the D&H and BRC case, the Carrier:

"...attributed its personnel changes to such factors as the Russian grain embargo, the age and deterioration of its equipment, the loss of certain accounts...reduction of the number of trains, it failed...to introduce any evidence which would have connected these alleged economic factors at least in point of time to the operational and personnel changes...it consistently failed to respond to questions how its allegations related to the situation...on or about the time the changes were actually instituted." (PP.3-4).

On the other hand, the organization in that case offered evidence which demonstrated that "the classification and switching operations previously accomplished at Oneonta were no longer performed there, since the acquisition of the Binghamton facility rendered such an operation obsolete." (P.4) The Board found that the operational and personnel changes instituted by D&H at its Oneonta and Green Ridge facilities were due to the acquisition and operation of the Conrail Line, and that such acquisition and operation had an adverse impact on the employees. The Board specifically found that:

"...the elimination of the switching and classification operations at Oneonta would have not been feasible without the

utilization of the Binghamton Line. Similarly, the transfer from Green Ridge could not have been accomplished without the acquisition of the Taylor Yard...the operational and personnel changes in issue completely coincided in time with the acquisition of the Conrail Line and, indeed, were anticipated both in the purchase agreement and the company's representations to the Interstate Commerce Commission...the conclusion is inescapable that these changes were occasioned by D&H's acquisition of the Conrail Line." (PP 5-6).

What is of significance is that the argument raising the defense against imposition of NYDC was raised late in the dispute and the Board presumably questioned the bona fides of such an argument when it said:

"With respect to the contention that the personnel changes at Oneonta and Green Ridge were solely occasioned by adverse economic conditions and were unrelated to the acquisition of the Conrail Line, it must also be noted that throughout the rather lengthy negotiations between D&H and the Organization, this contention was never made and the issue was raised for the first time at the hearing." (P. 18) (Emphasis Added).

All of the foregoing leads the panel to conclude that the Carrier here sustained its burden of proving that factors other than the transaction affected these employees. Conrail's discontinuance of its Binghamton-Scranton Line, the closing of the Scranton Yard, and the later closing of the Scranton Diesel Shop were truly part of a force reduction throughout its entire system - they were not due to the D&H acquisition.

Portents of this conclusion may well be suggested in Service Order 1486 dated in September, 1980. That Order did not include language referring to NYDC, and the Carrier's argument is well taken that this may have been so because the Carrier had closed the line, and there were no employees to protect. The Board is of the opinion that had there been

no take over by D&H, Conrail still would have effected a reduction in force. The Carrier properly argues:

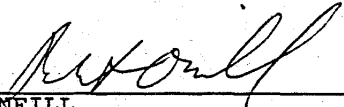
"It is well established that a carrier action taken even within a short time of the transaction for which protection is granted, does not activate the protective provisions of the NYDC, unless the carrier action was the direct result of the transaction...the action complained of was taken for reasons other than the sale of the Binghamton-Scranton Line to the D&H..." (Carrier Brief, Pp11-13).

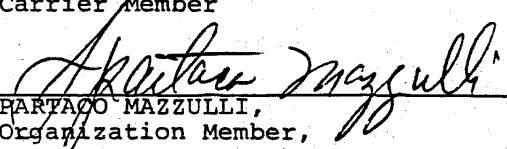
The final succinct conclusion is that Conrail made no changes resulting from its sale of the Line which adversely impacted on the Claimants. That is not to say that Claimants are in the same position now as they once were. However, those changes cannot legally under the circumstances be attributed to the transaction in this case. Accordingly, the Claimants are not entitled to the benefits of the protective provisions developed in NYDC.

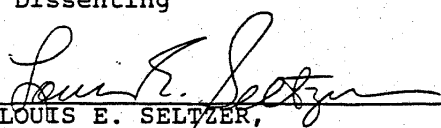
A W A R D

The employment conditions of the listed employees of the Consolidated Rail Corporation were not adversely affected by D&H's acquisition of the Conrail Line. The claims are denied.

Date: December 16, 1985


R. O'NEILL,
Carrier Member


SPARTACO MAZZULLI,
Organization Member,
Dissenting


LOUIS E. SELTZER,
Neutral Member

Before ARBITRATION COMMITTEE appointed pursuant to
Article I, Section 11 of Appendix III, I.C.C. Finance
Docket No. 28250

In the Matter of	)	
	)	
UNITED TRANSPORTATION UNION (T)	)	
	)	O P I N I O N
and	)	
	)	A N D
CONSOLIDATED RAIL CORPORATION	)	
	)	A W A R D
Docket No. CRT-906	)	

SUBMITTED ISSUES

1. Is trackman James Poltrack entitled to the benefits described in the "New York Dock Conditions" as requested on August 16, 1982 due to the abolishment of his position on August 11, 1982?
2. Is trackman Thomas A. Grant entitled to the benefits described in the "New York Dock Conditions" as requested on August 17, 1982, due to the abolishment of his position on August 13, 1982?
3. Is trackman Wayne Ust entitled to the benefits described in the "New York Dock Conditions" as requested on December 10, 1982, due to the abolishment of his position on December 10, 1982?
4. Is trackman T. M. Roberts entitled to the benefits described in the "New York Dock Conditions" as requested on December 10, 1982, due to the abolishment of his position on December 10, 1982?

BACKGROUND FACTS

On January 11, 1980, the U. S. Interstate Commerce Commission issued as Finance Docket 29805 a Notice of Exemption from the requirements of 49 U.S.C. 11343-11347 to the proposed merger of Consolidated Rail Corporation (Conrail) with the Raritan River Railroad Company (Raritan), the latter

wholly owned by Conrail at the time. This grant was made "subject to the conditions imposed for the protection of employees imposed in New York Dock Ry-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), affirmed by slip opinion of U. S. Court of Appeals for 2nd Circuit, November 7, 1979." The latter document provides certain payments to individuals caused to be displaced or dismissed because of merger. It bears the designation of Finance Docket No. 28250 and will be referred to herein as New York Dock Conditions or NYDC. Provisions of this document which are material and pertinent to the instant controversy, are the following:

1. Definitions.--(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
 - (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
 - (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.
- * * *
3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the

benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement

* * *

11. Arbitration of disputes

* * *

- (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

The merger of Raritan with Conrail was effectuated on April 24, 1980.

CIRCUMSTANCES

It is undisputed that the four above named claimants were hired by the Raritan River Railroad on various dates in 1970 to work as trackmen (work consisting primarily of maintenance and repair of tracks and their component and connective appurtenances and equipment) and held such positions at the time of the Raritan-Conrail merger on April 24, 1980.

The position of Claimant Poltrack was abolished on August 11, 1982. He applied for NYDC benefits on August 16, 1982.

The position of Claimant Geant was abolished on August 13, 1982. He applied for NYDC benefits on August 17, 1982.

The position of Claimant Ust was abolished on December 10, 1982. He applied for NYDC benefits on December 10, 1982.

The position of Claimant Roberts was abolished on December 10, 1982. He applied for NYDC benefits on December 10, 1982.

Carrier denied Claimants' applications.

POSITIONS OF THE PARTIES

Carrier takes the position that these losses of jobs were not the direct result of the Raritan-Conrail merger and that the claims must be rejected because claimants have not met the burden of proof put on them by Article 1, Section 11 (e) of NYDC to show that they were adversely affected by a "transaction" as defined in Article 1 (a) of that document, i.e. "to identify the transaction and specify the pertinent facts of that transaction relied upon" (Article 1, Section 11 (e)).

In support of its argument, Carrier cites the Award of an Arbitration Committee chaired by Referee Robert O'Brien

in a controversy under NYDC involving the International Organization of Masters, Mates and Pilots, and the Chesapeake and Ohio Railway Company (12/29/83). This decision states, in part:

"it must be shown that there existed a causal nexus between a 'transaction' and the adverse impact experienced by employees claiming the protective benefits established by the New York Dock conditions. Absent such causal nexus, said employees are not entitled to the benefits provided by the New York Dock conditions despite the fact that they may have suffered some loss of earnings, or that their positions were abolished, subsequent to the ICC authorized 'transaction.'"

In Carrier's view, in this case, it is clear from the record that the claimants have failed to prove - or even allege - that they were adversely affected, with respect to their employment as the result of the "transaction" which is the subject of NYDC. It is pointed out by Carrier that in its on-the-property responses to claimants, Carrier stated that the loss of the respective jobs "cannot be deemed as a result of a transaction but merely due to a normal reduction in force as the result of the completion of programmed work on the former Raritan River property". No denial of these statements or support of such denials were ever put forward by claimants or their Organization.

Carrier points out that the abolishments in question took place in August and December 1982, approximately 2½ years after the merger and asserts that at that time there had been no integration or coordination of maintenance-of-way work on the Raritan line with Conrail maintenance-of-way work. It maintains that had the Raritan not been merged with Conrail, these abolishments would have occurred nevertheless when they did.

Organization maintains that abolishment of these positions was a direct result of the Raritan-Conrail merger. This was the causal "transaction" that resulted in the employment by Carrier of Conrail employees with no Raritan River seniority to work on former Raritan property. And it was because those Conrail employees performed said work that the positions of these four former employees of the former Raritan River Railroad were abolished.

OPINION

Organization argues that the causal nexus between merger and the abolishment of the jobs of these four is apparent from the fact that individuals hitherto having seniority only on the Conrail trackage, have, at various times since the termination of Claimants, done work on the former Raritan trackage which had customarily been performed by claimants

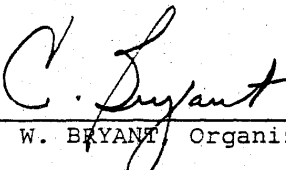
In the first place, it is not self-evident, that if these facts were proven they would constitute a showing that these four jobs were lost in August and December 1982 because of the merger in April 1980.

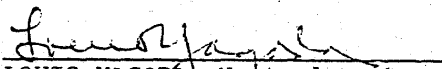
But this Committee is unable to reach such evaluations because claimants have not met their burden under NYDC of proving either that the events described took place or that they resulted from the merger "transaction" for which NYDC establishes benefits.

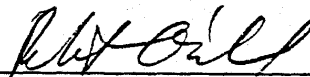
AWARD

1. Trackman James Poltrack is not entitled to the benefits described in the "New York Dock Conditions" as requested on August 16, 1982 due to the abolishment of his position on August 13, 1982.
2. Trackman Thomas A. Grant is not entitled to the benefits described in the "New York Dock Conditions" as requested on August 17, 1982, due to the abolishment of his position on August 13, 1982.
3. Trackman Wayne Ust is not entitled to the benefits described in the "New York Dock Conditions" as requested on December 10, 1982, due to the abolishment of his position on December 10, 1982.

4. Trackman T. M. Roberts is not entitled to the benefits described in the "New York Dock Conditions" as requested on December 10, 1982, due to the abolishment of his position on December 10, 1982.


C. W. BRYANT, Organization Member


LOUIS YAGODA, Neutral Member


ROBERT O'NEILL, Carrier Member

Dated JUN 18 1985

Award No. 2
Case No. 2

Public Law Board No. 3820

PARTIES
TO
DISPUTE:

American Train Dispatchers Association
and
Seaboard System Railroad

STATEMENT
OF
CLAIM:

"Claim of Train Dispatcher T. J. Fabrikant submitted under New York Dock Conditions for guarantee payments account being displaced from Regular Train Dispatcher Assignment as a result of Coordination of the Savannah-Waycross and Birmingham Train Dispatching offices effective June 1, 1983."

"Claim for months and amounts as follows:

July 1983	\$ 92.19
September 1983	632.35
October 1983	92.19
November 1983	1,372.51
December 1983	307.83
January 1984	731.54
February 1984	1,693.55"

FINDINGS:

This dispute arises under the "New York Dock" labor protective conditions and the parties' implementing agreements of May 6, 1983. Pursuant to Section 4 of the New York Dock conditions, Carrier served notice

of February 14, 1982 of its intent to coordinate certain train dispatching territories, functions and work incidental thereto from the Savannah and Waycross offices to Birmingham and other locations. Implementing agreements were signed by the parties on May 6, 1983 and the coordination became effective on June 1, 1983.

Claimant was a regularly assigned train dispatcher in Carrier's Savannah office. It is Petitioner's position that he remained in that capacity until June 14, 1983 when he was displaced by a senior train dispatcher as a result of the coordination of June 1, 1983. Accordingly, in Petitioner's view, claimant is entitled to the compensation he seeks under Section 5(a) of the New York Dock Conditions.

The record establishes that prior to June 1, 1983, the coordination effective date, regular assigned train dispatchers at Savannah and Waycross, including claimant, were offered in seniority order the opportunity to fill four dispatcher positions transferred to Birmingham. That offer was made in accordance with the express terms of an implementing agreement of May 6, 1983; Petitioner as well as Carrier committed themselves to the provisions of that agreement.

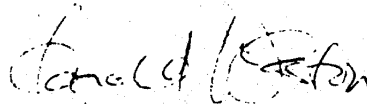
We also find that claimant was well aware prior to June 1, 1983, that the coordination was about to take place and that he would inevitably be soon displaced in the chain of displacements that would follow. Nevertheless, claimant decided not to apply for the Birmingham train dispatcher position which had a higher rate of pay than his position in Savannah. As a result, he was bumped off his position. He lacked sufficient seniority to obtain a regular

position at Savannah and was placed, at his election, on the extra board in Savannah since no opening existed at Birmingham after June 1, 1983.

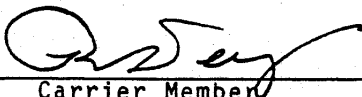
Viewed realistically, this record establishes that claimant's displacement did not flow directly from the "transaction" in this situation, namely, the coordination of June 1, 1983, but resulted from his failure to take reasonable steps and precautions to exercise seniority and protect his status. He knew of the options that were available to him and we are not impressed by his plea that he did not have to protect his rights as a regular assigned dispatcher until June 14, 1983 when no Birmingham train dispatcher position was still open.

AWARD: Claim denied.

Adopted at Jacksonville, Florida, August 24, 1985.



Harold M. Weston, Chairman



Carrier Member



Employee Member
Dissent Attached

L. J. Finnegan
Assistant Vice President
Labor Relations

October 24, 2001

PB-TCU-NYD - Rodan, D. R.
SSN: 140-38-7600

Mr. A. P. Santoro, Jr.
General Chairman, TCU
309 A Street
Wilmington, DE 19801-5324

Dear Mr. Santoro:

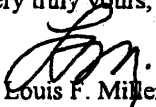
This refers to conference with Mr. L. D. Jones October 11, 2001, concerning claim on behalf of D. R. Rodan for the protective benefits under the New York Dock conditions.

Clerk Rodan remains on the same position of Chief Clerk he held prior to the transaction and therefore has not been placed in a worse position with respect to his compensation. Clerk Rodan does not meet the definition of a "displaced" or a "dismissed" employee in order to qualify for New York Dock benefits.

Clerk Rodan alleges that the abolition of the Night Report Clerk position resulted in the loss of overtime as he filled that position when the incumbent was off for any reason. The elimination of the Night Report Clerk position was not due to the Conrail transaction. The changes which resulted in the abolishment of this position were made to enhance departmental efficiency by eliminating duties that were no longer necessary. These changes had no causal connection to a transaction as defined in New York Dock and could have been accomplished prior to the Conrail transaction without the approval of the STB.

For the reasons set forth above, this claim is without merit and is accordingly declined.

Very truly yours,


/s/ Louis F. Miller, Jr.

cc: Mr. L. D. Jones

W:\PROTECT\LAUSTIN\RODAN.NYD\fad

In the Matter of Arbitration
Under New York Dock Conditions, Section 11
Pursuant to ICC Finance Docket No. 31432

Between:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And:

CONSOLIDATED RAIL CORPORATION

Arbitration Committee

Herbert L. Marx, Jr., Chairman and Neutral Member
Kenneth R. Mason, Employee Member
J. H. Burton, Carrier Member

October 9, 1992

Hearing held at Philadelphia, PA, August 27, 1992

EMPLOYEES' QUESTION AT ISSUE:

Were Claimants (D. R. Jones, W. J. Smith, Jr., R. Weahry, J. B. Santangelo, D. J. Flower, M. D. Lane, D. W. Mason, D. M. Petrella, and G. Gonzalez) placed in a worse position in respect to compensation and/or rules governing working conditions, or deprived of employment, as a result of the transaction described in ICC Finance Docket No. 1432 and thereby entitled to the labor protective provisions of New York Work Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)?

CARRIER'S QUESTION AT ISSUE:

Were the Claimants (D. R. Jones, W. J. Smith, J. R. Weahry, J. B. Santangelo, D. J. Flower, M. D. Lane, D. W. Mason, D. M. Petrella, and G. Gonzalez) adversely affected by the transaction described in ICC Finance Docket No. 31432, and are they entitled to the labor protective provisions under New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C. C. 60 (1979)?

BACKGROUND FACTS

The Carrier and CSX Transportation jointly owned 16 miles of trackage on the Akron Branch in Ohio. While the trackage was predominately utilized by CSXT, the Carrier was responsible for dispatching trains and maintaining the track. On January 31, 1989 a letter of understanding was reached between the two Carriers, providing for CSXT to purchase the Carrier's interest in the Akron Branch and to assume responsibility for maintaining the trackage and dispatching trains over the territory.

The Interstate Commerce Commission approved this undertaking in Finance Docket No. 31432, imposing New York Dock labor protection for employees.

Pursuant to Section 4 of New York Dock, an Implementing Agreement was reached on January 30, 1990 between the Carrier and the Organization. On February 6, 1990, CSXT assumed responsibility for the Akron Branch. Under Section 5 (and in one instance, Section 6) of the Implementing Agreement, the Claimants were furnished with test period earnings statements. The Claimants continued to have Akron as their headquarters until September 10, 1990, when their headquarters were transferred to Ravenna. No changes were made in the Claimants' titles or base rate of pay.

F I N D I N G S

There is no question that a transaction, as defined under New York Dock, occurred in that control of the Akron Branch was ceded by the Carrier to CSXT. The result was that work on the Akron Branch was no longer available to Carrier's Maintenance of Way employees. The Organization argues that the earnings of the Claimants were, at times, diminished not as to base rate but as to total compensation as compared to the Claimants' test period earnings. Based on this, the Organization contends that the Claimants met the qualifying requirements of Section 1 (b) of New York Dock, which reads as follows:

"Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

The protection due the Claimants, according to the Organization, is provided in Section 5 (a) of New York Dock, which reads as follows:

So long after a displaced employee's displacement as he is unable, in the normal exercise of seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Thus, the Union contends that the transaction led to placing the Claimants in a "worse position" owing to loss of overtime work on the Akron Branch and that they are entitled to benefits in any month when their compensation is less than that of their test period compensation.

The Carrier contends that no "displacement" occurred in that the Claimants continued in their pre-transaction assignments. Earnings records show no overall diminution after the transaction, although this may vary depending on changes in earning levels depending on the general availability of work. According to the Carrier, the loss of the Akron Branch represented 20 per cent of available work time, with the remaining 80 per cent unchanged. Earnings may well vary depending not on the loss of the Akron Branch but on changes in the overtime required in the remaining portion of the Claimants' assignments.

In the Arbitration Committee's view, questions as to the meaning of "position" in Section 1 (b) were properly resolved in Transportation-Communications International Union and Norfolk Southern Corporation (Neutral George S. Roukis, April 19, 1989), which stated:

. . . the Board concurs with the Organization's interpretation that the word "position" as contained in Section 1 (b) of the New York Dock Conditions connotes status, situation or posture rather than a specific job or assignment. The pervasive arbitral authority cited by the Organization supports our determination.

However, where there is no actual removal or transfer from a "a specific job assignment", as here, the Organization bears a considerable burden to show that the Claimants' "status, situation or posture" was "worse" after the transaction. The Organization provided data to show that in the first one or two months following the transaction, monthly earnings for most of the Claimants were less than the test period average, and in two instances this was the case for five months and nine months, respectively.

The Carrier, however, supplies data which tells a different story. In a study of the annual earnings of eight of the nine Claimants (one Claimant having work only portions of the years in question), earnings in 1991 were higher than 1990 (pre-transaction) for five of the Claimants and lower for three of the Claimants. In a five-year study of the Claimants' earnings (1987-1991) variations in earnings were common. For example, in 1988 earnings for all Claimants were lower than 1987, despite the absence of any applicable transaction.

It may be argued that New York Dock benefits are applicable in any month where compensation does not reach the test period average, and so comparisons of annual earnings or not relevant. The Arbitration Committee understands and accepts this, insofar as it is applicable to employees who have been clearly determined to

be "displaced employees" in a "worse position". But this monthly test does not apply in considering whether employees are determined to be in a "worse position" so as to qualify them for New York Dock in the first place.

It is clear that the Claimants have had a portion of their work territory reduced as a result of the transaction. They did not, however, suffer displacement from their assignments nor reduction in their work week or base pay rate. The only change which can be put forth is an allegation as to overtime opportunity lost as a result of sale of the Akron Branch. But the overall earnings records, before and after the transaction, fail to prove that the Claimants were placed in a "worse" position. Put another way, the Organization offers no convincing proof that overall earnings were affected by loss of the Akron Branch.

As stated in an Award concerning sale of trackage (Brotherhood of Maintenance of Way Employees and CSX Transportation, Inc., Neutral Nicholas H. Zumas, March 26, 1990):

The BMWE has not sustained its burden of proof in this matter. Fluctuation of levels of compensation and movement of territory are normal characteristics of maintenance of way employment. The fact that some Claimants had their work levels altered or their headquarters points moved does not prove adverse effect nor does it show the causal nexus between the transaction and the adverse effect that is required before imposing NYD protection benefits.

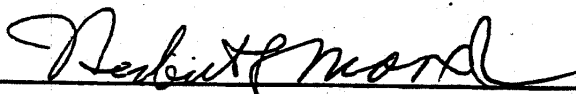
In sum, the Arbitration Committee here must rule on the eligibility for New York Dock benefits for employees not required to terminate their current work assignments as the result of a transaction. While it is within reasonable possibility that such

employees are found to be in a "worse position", there is no convincing showing here of a consistent and clearly measurable diminution of compensation owing solely to the transaction.

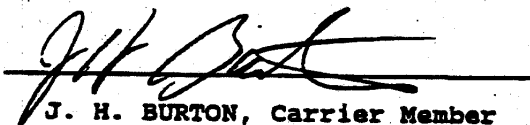
A W A R D

The Question at Issue posed by the Carrier is answered in the negative.

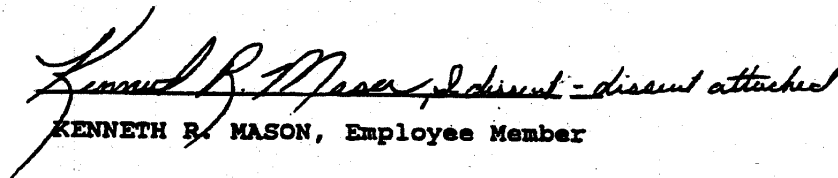
The Question at Issue posed by the Organization is answered in the negative.



HERBERT L. MARX, Jr., Chairman and Neutral Member



J. H. BURTON, Carrier Member



KENNETH R. MASON, Employee Member

NEW YORK, NY

DATED: DEC 01 1992

DISSENT OF LABOR'S MEMBER

In the Award, the Committee acknowledged a transaction, as defined under New York Dock ["NYD"], did take place in the selling of the Akron Branch by Conrail to CSX Transportation. However, the majority held that Claimants loss in compensation was not solely attributed to the transaction.

In rendering its decision the majority of the Committee, held in part:

"However, where there is no actual removal or transfer from a "a specific job assignment", as here, the Organization bears a considerable burden to show that the Claimants' "status, situation or posture" was "worse" after the transaction. The Organization provided data to show that in the first one or two months following the transaction, monthly earnings for most of the Claimants were less than the test period average, and in two instances this was the case for five months and nine months, respectively."

and later:

"It is clear that the Claimants have had a portion of their work territory reduced as a result of the transaction. They did not, however, suffer displacement from their assignments nor reduction in their work week or base pay rate. The only change which can be put forth is an allegation as to overtime opportunity lost as a result of the sale of the Akron Branch. But the overall earnings records, before and after the transaction, fail to prove that the Claimants were in a "worse" position. Put another way, the Organization offers no convincing proof that overall earnings were affected by the loss of the Akron Branch."

In the above quotes, this member finds the majority incorrectly placed the burden of proof on the Organization. Section 11(e) of NYD, clearly places the burden on the Carrier to show that something other than the transaction affected the employees. Section 11(e) reads:

Section 11(e)

"(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee."

Thus, this member finds the Organization identified the transaction, and the pertinent facts relied upon. The Organization offered pay records of the Claimants following the transaction. These records showed earnings following the transaction were below Claimants Average Monthly Compensation ["AMC"].

The Carrier presented to the Committee, the wage records of the Claimants covering a five year period (1987-1991). In rendering the decision the majority based its findings, in part, on the variations in earnings over that period. In doing so, this member finds the majority looked outside of the NYD provisions. NYD only provides for a review of earnings and hours worked during the previous twelve months, in which the Claimant had earnings.

Under the second paragraph of Section(5) of NYD, the AMC is determined by adding together compensation earned by the employee in the previous twelve (12) months in which the employee received compensation. This amount is then divided by twelve (12). The second paragraph in Section (5) reads:

"Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases."

In this member's opinion, NYD only provides for the comparison of earnings with that of the employee over the previous twelve (12) months in which the employee had earnings. Hence for this Committee to review anything outside the previous twelve (12) months, in which the Claimant had earnings, was done outside the

provisions of NYD. Accordingly, this member must reject any findings based on a five (5) year review of wages, while taking the position the Carrier failed to meet its' "burden of proof".

In the Carrier's presentation before the Committee, the Carrier acknowledged that approximately twenty percent (20%), (Organization contended it was a far greater percentage) of the time worked by the Akron Track Gang, was spent on the territory covered by the transaction. Further, the Committee acknowledged the work opportunity for Conrail employees, on the territory covered by the transaction, would no longer be available to Claimants.

However, the majority held Claimants were not displaced from their assignments, and with their work week and base pay rate unchanged, combined with other factors that may affect earnings, Claimants were not placed in to a "worse position", in regards to either work rules or compensation, as a result of the transaction. Thus, Claimants are not entitled to the protection provided under NYD. According to the majority, Claimants loss in compensation was the result of other factors.

This Member disagrees. Instead I find that Claimants were "...placed in a worse position with respect to his compensation and rules governing working conditions". The Committee correctly found, following the transaction Claimants lost the ability to work on a section of track that previous to the transaction and according to the Carrier, required a minimum of twenty percent (20%) of their time worked. In doing so, according to this member, the Committee found the Claimants were directly affected by the transaction. However the majority found otherwise.

This twenty percent (20%) loss of work opportunity, included both straight time hours, as well as overtime hours. Hence, a loss in compensation. As a result of this transaction, and no longer being afforded the opportunity for overtime on the Akron Branch, Claimants compensation will most assuredly be reduced.

Section 1(d) of NYD never uses the term "base pay rate". NYD only speaks of compensation. Section 1(b) of the NYD reads:

"(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions."

This Member finds the term "compensation", as used in the above section, is a combination of earnings made in both straight time and overtime hours. This contention is supported by the language of Section 5 of NYD, as defined above.

This computation of compensation includes straight time earnings, combined with overtime earnings. It does not address, or take into consideration the basic pay rate.

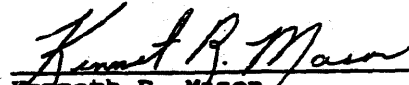
The majority found the Claimants were not required to terminate their current assignments as a result of the transaction. Yet, on September 10, 1990, Claimants' headquarters was moved to another location. A move, this member finds, the Carrier would not have made had it not been for the transaction. Thus, this member finds the headquarters of the Akron Track Gang was relocated as a result of the transaction.

NYD recognizes that certain changes maybe made by a Carrier in anticipation of a transaction, to avoid the certification of employees as NYD protected. In such situations, the Carrier is still held accountable to the employees.

In the present case, this member finds the Carrier's sole motivation in having Claimants report at the former headquarters for approximately eight (8) months following the transaction, before transferring them to a new headquarters, was to avoid NYD. The Carrier has offered no other explanation.

Therefore, this member must reject the majority's decision to incorrectly place the burden of proof on the Organization. This member finds that the Claimants loss in compensation was solely the result of the transaction. In this member's opinion, the Carrier failed to show otherwise.

This member finds further, the loss in compensation and the moving of the headquarters, even though eight (8) months later, can only be linked to the transaction. Accordingly, this member must dissent from the findings of the majority.


Kenneth R. Mason
Employee's Member
Brotherhood of Maintenance of
Way Employees

* * * * *

* Arbitration Pursuant to Appendix III, Article I, Section 11 *
 * (Finance Docket No. 28250) *
 * Involving the *
 * "New York Dock Conditions" *
 * Imposed by the *
 * Interstate Commerce Commission *
 * on the *
 * San Diego & Arizona Eastern Railway *

* * * * *

Parties to Dispute: United Transportation Union

and

San Diego & Arizona Eastern Railway
 Transportation Company

Statement of Claim: Claim of Trainman William L. Carlton, II, for additional compensation in the amount of employment protection benefits applicable to those adversely affected by the transfer of ownership rights of the San Diego & Arizona Eastern Railway, commencing April 1, 1980.

Committee Members: Chairman and Neutral Member: Gil Vernon

Labor Member: Glynn Gallagher, General Chairman
 United Transportation Union

Carrier Member: Rick Cecil, General Manager
 San Diego & Arizona Eastern Railway

BACKGROUND

On October 15, 1979, the parties entered into an Agreement for the purpose of implementing certain transactions approved by the Interstate Commerce Commission. The Agreement described the transactions as follows:

"Acquisition by Southern Pacific Transportation Company of the line segment and operations of the San Diego and Arizona Eastern Railway Company from Milepost 148.1, El Centro, west to Milepost 129.61, at or near Plaster City, as described in the application dated March 15, 1979, filed with the Interstate Commerce Commission.

Transfer of ownership rights for the San Diego and Arizona Eastern Railway Company to the San Diego Metropolitan Transit Development Board and the installation of Kyle Railways as the operator for freight services on the San Diego and Arizona Eastern Railway Company, as described in the application dated March 15, 19, filed with the Interstate Commerce Commission."

The Agreement also provided:

"Employees holding positions on the San Diego and Arizona Eastern Railway Company on the date of implementation and who become adversely affected as a result of the implementation of the transactions listed in this Agreement will be afforded the applicable protective benefits set forth in Attachment "A" hereto pursuant to the terms and conditions therein."

Attachment "A" to the Agreement is Appendix III to ICC Finance Docket No. 28250 commonly known as "the New York Dock" protective provisions.

The new operator was installed November 1, 1979. On April 17, 1980, the Brakeman Extra Board was reduced by one position. Employee Bobrowski who occupied a position on the Brakeman's Extra Board was removed therefrom and displaced the Claimant, Mr. Carlton, who then placed himself on the Yardman's Non-Guaranteed Extra Board. Mr. Carlton, on April 30, 1980, filed a claim for "New York Dock Guarantee" for the month of April, 1980. On September 18, 1980, the denial of his claim was appealed to the next level. The appeal was based on the contention that the Claimant had been adversely affected by the transfer of ownership and therefore was entitled to protective benefits. The claim cited paragraph 2 of the Implementing Agreement as support. On July 20, 1981, the Union notified the Carrier that, in view of their inability to agree on protective benefits for the Claimant, they would refer the dispute to an Arbitration Committee as set forth in Section 11 of the New York Dock Conditions.

The undersigned was mutually selected to serve as a Chairman and Neutral Member of the Committee. A hearing was held in the matter on

January 27, 1984, in San Francisco. At the hearing the parties were given full opportunity to present arguments and evidence in support of their position. Based on the arguments, the evidence, the provisions of Appendix III, Article I, Section 11 - Finance Docket No. 28250, and the Implementing Agreement dated October 15, 1979, the Neutral renders the following award.

FINDINGS

Section 11 (e) of the New York Dock Conditions requires that, in the event of a dispute as to whether an employee was affected by a transaction, the employee identify the transaction and specify the facts of the transaction. Section 11 (e) then goes on to say that it is then the Carrier's burden to prove that factors other than a transaction affected the employee. Section 1 (b) and (c) also defined a "displaced employee" and a "dismissed employee" as someone who "as a result of a transaction" is either placed in a worse position with respect to compensation, etc. or deprived of employment. (Emphasis added)

The Union basically contends that the Claimant, and other trainmen similarly situated, suffered adverse affect from the sale of the property owing primarily from the new owner's and lessee's methods of operating the railroad, different from those under ownership by the Southern Pacific Transportation Company. These changed methods are detailed in the Union's submission by reference to a letter submitted by Local Chairman Bobrowski. The letter is dated May 13, 1981. No real purpose would be served in reiterating the letter in detail, but in summary the letter cited the following factors as the cause of adverse affect on the Claimant: (1) the decision to embargo freight traffic on the main line from San Diego Yard to San Ysidro between the hours of 7 a.m. and 7 p.m. which the Union claims

resulted in reduced shipper interest; (2) relocation and the inoperative condition of weigh scales; (3) elimination of team tracks; (4) annexation of the Plaster City job to the Southern Pacific; (5) poor utilization, maintenance, and insufficient provision of locomotive power; and (6) general inability of management to live up to shipper obligations.

The Carrier makes a variety of arguments, however, two should be noted at the outset. First, they argue that the appeal of the claim to an Arbitration Committee is untimely, and second, that the Union has failed to specifically identify the transaction giving rise to the alleged adverse impact on the Claimant.

On the Carrier's first point, the Committee finds it would be improper under the circumstances to hold the Union's appeal as fatally barred from consideration. This is primarily a result of the Carrier's failure to register any objections--as evidenced by this record--prior to the hearing to the timeliness of any aspects of the original claim or its subsequent appeals.

With respect to the Carrier's second threshold argument, it can be stated--assuming for the sake of discussion the Union has identified the transaction and the facts on which they rely--that after a careful review of the evidence as a whole the Carrier has put forth enough evidence to convince the Committee that the Claimant was not adversely affected "as a result of a transaction." On the contrary the Carrier has shown instead that the Claimant was adversely affected primarily for reasons other than a transaction.

The Carrier contended that several factors, including a decline in business adversely affected the Claimant. Before discussing how these and

other factors affected the Claimant, a major argument by the Union must be addressed. They contend that a decline in business defense is not available or valid in arbitrations under the "New York Dock" conditions. They point out that under other protective provisions such as the Washington Job Protection Agreement and the Amtrak C-1 conditions, the language specifically mentions fluctuations and changes in the volume of employment. They submit that in the absence of such language in the "New York Dock" conditions is significant. Being aware of such provisions, if the framers of the language intended to make such a defense available, the organization suggests they would have included them in the instant conditions.

The Neutral does not find the absence of specific references to changes in the volume of employment sufficiently significant to conclude that a reduction in business defense is not available. This is so because the language of the conditions clearly sets forth that, to be considered protected, an employee must be adversely affected as a "result" of a transaction. Thus, it is clearly implied that factors other than a transaction which may adversely affect an employee do not turn on the protective provisions. Only adverse effect as a "result" of a transaction qualifies an employee for protective benefits and no benefits flow from adverse impact due to other causes. Certainly the Neutral cannot ignore that the use of the word "result" requires a causal relationship between the transaction and the adverse impact. Therefore, on the other hand, the Neutral cannot ignore any evidence which suggests that the adverse situation was a result of other causes. One must draw the inference from the language that any causes of adverse impact other than a transaction must be weighed and considered by the Arbitrator.

The fact that the writers of the language failed to enumerate any specific examples of other possible causes, such as a decline in business or fluctuations in employment, does not overcome the implied requirement to show, to the exclusion of other reasons, a causal nexus between the transaction and the employee's adverse employment situation. Contrary to the Union's argument, it seems that in view of the unqualified requirement for a causal nexus between a transaction and adverse impact, that if the writers wished to preclude certain defenses, they would have explicitly stated so. It is noted that other Arbitrators have held the reduction in business volume is a legitimate defense under New York Dock conditions. For instance see SEA No. 915 - New York Dock Railway v. Brotherhood of Railway, Airline and Steamship Clerks (Arbitrator Zumas). The following comments from this Award are indicative that the decline in business defense was considered:

"The Organization is correct in its view that the coverage of the protective benefits of Appendix III extends past the date of the transaction to apply to losses suffered by a later displacement or dismissal. In order for the protective benefits to apply, however, the displacement or dismissal must be caused by the transaction authorized by the I.C.C. The question here is whether the action taken by the Carrier on April 1981 was the result of the 1980 coordination or whether the elimination of the positions in question was the result of some other force or factor.

Given the relative proximity of the dates--April 1980 and April 1981--there is some rationale for the supposition that the two occurrences were related. The Carrier has made a convincing case, however, that a number of external factors led to a drastic drop in business between those dates. These factors affected both the BEDI operation and, perhaps to a lesser extent, the NYDR operation. The statistics in the record demonstrate that there was a decline in business of both companies despite the acquisition of BEDI by NYDR.

The Organization suggests that any efficiency realized by the elimination of the positions in question could have been made at the time of coordination. The Organization contends that the Carrier would have been liable for Appendix III benefits had the positions been

abolished at that time and that the Carrier waited a year merely in an attempt to avoid those obligations. While that suspicion itself is not wholly implausible, there is no probative evidence in the record to support the contention. As noted above, the Companies' operations were not merged nor were their terminals interconnected. The coordination itself does not suggest that management sought extensive changes in manning. In sum, there is no evidence that the Carrier effectively eliminated work in April 1980 and (sic) delayed notice for a year merely to avoid Appendix III benefits. Rather, the evidence supports the Carrier's claim that a decline in business during the year caused the elimination of the positions." (Emphasis added)

In this case the Neutral finds that the decline in business defense is not only available but a plausible explanation--in combination with the return of Bobrowski to active service a short time before--for any adverse impact the Claimant may have experienced in the time period immediately subsequent to his initial claim. When Bobrowski returned to service, the Claimant, because of his lesser seniority, was one more "notch" closer to displacement in the event that any situation occurred which limited or diminished work opportunities. This enhanced the adverse effect on the Claimant of the decline in business which occurred at approximately the same time.

Based on the credited evidence, it is apparent that such a decline in business did in fact occur. At the time of the change in ownership (November), the Carrier handled 546 cars during that month. In the subsequent three months (December, January, and February) they handled 608, 523, and 626 cars respectively. However, in March the level fell dramatically to 458 and 425 in April. This amounted to approximately a 22 percent decrease in car loadings between November and April. Given this fact and the fact that Bobrowski was on vacation from March 24 to April 6 and another Guaranteed Extra Board was on vacation from April 6 to April 13, it is difficult to embrace the idea that the subsequent reduction of Bobrowski from the

Guaranteed Extra Board and Mr. Carlton's subsequent displacement was the result of any action taken by the Carrier pursuant to a transaction identified in the Implementing Agreement. It is, on the other hand, more apparent and acceptable to conclude that the reduction of the Extra Board and the subsequent displacement of Claimant was a result of normal fluctuations in employment. In fact the Carrier claims without rebuttal that the Extra Board was even increased at times between November and April and Bobrowski's reduction brought it down to the same level it was in November. Moreover, there is no basis to believe that the decline in business was caused by decisions made in connection with the transfer of ownership. Based on the evidence we must conclude the factors which lead to the reduction of the Guaranteed Extra Board (which caused Bobrowski to displace the Claimant) would have occurred regardless of the change in ownership status or acquisition of the line segment from Milepost 148.1 to Milepost 129.61 by the Southern Pacific Transportation Company.

We note that many of the events presented by the Union in the Local Chairman's letter as a basis for their claim of protected status for Mr. Carlton occurred much later than the initial claim date of April, 1980. Accordingly, it is difficult to conclude that events subsequent to the initial claim date adversely affected his status in April, 1980. However, even if we look beyond the time period covered by the local Chairman's letter, it is equally difficult, based on this record, to find a nexus sufficient enough to justify holding that the Claimant is a displaced or dismissed employee. There were simply too many other events beyond the control of the Carrier which affected their ability to operate at full employment as opposed to actions taken pursuant to an Implementing Agreement.

For instance, in January, 1980, a trestle of a key bridge washed-out, severing the railway into two parts. This forced the preponderance of the Carrier's traffic to be routed over a foreign road, thus, increasing mileage and Carrier cost and adversely affecting the Carrier's ability to compete and provide service. Replacement of the bridge was not completed until December, 1982. Also in March of 1981 other bridges suffered fires which hampered the Carrier's ability to operate.

In summary, these event and other events, in addition to the events immediately preceeding the reduction of the Extra Board in April, 1980, leave us unable to conclude that any reduction in employment experienced by the Claimant was the result of a transaction. On the other hand, there is more evidence to show that factors other than a transaction were the cause of any adverse impact that the Claimant may have experienced. It is well established in such matters that a causal nexus must be apparent between the transaction and the employe's employment situation. This causal nexus must be direct and more than speculative or merely proximate. Based on this record we are unable to find the necessary causal connection between the transactions referred to in the Implementing Agreement and the Claimant's employment situation.

AWARD

The Claim is denied.



Gil Vernon, Chairman and Neutral Member



R. D. Cecil, Carrier Member

Glynn Gallagher, Labor Member

Dated this 20th day of July, 1984