

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

NEW YORK DOCK RAILWAY)

and)

BROTHERHOOD OF RAILWAY,)
AIRLINE AND STEAMSHIP CLERKS)
_____)

SBA No. 915

OPINION AND AWARD

Background

The undersigned neutral was selected by the parties as Chairman of an Arbitration Committee established pursuant to Article 1, Section 11 of Appendix III of I.C.C. Finance Docket No. 28250 (hereafter New York Dock (II)). Hearing was held in Washington, D.C. on December 13, 1982. Post-hearing briefs were received by the Chairman on January 15, 1983. The Company was represented by Walter M. King, Esq., and the Union was represented by Mr. Edward A. Hanley, Jr.

Statement of Facts

New York Dock Railway (NYDR) and Brooklyn Eastern District Terminal (BEDT) are Class III, Terminal Switching Carriers subject to the jurisdiction of the Interstate Commerce Commission. Both companies run carfloat operations on the Brooklyn waterfront. The companies' terminals are adjacent but are not connected by rail.

In 1977, the ICC granted authority for NYDR to acquire control of BEDT's capital stock. The ICC imposed labor protective conditions, subsequently modified, and an Order of the ICC was served on February 23, 1979. The labor protective conditions imposed are referred to as Appendix III New York Dock Conditions. They provide, in part:

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.

* * * * *

(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.

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11.(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.

Pursuant to the authority contained in the Order, NYDR and BEDT began a phased program of integrating employees represented by the seven labor organizations on the properties. In accordance with the provisions of Appendix III, NYDR and BEDT entered into implementing agreements with the organizations representing their employees. An agreement was reached with BRAC on March 19, 1980, to be effective on April 2, 1980, the date of the formal

coordination of NYDR and BEDT operations. According to the implementing agreement, the employees of NYDR and BEDT were to be dovetailed into a single seniority roster and were to be covered by the terms and conditions of the NYDR schedule agreement as NYDR employees. This implementing agreement also dealt with initial employment on the coordinated carrier. That provision read as follows:

**Section II OBTAINING A POSITION IN THE COORDI-
NATED OPERATION**

(a) Ten (10) days prior to the effective date of the coordination of work referred to in Section 1, above, and for a period of seven (7) days, appropriate bulletins shall be posted at locations conspicuous to all employees. Such bulletins shall contain a notice of the jobs or positions to be abolished effective with the date of the coordination and the new positions established at NYD effective with the date of the coordination. Said bulletins shall show the title, location, rate of pay, hours of assignment and a brief description of the duties to be performed.

(b) During the seven (7) day bulletin period referred to in (a) above, all NYD and BEDT employees shall have the privilege of submitting a written bid for any bulletined position for which (s)he is qualified. Bids will be submitted upon a form provided by the Carriers with a copy to the Local Chairman.

(c) Three days prior to the effective date of the coordination, the senior qualified bidders on the dovetailed roster shall be placed upon the awarded positions. Employees who choose not to bid or who lack sufficient seniority to obtain one of the bulletined positions shall be assigned to a vacant position, if any, which may be available in the coordinated operations.

(d) On the effective date of the coordination, all affected employees shall have been awarded or assigned to as many positions as are available in the coordinated operation. Subsequent vacancies, if any, will be filled in accordance with the schedule agreement so long as there are present BRAC members available to fill such vacancies.

Prior to the effective date of the agreement, three of the Claimants here were employed by the BEDT; the fourth was employed by the NYDR. In accordance with the Implementing Agreement, the positions of the four were abolished and all were required to bid on new positions. The four Claimants did so and all maintained or improved their base hourly wage.

According to the Carrier, the consolidation in April 1980 "resulted in no dismissals and limited displacements." The Organization claims that nine "positions" were lost in April 1980, but it does not claim that any employees were dismissed at that time. In any event, on April 15, 1981, the Carrier issued a notice of the elimination of six positions with the close of business, April 21, 1981. The Carrier gave as the reason for the abolishment of the positions the decline in business. Four of the incumbents are represented by the Organization and are Claimants here. The Organization claims that the Claimants are dismissed employees. The Carrier claims the employees in question have only been furloughed and that they have all received some work from the extra board while furloughed. In any event, the Organization claims that the Claimants are victims of the coordination that was put into effect on April 2, 1980 and that, since that coordination was a transaction within the meaning of Appendix III, the Claimants are entitled to the dismissal allowances provided therein.

The Carrier's argument is, essentially, that the decline of business suffered by the Carrier led to the furlough of employees in April 1981 and that there is no relationship between the 1980 coordination and the 1981 furlough. The Carrier points out that in order to obtain the protective benefits provided by Appendix III, the displacement or dismissal of an employee must be the result

of the transaction (in this case, the coordination) authorized by the I.C.C. In support of its argument that the decline in business caused the furloughs, the Carrier introduced arguments and exhibits relating to the following points:

1) Both companies, NYDR and BEDT, have suffered losses in the total freight cars handled and in freight revenue.

2) Both companies have suffered losses since the 1980 consolidation.

3) Loss of traffic has been caused by the economy, inter-modal competition, and Conrail's marketing and pricing policies.

4) BEDT's major product, bulk and bag flour, has dropped off 83% as a result of Conrail's rate cancellations between the second quarter of 1980 and the first quarter of 1981.

5) NYDR's car loss from the second quarter of 1980 to the first quarter of 1981 was 33 percent.

Opinion of the Board

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 BEDT 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 BEDT 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 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.

AWARD

The employee protective conditions of New York Dock II imposed in I.C.C. Finance Docket No. 28250 are not applicable to the abolishment of the positions listed in Carrier Bulletin #64-81, dated April 15, 1981.

Nicholas H. Zumas
Neutral Member

Van Grace

Carrier Member

Robert M. Givran
Organization Member
Dissent

Date: 4/22/83