NE. YORK DOCK - Case No. [redacted]

ARBITRATION AWARD

In the Matter of Arbitration Between

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

And

SOUTHERN FREIGHT TARIFF BUREAU

FINDINGS AND AWARD

QUESTION AT ISSUE:

"Were the claimants [Z.H. Williams, G.N. Christopher, J.W. Whitaker, J.L. Alexander, M.D. Perry, R.J. Smith, D.B. Hollis, B.J. Harper, T.M. Gann, P.M. George, D.H. Leslie, D.B. Barden, D.R. Walker, R.Y. Mitchell, C.M. Smithwick, W.T. Gasaway, R.W. King, J.E. Tate, T.G. Wade, T.D. Spratlin, J.D. Cook, J.S. Cochran, and R.K. Hughes], or any of them, adversely affected as a direct result of changes to antitrust immunity for collective ratemaking effected by Section 219 of the Staggers Rail Act of 1980?"

BACKGROUND

By letter dated March 14, 1983, the parties to this dispute jointly informed the National Mediation Board (NMB) of their desire to provide for arbitration of the above Question at Issue through establishment of an arbitration committee under Article I, Section 11 of the New York Dock conditions (New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 [1979]). The Brotherhood of Railway and Airline Clerks (Brotherhood) advised it had selected as their member of the arbitration committee, Mr. E.J. Neal, International Vice President of the Brotherhood. The Southern Freight Tariff Bureau (SFTB) initially advised it had selected as its member of the arbitration committee, Mr. T.C. Sheller, Senior Vice President-Labor Relations, Norfolk Southern Corporation. However, by letter dated May 16, 1983, it named Mr. R.S. Spenski, Assistant Vice President-Labor Relations, Southern Railway Company, in place of Mr. Sheller. In its letter the Brotherhood and SFTB members of the arbitration committee advised the NMB they had agreed on the nomination of Mr. R.E. Peterson of Briarcliff Manor, N.Y., as the neutral member of the arbitration committee, and requested the NMB so designate Mr. Peterson to sit with the arbitration committee to resolve the dispute. The NMB complied with the request of the parties, advising all concerned by letter dated March 29, 1983.

Hearings before the arbitration committee were held in Washington, DC on May 17, 1983, with the parties being ably represented by appearances of the following named persons:

BROTHERHOOD:

Ernest W. DuBester, Esq., HIGHSAW & MAHONEY, P.C.
T.P. Stafford, Vice President
M.R. Magnuson, Director Rules
H.F. Hignite, Employee, SFTB

SFTB:

Jeffrey S. Berlin, Esq.
Terrence J. McCartin, Esq.
VERNER, LIIPFERT, BERNHARD & McPHERSON, CHARTERED
Marcellus C. Kirchner, Norfolk Southern Corp.
H.L. Lassetter, Asst. Manager

Prior to the hearing the parties exchanged briefs or submissions in support of their respective positions on the Question at Issue. At the hearing they introduced additional documentation and participated in a lengthy exchange of oral arguments and the examination of witnesses. Following the hearing each party submitted a post-hearing brief to the arbitration committee.

The question we have here calls for a determination as to whether the Claimants, or any of them, were adversely affected as a direct result of changes to antitrust immunity for collective ratemaking as concerns trailer-on-flatcar (TOFC) and container-on flatcar (COFC) service effected by section 219 of the Staggers Rail Act of 1980 [Public Law 96-488; 94 Stat. 1895] when the Southern Freight Tariff Bureau (SFTB) abolished three employee positions, and, if adversely affected, thereby entitled to the protective conditions of section 219(g) of that statute.

Section 219(g) of the Staggers Rail Act, in pertinent part, reads as follows:

> "The Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendments made by the section with fair arrangements no less protective of the interests of such employees than those established pursuant to Section 11347 of Title 49, United States Code."

On August 8, 1979, the Interstate Commerce Commission (ICC or Commission) issued an "Advance Notice of Proposed Rules" in consideration of the institution of a rulemaking proceeding which would, amongst other things, exempt from regulation [under 49 USC 10505] rail transportation of TOFC/COFC shipments, either in whole or in part. The purpose of the proceeding was to determine what the Commission could do, through modification of its regulations governing TOFC/COFC service, to improve the intermodal relationship between rail and motor transportation and to increase the amount of TOFC/COFC traffic as related to the conservation of energy, enhancement of the environment, and more efficient use of transportation resources.

In its Advance Notice, the Commission took note that Section 207 of the Railroad Revitalization and Regulatory Reform Act of 1976 [Public Law 94-210, 90 Stat. 31] amended former section 12(1) [now 49 USC 10505] of the Interstate Commerce Act by adding a new subdivision (b) which permitted the Commission, upon petition or on its own initiative, to exempt from regulation any person, class of person, services, or transactions relating to transportation by railroad if because of its limited scope, the Commission found that regulation is not necessary to effectuate the national transportation policy; regulation would be an undue burden on the persons or class of persons involved, etc. The Commission also expressed the belief that it might be possible to encourage greater use of TOFC/COFC service by motor carriers by revising rate regulation to complement or substitute for other ideas suggested in its Notice, principally, providing the contract motor carriers with all the flexibility they need to make effective use of substituted service.

The Commission provided that comments must be filed concerning its Advance Notice of Proposed Rules by October 22, 1979.

Thereafter, on November 19, 1980, the Commission issued a "Notice of Proposed Rule (Exemption)" in further regard to its proposal to exempt rail and truck service provided by rail carrier in connection with TOFC/COFC service from Title 49. In this Notice the Commission stated its proposed exemption was also based on a finding that regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101(a) or to protect shippers from the abuse of market power by railroads. The effective date of the Proposed Rule (Exemption) was announced to be January 27, 1981, with comments due December 29, 1980.

In the above-mentioned November 19, 1980 Notice, the

Commission made reference to the fact that since publication of its Initial Notice (August 8, 1979), Congress had enacted the Motor Carrier Act of 1980 and the Staggers Rail Act of 1980. The Commission stated that the new laws have profoundly affected the content, direction, and procedure of its TOFC/COFC proceeding and that the Commission's authority related to transportation provided by railroads had been strengthened and clarified by such legislation. The Commission also made particular mention of the fact that the Staggers Rail Act "authorizes exemption of service provided by carriers in all instances where regulation is not needed to prevent abuses of market power" and that the statute had singled out TOFC/COFC service as a candidate for exemption, noting, "Section 10505(f) provides, 'the Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.'" The Commission then next stated: "We believe that a total exemption for this traffic is appropriate based on the standards of 49 U.S.C. Code 10505."

Among background comments expressed in its Notice, the Commission said:

> "Numerous participants support our views and have pointed out how regulatory barriers impede the growth of TOFC/COFC service. DuPont welcomes the exemption as an opportunity to negotiate for price and service options which meet its particular needs. It looks forward to the end of complex and inflexible rate structures and service plans. DuPont recognizes that regulation of the competitive service is serving no useful purpose."

Commenting upon certain of the railroads' expressed intentions, particularly that related to publishing identical single-factor, joint through rates over competing routes, the Commission said that such action "would completely negate the intended benefits of the exemption." The Commission then went on to state:

> "Railroads and users of TOFC/COFC services have defined their relationships in certain ways because of the existence of antitrust immunity. The fact that certain users or sellers may have to conduct their businesses somewhat differently is not a good reason to continue antitrust immunity for TOFC/COFC service."

On February 19, 1981, the Commission issued its "Notice of Final Rule (Exemption)" exempting rail and truck service

provided by rail carriers in connection with TOFC/COFC service. Incorporated into the Final Notice, amongst other statements, was the following:

> "We recognize the limitations on our predictive powers. Our favorable experience with exemption of fresh fruits and vegetables -- although not identical to the issues presented here -- encourages our continued employment of the exemption power. We believe that exemption of TOFC/COFC service will benefit the shipping public. We nonetheless stand ready to monitor the effects of the exemption to assure that continued regulation is not needed. We believe that such after-the-fact evaluation is what Congress intended. See H.R. Rep. No. 96-1430 [96th Cong. 2d Sess.]."

The Commission also stated that it was confident, notwithstanding troublesome questions which had been voiced by shippers and others, "that rail managements will respond enthusiastically when relived from existing regulatory constraints."

In regard to the effective date of the exemption, the Commission stated:

> "There is general concern that the 80 days which have elapsed since the effective date of the exemption was announced is not sufficient time to prepare for the exemption. We seriously question if this is the case. Carriers have the option of continuing their present rates and practices until they are replaced by new arrangements negotiated under the exemption. The transition should not be that difficult...Nevertheless, to remove any doubt about APA [Administrative Procedure Act, U.S.C. Sec. 553] procedural claims and to give some commenters including the FMC [Federal Maritime Commission] additional time to adjust to the exemption we are postponing the effective date of the rules until March 23, 1981." (Underscoring Added)

In a separate concurring expression, one ICC Commissioner stated that although he was not satisfied that the Commission's decision fully clarified the scope of the exemption or was otherwise totally responsive to concerns raised by all parties, he gave the decision his unqualified support "because of the fact that Congress intended that we pursue partial and complete

exemptions from remaining regulations consistent with the policies of the Staggers Act [and that] revocation procedures contained in the first exemption provision are retained in the Staggers Act and in my view are strengthened by Congressional intent that we adopt a policy of reviewing carrier actions after the fact." (Underscoring Added)

On the day that the Commission's "postponed" deregulation became effective, namely, March 23, 1981, the SFTB issued Information Bulletin No. 303, announcing the abolishment, effective April 1, 1981, of three positions, i.e., Assistant Executive Clerk and two positions of Rate Clerk. Claimants Gasaway and Williams were incumbents of the latter two positions of Rate Clerk. The third position was occupied by Mr. J. Pierce. The incumbents were advised that they may exercise their seniority rights in accordance with the existing collectively bargained working agreement.

The following day, March 24, 1981, the Brotherhood dispatched a mailgram to the SFTB. In pertinent part, this mailgram read:

> "Please be advised that in accordance with the Harley Staggers Act and the labor protective condition named therein, you are required to give not less than sixty (60) days notice to this Organization when employment is affected account deregulation.
>
> "Therefore, we demand that the abolishment notices for the above named employees be canceled and that appropriate notice be given this Organization; and, further, that negotiations begin immediately for the purpose of providing appropriate labor protective conditions for the affected employees."

The SFTB response to the above mailgram was by letter dated March 25, 1981, the SFTB's Tariff Publishing Officer advising the Brotherhood as follows:

> "By letter of March 20, 1981, I advised you that employees of Southern Freight Tariff Bureau are not affected by amendments made pursuant to Section 219 of the Staggers Act. Notwithstanding, I will give careful consideration to the contentions set forth in your Mailgram and get back to you at an early date."

Thereafter, by letter dated April 1, 1981, the SFTB's Tariff Publishing Officer again wrote the Brotherhood. In

pertinent part he stated:

> "Our Bureau is not a rate bureau that establishes or has final determination of rates. Therefore, we are not affected by Section 219 of the Act.
>
> "Your allegation that the three employees affected by our position abolishments are subject to the protective conditions of the Staggers Act is not supported by the provisions of the Act as they are not employees engaged in the business of making rates. As your contentions are not supported by the amendments made pursuant to Section 219 of the Staggers Act, we cannot agree that our actions relative to the three positions at issue are improper. Accordingly, we are not required to negotiate protective conditions for employees not covered by the law."

In connection with seniority displacements as exercised by Messrs. Pierce, Gasaway and Williams, the SFTB's Office Manager posted Bulletins listing assignments made as a result of the job abolishments as they pertained to the Claimants (Bulletin Nos. 6867, 6868, 6869, 6870 and 6871).

In response to the claim of record which the Brotherhood thereafter submitted to SFTB's Assistant Tariff Publishing Officer under date of May 27, 1981, the SFTB replied, on June 3, 1981, in pertinent part as follows:

> "I am unable to determine any rules violation of the current working agreement and none was cited in your statement. Conversely, the abolishments of the three positions and resultant exercise of seniority rights by employees affected were accomplished in strict compliance with the provisions of Rules 13 and 5(b) of the Working Agreement.
>
> "I assume your allegation as to violation of 'the protective conditions mandated by the Interstate Commerce Commission known as the New York Dock III Condition' refers to Section 219 of the Staggers Rail Act of 1980 dealing with 'Rate Bureaus.' Southern Freight Tariff Bureau is not a rate bureau that establishes or has final determination of rates, and its employees do not come within the purview of the provisions of that Act. Your allegation that the employees affected by the position abolishments

should be compensated as set forth in the 'New York Dock Condition' is not supported by the provisions of the Staggers Rail Act as they are not employees engaged in the business of making rates. As your contentions are not supported by the amendments made pursuant to Section 219 of the Staggers Rail Act, I cannot agree that our actions relative to the abolishment of three positions no longer needed, with attendant displacement by exercise of seniority rights, were improper. In this connection, you should be aware that the abolishment of the three positions at issue were the direct result of the Interstate Commerce Commission's decision in Ex Parte No. 230 (Sub. No. 5) - Improvement of TOFC/COFC Regulation - exempting from regulation rail and truck service (including the publishing and filing of freight rates schedules) provided by rail carriers in connection with TOFC/COFC service under Title 49, Subchapter IV of the U.S. Code. This proceeding preceded by several months any action that could be taken as result of the Staggers Rail Act.

"Finally, your allegation that named employees were 'forced to assume a position which paid (stated amounts) less than the position he held at the time of the transaction' is a stark misstatement of fact. The employees affected exercised seniority rights on positions of their choice held by junior employees and in several instances could have obtained positions of equal or greater monetary compensation. For example, Z.H. Williams could have exercised seniority rights on any one of several positions with equal or greater compensation ranging to an increase of as much as $179.80 per month.

"All matters carefully considered, your claim is denied."

By letter dated June 8, 1981, the Brotherhood appealed the decision of the Assistant Tariff Publishing Officer, stating in pertinent part the following:

"[T]he term 'rate bureau' as mentioned in the Staggers Act of 1980, was not intended to be taken literally, but intended to incorporate all employees of a rate type bureau who deal with the rate making process. The employees of your bureau do deal with the rate making process in that the tariffs that are produced and which they work with, contain rates. Further, we

> cannot agree that the tariff deregulation was not covered by the Staggers Act. The Staggers Act was intended to cover these, and other, deregulations.
>
> "Mr. Lasseter also states that we have misrepresented the facts. I cannot agree with the position he has taken in that the employees were forced to assume different positions as a result of the transaction. His statement is nothing more than self-serving as there is no proof in the deregulation."

In denying the appeal, the Tariff Publishing Officer, on July 20, 1981, advised the Brotherhood:

> "First, nothing in the collective bargaining agreement forbids abolishments of positions. This fact was acknowledged by you in conference. Second, your claims are factually incorrect as the job abolishments were not a result of the so-called Staggers Act. Rather, they were the result of an ICC decision that preceded the Staggers Act by several months. Third, the claimants through their own choosing displaced on positions paying less than their clerical rate when they could have acquired positions of equal or higher rates. Last but not least, your claim of any violation of the Staggers Act is not properly progressed as the Staggers Act is not a collective bargaining agreement between the parties and thus not a dispute properly handled via the collective bargaining grievance procedure."

The Brotherhood meantime, under date of July 14, 1981, filed a complaint and request for declaratory relief with the ICC, alleging that the SFTB failed to comply with the employee protection provisions of section 219(g) of the Staggers Act when it abolished the three positions. Specifically, the Brotherhood expressed a desire that the Commission order SFTB to enter into negotiations for an implementing agreement as provided by New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), and imposed upon all rate bureaus in Western Railroads--Agreement, 364 I.C.C. 782 (1981).

In its decision, decided July 14, 1982, (BRAC v SFTB, 366 I.C.C. 390), the Commission held that employees of SFTB are employees of a rate bureau and are, therefore, entitled to the employee protective conditions contained in New York Dock if they can show that they are being adversely affected

by the amendments to 49 U.S.C. 10706 made by section 219 of the Staggers Act. The Commission noted that Section 219(g) was designed to protect employees who might be adversely affected as a result of the Staggers Act narrowing of antitrust immunity. In this latter regard, the Commission specifically stated:

> "Section 219 of the Staggers Act narrowed or restricted the antitrust immunity previously enjoyed by rate bureaus and their members for their collective ratemaking activities. Section 219(g) was designed to protect employees who might be adversely affected as a result of this narrowing of antitrust immunity."

The Commission also took note that in its complaint to the Commission, the Brotherhood had alleged that "as a result of the deregulation of TOFC/COFC service, numerous employees were effected." The Commission also noted for the record it was SFTB's contention that to invoke section 219(g) that the Brotherhood "must show that any adverse effects on [the employees] were directly caused by the changes to antitrust immunity for collective ratemaking effected by section 219" and that it was SFTB's further contention that the Brotherhood had failed to demonstrate "any causal relationship because the three jobs were abolished as a direct result of the Commission's TOFC/COFC decision and not as a result of the narrowing of antitrust immunity by section 219."

Thereafter, the Commission expressed the conclusion "that SFTB employees are of a rate bureau for purposes of section 219(g) of the Staggers Act and that if they are affected by the recent changes made by section 219, such employees are entitled to the employee protective conditions imposed in New York Dock." As to the question of whether certain employees have been affected by actions taken under 219, the Commission said it believed this specific issue should be resolved by arbitration, noting "the statute limits protection to recent changes made by section 219, [and that] the dispute requires a determination of whether the adverse effects to the employees were directly caused by changes to antitrust immunity for collective ratemaking effected by section 219." (Underscoring Added)

CONTENTIONS OF THE PARTIES:

Basically, here, as before the ICC, it remains the position of the SFTB that section 219(g) of the Staggers Act has no application to the job abolishments, the SFTB maintaining they resulted from a deregulation action taken by the Commission in

an administrative proceeding having no relationship to section 219 of the Staggers Act. The SFTB likewise continues to urge that to invoke section 219(g) that the employees (the Brotherhood) must show that any adverse effects on them were directly caused by the changes to ahtitrust immunity for collective ratemaking effected by section 219. It submits that the Brotherhood has failed to demonstrate any causal relationship because the three jobs were abolished as a direct result of the Commission's TOFC/COFC decision and not as a result of the narrowing of antitrust immunity by section 219. It states that after the TOFC/COFC decision was announced, the SFTB evaluated its reduced needs and decided to abolish three positions because the number of TOFC/COFC tariffs would be reduced by reason of the Commission's action.

In support of its position, SFTB submits that the workload of "two desks" (six employees) responsible for the compilation of TOFC/COFC tariffs decreased by approximately fifty percent as the direct result of the Commission's deregulation of TOFC/COFC service, and not as a direct or indirect result of the narrowing of the antitrust exemption accomplished by section 219 of the Staggers Rail Act. It argues that while rate bureau employees who come under the protection of section 219(g) are entitled to New York Dock conditions, that in the particular circumstances of the three job abolishments the affected employees (Claimants) were not adversely affected by a "transaction" as defined under New York Dock, i.e., "any action taken pursuant to authorization of [the] Commission on which these [New York Dock] provisions have been imposed." SFTB thus maintains, that in the context of section 219(g) the Commission has interpreted this definition as requiring that the protective conditions be imposed only where "the adverse effects to the employees were directly caused by changes in antitrust immunity for collective ratemaking effected by Section 219."

In essence, the SFTB submits that the TOFC/COFC exemption proceeding was initiated and completed under the Commission's authority conferred by section 207 of the 4R Act, as amended and reinforced in section 213 of the Staggers Rail Act; an action completely unrelated to the restriction of antitrust immunity imposed by section 219 of the Staggers Rail Act with regard to the collective ratemaking activity of rate bureaus.

The Brotherhood vigorously maintains that the SFTB misconceives the nature and effects of the Commission's use of its exemption authority under section 10505 of the Act and totally misconstrues the Congressional intent underlying section 219(g). It urges that fundamental to this dispute is

recognition that the Staggers Rail Act added a new "rail transportation policy [by] substituting this rail policy as the new standard to which collective ratemaking agreements must conform; that the "new rail transportation policy contained in §10101(a) gives the Commission a legislative mandate to promote effective competition, to deregulate the rail transportation system, and to require independent action by individual carriers."

The Brotherhood states it recognizes "an inherent conflict... exists between exemptions granted under §10505 and antitrust immunity under §10706 [and that] the Commission has necessarily determined that the removal of antitrust immunity under §10706 is the quid pro quo of deregulation, such as that of TOFC/COFC service, through the exemption process under §10505." It maintains that indicative of the interplay between the "§10505 exemption authority" and "§10706 antitrust immunity" is the manner in which the ICC's authority to grant exemptions was "expanded" by the Staggers Act.

The Brotherhood submits that under the former revised ICC Act, in order for the Commission to exempt a transaction or type of service, it was necessary to show that the transaction was of limited scope and that regulation was not necessary to carry out the national transportation policy, was an unreasonable burden, and would serve little or no public purpose, whereas the Staggers Act "expanded the Commission's authority to exempt rail carrier transportation under §10505 upon a showing that regulation 'is not needed to protect shippers from the abuse of market power.'" Further, that "by placing an affirmative duty on the Commission to pursue exemptions from remaining regulation so as to 'eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power...', Congress understood and intended that coincident with increased use of the exemption authority under §10505 would be the narrowing or elimination of antitrust immunity under §10706 to ensure that the antitrust laws would be available for use." The Brotherhood contends that its view is reinforced by "the consistent thread throughout all of the Commission's exemption decisions that the narrowing or elimination of antitrust immunity under §10706 (as amended by Section 219) is concomitant to the exercise of the exemption authority under §10505." It points most specifically to ExParte No. 346 (Sub. No. 8), Exemption Regulation-Boxcar Traffic (May 2, 1983) as a Commission decision directly on point with the Brotherhood's arguments.

As concerns the SFTB's argument that the Commission had

begun to exercise its exemption authority pre-Staggers and that the affected employees are thereby not affected by what it terms the post-Staggers deregulation of TOFC/COFC service, the Brotherhood avers that to do so "completely overlooks Congress' understanding of the relationship between §10505 and §10706 and the Congressional intent in modifying §10706 to include the protections of Section 219(g)."

DISCUSSION AND FINDINGS:

This arbitration committee has thoroughly studied the well-documented and presented hearing briefs of the parties as well as testimony and arguments offered orally at the arbitration hearing. Careful examination has also been accorded the numerous exhibits submitted by the parties, excluding, of course, those exhibits which were declared inadmissible at the arbitration hearing.

We will first give consideration to the arguments of the parties with respect to the Commission's authority. In this connection, we think it is clear, as the Commission especially recognized in ExParte No. 346, that although Congress left in place much of the Commission's regulatory mechanism when it enacted the Staggers Rail Act, that Act "significantly limited the Commission's regulatory powers," or, as also sometimes expressed, expanded by section 219 amendments the Commission's authority for deregulation of services. In this regard, we believe the conclusion is supported by comments enunciated in the Commission's TOFC/COFC decision, as well as in other ICC decisions cited to this arbitration committee, that the Commission was of the opinion or belief it was not beyond full utilization of existing authority to take self-initiated administrative action specifically embracing deregulation of TOFC/COFC service absent the expanded amendments or authority.

It is evident from the record, as the Commission itself has indicated, that while exemptions previously required findings that a given regulation was unduly burdensome and served no useful purpose, the Staggers Rail Act eliminated the test of burdensomeness, and instead required that exemptions be granted whenever it was determined continued regulation was unnecessary. In effect, deregulation was hastened by elimination of certain existing procedures and practices which required exhaustion of various notices, hearings, etc., with the Commission being given the authority to exempt a service in all instances where regulation is not needed to prevent abuses of market power. In this regard, we note the Commission, in ExParte No. 346, stated:

> "Subsequent to the Staggers Act, the Commission instituted other procedures to add elements of

> market response to the existing system. Today's decision represents another step in the direction of substituting market forces for regulation... consistent with Congressional directives." (Underscoring Added)

A review of the record also shows that in citing TOFC/COFC service as a possible candidate for immunity exemption, the Staggers Rail Act did not mandate that the Commission exercise deregulation authority subject to its added or amended authority. Essentially, the Act stipulated only that the Commission "may" take action pursuant to its new authority.

We think the contingency wording of this provision of the Act evidenced an awareness of the Commission's then existing authority and the action which it had already initiated with respect to TOFC/COFC service. In other words, it would appear that the Commission had the alternative of completing its action with respect to TOFC/COFC deregulation in continued pursuit of authority previously conferred upon it by past amendments to the ICC Act and/or in pursuance of the Staggers Rail Act.

This arbitration committee also believes, in absence of a clear statement by the Commission holding that the protective conditions of section 219(g) were specifically applicable to its TOFC/COFC decision, that a presumption must be made that by not giving significance to section 219(g) the Commission was apparently of the belief that protective obligations were only to be imposed in connection with job abolishments found to be the direct result of the Staggers Rail Act amendments. We say this in recognition of the language the Commission used in explicit contemplation of abritration proceedings and its stated awareness, at least in part, concerning the basic positions of the parties as to whether protective conditions were imposed by reason of TOFC/COFC deregulation. Basically, the Commission limited the grounds for controversy, maintaining that resolution of the dispute required establishment of a determination that the job abolishments were "directly caused" by changes to antitrust immunity as related to enactment of section 219. It must therefore be assumed that if the job abolishments were not related to other than a change in regulation of TOFC/COFC services that the protective conditions of section 219(g) were not to be declared applicable to the dispute at issue.

We therefore, believe it quite reasonable to conclude from both our reading of the Staggers Rail Act and statements by the Commission, that while protective conditions may flow to actions which the Commission would take in the future with regard to

deregulation or antitrust immunity made in pursuance of the Staggers Rail Act, in the instant case, since it had taken administrative action pursuant to other existing authority, the protective features of section 219(g) did not attach to the Commission's TOFC/COFC decision.

We next turn to consideration of the reasons advanced by the parties to this dispute as to why the three positions at issue were in fact abolished by the SFTB to determine if such action was directly related to enactment of the Staggers Rail Act. In this connection, the arbitration committee has given extensive study to arguments, testimony and exhibits regarding job functions involved with the compiling and publishing of tariff documents, especially those known as disposition advices, disposition notices, and independent publication instructions; changes or fluctuations in the number of tariff pages published by the bureau; time required for the preparation of the various types of data for which the tariff bureau is responsible; etc.

Our review of the documentation as submitted fails to convince us that there was a decline of work directly attributable to enactment of the Staggers Rail Act with respect to the three positions at issue. Actually, the data tends to show that there was no decline in work at the bureau during the period of time from enactment of the Staggers Rail Act and the date the SFTB abolished the three positions coincident with the effective date of the Commission's deregulation of TOFC/COFC service. We are thus left to conclude, as the SFTB has maintained, that the decision to abolish the three positions was the direct result of the deregulation of TOFC/COFC service and a managerial determination that such deregulation "would cause a diminution of approximately fifty percent in the total work required to be performed by the two desks [six employees] responsible for the compilation of TOFC/COFC tariffs."

Accordingly, in view of the limitation which the Commission placed upon this controversy, namely, that as a prerequisite to an entitlement of protective benefits it must be established that the job abolishments were "directly caused" by changes to antitrust immunity as related to the enactment of section 219, this Board has no alternative but to conclude, absent a probative showing to the contrary, that the Claimants in this dispute were not adversely affected by job abolishments attributable directly to a decline in work coincident with enactment of the Staggers Rail Act. As set forth above, the evidence of record supports the conclusion that abolishment of the three positions was directly attributable to the Commission's pre-Staggers Rail Act administrative determination to specifically

deregulate TOFC/COFC service under its then existing authority, and not the Staggers Rail Act itself. Under these circumstances, we do not find the Claimants to be entitled to protective benefits in pursuance of section 219(g) and NY Dock. Their claims must therefore be denied.

AWARD:

In view of all the facts and arguments offered by the parties, both in writing and orally, and based upon the findings in the foregoing analysis, it is held that the Question at Issue must be answered in the Negative; the Claimants were not adversely affected as a direct result of changes to antitrust immunity for collective ratemaking effected by Section 219 of the Staggers Rail Act of 1980.

Robert E. Peterson, Chairman
and Neutral Member

E.J. Neal, Brotherhood Member

Dissenting

R.S. Spenski, SFTB Member

Washington, DC
August 31, 1983