In the Matter of Arbitration

between

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

and

SOUTHERN RAILWAY COMPANY

Pursuant to Article 11 of the New York Dock II Conditions which were imposed by the Interstate Commerce Commission in connection with its Order in Finance Docket 29430 (Sub-No. 1), approving the coordination of operations on the Norfolk and Western Railway Company and the Southern Railway Company.

FINDINGS

AND

AWARD

281-96-58a
Claim of
L. E. Fitzgerald

29

QUESTION AT ISSUE:

"Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Agreement between the parties when it declined to allow benefits claimed by Agent-Operator L. E. Fitzgerald, Manassas, Virginia as a result of his being displaced on September 19, 1982, from his position of Clerk-Operator at Monroe, Virginia.

2. Carrier shall now be required to allow any and all benefits to Agent-Operator L. E. Fitzgerald due under provisions of the New York Dock Conditions as a result of said transaction. "

FINDINGS:

The dispute here at issue concerns a determination as to whether Claimant is entitled to the protective benefits of the New York Dock Conditions as a consequence of being displaced from his clerical position following Carrier's abolishment of another contract position at Monroe, Virginia on September 19, 1982.

It is the Organization's contention that the job abolishment should have been treated as a "transaction" subject to the protective conditions imposed upon the coordination of operations of the rail carriers. In this regard, in arguments to the Board, the Organization states: "While Claimant suffered no monetary loss insofar as compensation is concerned

up to this point, he still suffered a monetary loss when the Carrier failed to properly comply with the provisions of the New York Dock Conditions which would have provided him with benefits as to moving expenses and allowances under Section 9 thereof."

Section 9 of Appendix III of the New York Dock Conditions reads, in pertinent part, as follows:

> "9. Moving expenses.-Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not exceed (sic) 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; * * * No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad with (sic) 90 days after the date on which the expenses were incurred."

We would note that the basis for there being no claim for compensation stems from the fact that Claimant displaced onto a position producing compensation equal to or exceeding that of his position at Monroe, Virginia. The rate of pay of the Clerk-Operator position from which he was displaced was $92.26 per day, whereas the rate of pay for the Agent-Operator's position to which he exercised seniority at Manassas, Virginia is $94.85 per day. However, the Claimant submits that such exercise of seniority necessitated he sell his home and incur moving expenses in going from Monroe to Manassas, a distance of 132.5 miles.

In support of its contention that Claimant was "adversely effected" by the coordination, the Organization directs attention to various

changes in rail traffic involving Monroe, offering interchange reports, switch lists, interchange corrections, etc., maintaining that by reason of traffic by-passing Monroe following the coordination the Carrier has affected the amount of work which had previously been required of employees at that location. Essentially, the Organization urges that the rerouting of cars has caused one entire yard shift to be abolished as well as three jobs in the Mechanical Department in addition to the clerical position involved in this dispute. It disputes Carrier allegations that the position abolishment was, as Carrier states, "due to a serious and pervasive decline in the Carrier's business," and challenges Carrier as having "dealt totally in generalities and not in specifics." In this latter regard, the Organization asserts that the claim should prevail account the Carrier not having met its burden of proof, the Organization citing Section 11(e) of Appendix III of the New York Dock Conditions, which reads:

> "(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 Carrier states that upon receipt of Claimant's "Request for Entitlement to Benefits" form it reviewed its records and determined that Claimant's displacement was a direct result of the declining economy and not the consolidation as was alleged by Claimant. In this respect, Carrier wrote Claimant under date of February 18, 1983, stating in pertinent part the following:

> "On your form you state that you were first placed in a worse position on September 19, 1982 when you were first displaced by J. H. Wilkes. You also state that the diversion of traffic to the NW caused a drop in work at Monroe. A review of the details concerning your situation reveals that your displacement was due to the 7 A.M. Chief Clerk's position at Monroe being abolished because of the economy. The Carrier experienced a serious business decline in 1982 and thusly had force reductions to help reduce expenses. The abolishment of the chief clerk position started the chain reaction that resulted in your displacement which was due to economic reasons and not because of the merger."

In support of its contentions, the Carrier directed attention to statistical information it had provided to the Organization during the handling of the claim on the property, arguing that the data supports a finding that the business decline at Monroe as well as on the Carrier's system properties began long before the consolidation of properties on June 1, 1982. In this connection, Carrier submitted that "Revenue-Ton-Miles" had declined (1982 vs. 1981), 6.9 percent in June, 17.6 percent in July, 17.1 percent in August, and 19.2 percent in September, or the month in which it had abolished the clerical position at Monroe. As concerned "Cars Handled/Engines Worked" at Monroe, Carrier showed that there had been a decline in cars handled commencing in December 1981 through September 1982, except as concerned May 1982, with the monthly decreases (1982 vs. 1981) ranging from 13.9 percent to 29.8 percent, the latter reflecting the decline as between August 1981 and August 1982.

In addition to the above, the Carrier also maintained that any traffic that may have been diverted from Monroe as a result of the consolidation had been compensated for by the addition of a new switcher between Monroe and Danville. The Carrier also directed attention to the following statement from its letter of January 18, 1984 to the Organization:

> "The claimant attempts to support his argument that interchange at Riverton Junction as a diversion away from Monroe is a major cause for the loss of a job at Monroe. He points up the interchange of 66 loads and the return of 66 emptys in the month of August 1982 at this station. This total of 132 cars handled in said month amounts to an approximate average of 4.3 cars per day. This certainly is not enough diversion, if such was the case, to impact substantially on the nubmer of clerks jobs to be maintained at Monroe, Virginia."

Bascially, the Carrier urges that Claimant's employment status was not altered as a result of any action taken by it in connection with the consolidation, but rather, by what it states, "the normal ebb and flow of seniority which is dictated by the volume of traffic handled by the Carrier." It thus submits that there is no merit to the claim.

The Board has given careful and studied consideration to all the arguments and data submitted by the parties. We do not find this record to support the conclusion Claimant be considered a "displaced employee," as that term is defined in the New York Dock Conditions, since we think it evident Claimant was not placed in a worse position as the result of a "transaction" flowing directly from the coordination of the two rail carriers. To the contrary, we believe the record supports a holding Claimant was displaced from his position as a consequence of Carrier having found it necessary to reduce its work force at Monroe coincident with a general decline in business and, in particular, a substantial decline in traffic at Monroe both before and after the consolidation on June 1, 1982, as well as at the time the abolishment was announced to be effective September 19, 1982.

Thus, while it might be held that there was some minor diversion of traffic from Monroe as a consequence of the coordination, it was not of sufficient nature to hold that a causal nexus existed between the job abolishment and the consolidation of the rail carriers. In this respect, we think it noteworthy that heretofore the weight of most arbitral authority has been to the effect that a remote or tangential affect cannot qualify an individual as having been adversely effected by a transaction. It will, therefore, be the Board's finding that Claimant was not adversely effected coincident to a transaction so as to be eligible for protective benefits under the New York Dock Conditions and the claim will be denied.

AWARD:

The Question at Issue is answered in the nenative, i.e., Claimant is not found to meet the necessary requirements in order to be entitled to the protection afforded by the New York Dock Conditions in relation to his exercise of seniority from Monroe to Manassas.

Robert E. Peterson, Chairman
and Neutral Member

D. R. Johnson, Carrier Member

E. J. Neal, Employee Member

Atlanta, GA
October 23, 1984

In the Matter of Arbitration

between

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

and

SOUTHERN RAILWAY COMPANY

Pursuant to Appendix III, Section 11 of the New York Dock Employee Protective Conditions (Imposed by the Interstate Commerce Commission in Finance Docket 28250)

FINDINGS

and

AWARD

Case 81-96-SBA

Claim of T. E. Venne

QUESTION AT ISSUE:

"Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Agreement(s) between the parties when it declined to allow Claimant T. E. Venne his rightful displacement allowances for March ($191.69), April ($278.93), May ($365.42), and June 1982 ($278.93).

2. Carrier further violated the Agreement(s) between the parties when it failed or refused to compute the Average Monthly Compensation due Claimant T. E. Venne in a proper manner.

3. Carrier shall now be required to allow Claimant T. E. Venne his displacement allowances enumerated, supra, in Item No. 1 and shall further be required to compute his Average Monthly Compensation in the proper manner as contemplated and mandated by the Agreement(s). "

FINDINGS:

By Decision and Order dated December 8, 1981 in Finance Docket No. 29690, the Interstate Commerce Commission approved application of the Southern Railway Company and the Kentucky and Indiana Railroad Company for a coordination of operations, facilities, services and work forces of the two rail carriers.

In regard to the imposition of employee protective conditions, the ICC Decision and Order reads as follows:

> "Employee protections. - Our approval of SOU's purchase of KIT must be conditioned on SOU's agreement

> to provide a 'fair arrangement at least as protective of the interests of employees who are affected by the transaction' as the labor protective provisions imposed in control proceedings prior to February 5, 1976. 49 U.S.C. 11347. In New York Dock Ry.-Control-Brookyln Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), affirmed sub. nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979), we described the minimum protection to be accorded employees under the statute in the absence of a voluntarily negotiated agreement. 4/ We may, if we choose, fashion greater employee protective conditions, tailored to the special circumstances of an individual case. Burlington Northern, Inc.-Control & Merger-St. L., 360 I.C.C. 784, 946 (1980).
>
> SOU estimates that 50 employee positions will be abolished in Louisville and New Albany. Seven SOU agency clerks and 1 SOU agent at Louisville will be transferred. Six new positions will be created: 1 yard foreman, 2 yard helpers and 1 yard engineer at Louisville, and 1 Labor Relations Officer and 1 Director of Labor Relations in Washington, DC. All of these changes will occur in the first year."

The above referenced footnote, 4/, stated: "Applicants have not negotiated any agreements with labor unions which establish employee protection in excess of the protections provided in New York Dock. Applicants have commenced negotiations with labor unions to obtain implementing agreements to effectuate the proposed transaction..." In this latter respect, the Carrier and the Organization party to this dispute entered into an Implementing Agreement under date of February 26, 1982.

Almost one month after the ICC approved coordination, and by letter dated January 6, 1982, Claimant was advised by the Carrier, as concerns this dispute, that his then current position of Supervisor of Data Processing (an appointed, non-contract position) was to be abolished on January 31, 1982 and that he was being appointed Project Analyst, Accounting, at Atlanta, Georgia, effective February 1, 1982, at a salary of $2,220.00 per month. This letter further stated:

> "Acceptance of this appointment will involve a change of residence. Therefore, if you accept the appointment, you will be subject to the benefits of Southern's relocation policy, which is attached.

> If you choose not to accept this appointment, you may opt to have Southern pay you a one-time cash payment of 12 months pay.
>
> In order to simplify your handling of these options, I have provided below two spaces with which you may signify your election...
>
> If you accept this offer, your new Department Head will be in touch with you regarding the details of your relocation and assumption of your new position.
>
> I would appreciate your advice and indication no later than January 27, 1982."

Under date of January 14, 1982, the Claimant wrote Carrier as follows:

> "This has reference to your letter dated January 6, 1982, File LF 338-10-L.
>
> I cannot accept or sign the two (2) options you are offering because as I see them either option would make me worse off than when I was working for K.&I.T."

Responding to Claimant's declination of the two options, the Carrier, by letter dated January 22, 1982, essentially reminded Claimant that since he held seniority as a clerk under the K&IT Agreement at Louisville, Kentucky, that he did, of course, have the right under the Agreement to exercise seniority to a clerical position. In this same connection, the Carrier letter further stated: "You should understand that should you elect to displace a junior clerk that such action on your part is a voluntary choice in lieu of accepting the protective benefits contained in my letter of January 6, 1982." The letter concluded:

> "In the event you change your mind and decide to exercise one of the two options contained in my letter of January 6, please recall that I need your advice and indication to do so not later than January 27, 1982."

On January 27, 1982, Claimant advised the Carrier that he wished to exercise his seniority rights, stating he would displace a junior employee from his position effective Monday, February 1, 1982. The Carrier acknowledged receipt of Claimant's notice of displacement on January 28, 1982.

Under date of April 12, 1982, Claimant filed with Carrier copy of a form known as a "Request for Entitlement to Benefits" form. The Claimant indicated on the form it was being filed account: "Placement in a worse position with respect to my compensation and rules governing my working conditions." In response to a question on the form as to the date he had first been placed in a worse position, Claimant stated it was February 1, 1982 and March 21, 1982 account his position abolished. The Claimant listed the position he held immediately prior to the dates shown above as "Per Diem & CMO" (the position to which he had exercised seniority to on February 1, 1982), and listed his current position as that of "City Clerk."

Upon receipt of the above form, albeit Carrier subsequently maintained it was by wrongful action, Claimant was notified by letter dated April 26, 1982, that a "preliminary investigation" showed his approximate average monthly earnings in the twelve-month period ending February 28, 1982 to be $2,181.71, and that this would "hereafter [be] referred to as [Claimant's] test period average."

A little over six weeks later, on June 11, 1982, Carrier addressed the following letter to Claimant:

> "This is in reference to your request for Entitlement to Benefits received in this office April 12, 1982, and our letter to you dated April 26, 1982.
>
> You were inadvertently advised of your test period average in the above correspondence. This was improper due to the fact that you were on a nonscheduled position with the K&IT and were offered a position with Southern as a Project Analyst which you declined. Subsequently, you elected to exercise your rights to a scheduled job.
>
> You will recall after you made said election that Mr. D. H. Watts, Vice President - Personnel, explained to you in his letter of January 22, 1982 that your action was a voluntary choice in lieu of accepting the protective benefits as explained in his previous letter to you of January 6, 1982.
>
> If you had accepted the Project Analyst position as offered, you would be currently employed with your protection rights intact. Hence, the Carrier cannot now be held liable for your protection.
>
> For the reasons given above, you (sic) claim is invalid and accordingly declined."

Carrier's declination of the claim was thereafter appealed on behalf of Claimant by the Organization to designated appeals officers for the Carrier, and by agreement to this Arbitration Board in pursuance of the grievance procedures of the New York Dock Conditions.

It is the Organization's contention that when Claimant's position of Supervisor of Data Processing was abolished at Louisville he became a "displaced employee" as that term is defined in Section 1(b) of Appendix III of the New York Dock Conditions and "clearly eligible for benefits, i.e., 'Displacement allowances' as contemplated in Appendix III, Section 5," of the New York Dock Conditions.

Appendix III, Section 1(b) reads:

> "'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."

Appendix III, Section 5, reads in pertinent part:

> "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 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.
>
> * * * * * *
>
> (b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.
>
> (c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause."

On the one hand, the Organization argues "it is obvious that the Carrier has attempted to 'put the cart before the horse.'" In this regard, it submits that the provisions of the Implementing Agreement of February 26, 1982 "were not even in effect at the time Claimant was given his two (2) options either to move to Atlanta or resign and remain in Louisville and even if it had been it would not have been applicable to him due to the fact that he was not covered by the Schedule Agreement on the K&IT." It urges, therefore, "the Carrier was, if effect, attempting...to force Claimant to make a move from Louisville to Atlanta under provisions of a non-existent agreement."

Conversely, the Organization states that "another remedy supports the position of the Employes." In this respect, it directs attention to Appendix III, Article IV of the New York Dock Conditions, stating: "This clearly gives to the Claimant the same rights and benefits and affords him the same protection as if he were, in fact, covered by the Collective Bargaining Agreement."

Appendix III, Article IV, reads:

> "Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protections as are afforded to members of labor organizations under these terms and conditions.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration."

The Carrier submits "that while it may be true that Mr. Venne was affected by the transaction in question, he was not adversely affected by it." It urges that when Claimant "elected not to accept an offered comparable non-contract position with the Southern Railway Company or a lump-sum separation allowance, his actions from that point forward were no longer a result of the transaction." It also argues that "in order for this Board to identify Mr. Venne as either a 'displaced' or a 'dismissed' employee, it would have to expand the definitions of these terms."

It is the Carrier's further position that employee protection agreements, as well as the New York Dock protective conditions, "were designed to provide protection to employees against adverse effects flowing from the transaction involved and not adverse effects arising from other unrelated causes, as in the instant case." It asserts the Claimant neither lost a regular job, nor was he involved in a chain of displacements that resulted from the transaction. It submits that Claimant, occupying a non-contract position, was precluded from taking advantage of any of the benefits the Organization secured for its members for this particular transaction, thus making any arguments which the Organization would offer relative to alleged violations of the February 26, 1982 Implementing Agreement moot.

In the Board's view, while it may be that Carrier decided to abolish Claimant's former non-contract position as a consequence of the coordination, there is no valid basis to support the contention a direct causal relationship or nexus exists between that abolishment and any loss of compensation or earnings Claimant may have sustained on the basis of his voluntary exercise of seniority rights to a contract position. The change in the employment status of Claimant from a non-contract to a contract position must, in our opinion, be treated as outside the protective pale of the New York Dock Conditions. In this respect, we think it evident Claimant had the opportunity to be afforded substantially the same levels of protections as are offered to members of labor organizations by having accepted one of the two options accorded him relative to his employment status at the time of the coordination as a non-contract employee. Certainly, absent any probative evidence that exercise of seniority to a contract position was also a proper alternative available to Claimant, it must be held that Claimant waived such non-contact protective status. At the same time, the Board believes it must be concluded that any effort to identify a tangential effect as flowing directly from abolishment of the non-contract position to Claimant's voluntary exercise of seniority to a contract position, and thereby application of the Implementing Agreement of February 26, 1982, must likewise fail absent a clear showing

that such Agreement has application to non-contract positions the same as contract positions.

Since the Board fails to find any proper basis to hold Claimant is entitled to a displacement allowance under the terms and conditions cited from the New York Dock Conditions and the Implementing Agreement, we have no alternative but to deny the claim as presented.

AWARD:

The Question at Issue is answered in the negative. The Claimant is not found to be entitled to a displacement allowance as claimed in the Question at Issue.

Robert E. Peterson, Chairman
and Neutral Member

D. R. Johnson, Carrier Member

E. J. Neal, Employee Member

Atlanta, GA
October 23, 1984