In the Matter of the Arbitration between:	:	
Delaware and Hudson Railway Company	:	ICC Finance Docket No. 29772
- and -	:	Claim under New York Dock Labor Protective Conditions
Donna Dae Gilchrist	:	
	:	

OPINION AND AWARD

Introduction

Under the provisions of Article I, Section 11, and Article IV of the labor protective conditions established in ICC Finance Docket 28250, New York Dock Railway - Control - Brooklyn Eastern District Terminal (1979), the undersigned was nominated by the National Mediation Board to serve as Arbitrator in the above-captioned matter.

A hearing was held on September 25, 1984, at the offices of McClung, Peters, Simon and Arensberg in Albany, New York. The Company was represented by Mr. Byron E. Rice, Jr., Vice-President for Human Resources, and Donna Gilchrist was represented by Mr. Lewis Baisden, General Chairman, Brotherhood of Locomotive Engineers, Delaware and Hudson System, who was retained by her attorney, Homer E. Peters, Esq.

The parties waived the provision in Article I, Section 11, for a three-member arbitration committee and agreed that the undersigned would serve as a single Arbitrator. Both parties presented oral explanations of their written submissions, including arguments and exhibits. Ms. Gilchrist testified at the hearing and was cross-examined by the Company. A transcript was prepared and received on October 20, 1984 by the Arbitrator, who declared the hearing closed as of that date.

Background and Issue

The case arose under ICC Finance Docket No. 29772, decided July 23, 1982, in which the Commission approved the acquisition of the Delaware and Hudson Railway Company (D&H or Company) by Guilford Transportation Industries, Inc. (GTI), subject to the New York Dock Conditions (NYDC) to protect employees adversely affected by the acquisition.

With the control of D&H, which became effective January 4, 1984, GTI completed the joining of three railroads under its Rail Division. The other two were acquired earlier: the Main Central Railroad Company (MCR) in 1982 and the Boston and Maine Corporation (B&M) in 1983.

Donna D. Gilchrist (claimant or grievant) was first employed by the Company in 1977 in a clerical position covered by a labor agreement. She was subsequently promoted to the position of Secretary in the Executive Department. When the GTI takeover occurred in 1984, she was Secretary to D&H President C. R. McKenna and classified as a management secretary outside the bargaining unit. On March 28, 1984, Mr. McKenna announced that he was closing his office in Albany and that her position was being abolished. Mr. McKenna became President and chief operating officer of the combined Rail Division, effective July 1, 1984, with his primary office at the former B&M headquarters in North Billerica, Massachusetts. According to the change-of-payroll Form 1380A, the last day worked by the grievant was March 30, 1984, and following three weeks' vacation earned in 1983 her employment was terminated as of April 20, 1984.

The parties agree on the issue before the Arbitrator:

1. Did the actions of the Delaware and Hudson Railway Company constitute a transaction pursuant to Appendix III, Labor Protective Conditions, New York Dock Railway - Control - Brooklyn Eastern District Terminal, when the President of said Company dismissed Donna Dae Gilchrist effective on April 20, 1984?

2. If the answer to Question No. 1 is in the affirmative, then what are the employee benefits to be afforded Ms. Gilchrist as a result of her dismissal?

The remedy requested is a lump-sum payment under Article I, Section 7, of the New York Dock Conditions. According to the grievant, if she had been notified that she was covered under NYDC at the time of dismissal, she would have opted for the separation allowance identified as a payment "computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936." The following schedule is presented as a guide to the computation and is not disputed by the Company. Based on this schedule, her employment from 1977 to 1984 would qualify for 12 months' pay after 5 to 10 years' service.

Length of Service	Separation Allowance
1 year and less than 2 years	3 months' pay
2 years and less than 3 years	6 months' pay
3 years and less than 5 years	9 months' pay
5 years and less than 10 years	12 months' pay
10 years and less than 15 years	12 months' pay
15 years and over	12 months' pay

Portions of ICC Finance Dockets

Interstate Commerce Commission Finance Docket No. 29772, Guilford Transportation Industries, Inc. - Control - Delaware and Hudson Railway Company, decided July 23, 1982.

It is ordered:

1. The primary application is approved.

3. This authority is subject to the conditions for the protection of employees enunciated in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), unless an agreement is entered prior to consummation, in which case protection shall be at the negotiated level (subject to our review to assure fair and equitable treatment of affected employees).

Interstate Commerce Commission Finance Docket No. 28250, New York Dock Railway - Control - Brooklyn Eastern District Terminal, decided February 9, 1979.

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. . . .

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.

7. Separation allowance.- A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

11. Arbitration of disputes.- (a) In the event the railroad and its employees or their authorized respresentatives cannot settle any dispute or controvesy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 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.

(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.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection 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.

Discussion

The dates and sequence of events leading to arbitration are not in dispute. A brief chronology summarizes the details of Ms. Gilchrist's work history as provided by the parties:

September 1977	Employment as Stenographer in Sales and Marketing.
December 1979	Promotion to Secretary in Executive Department. Major portion of work for Assistant Vice-President Richard E. Long.
December 1, 1983	Promotion to Secretary to President C. R. McKenna.
March 28, 1984	Verbal notice that position was abolished with closing of President's office in Albany. Written notice to Secretary Anne Pope, covered by BRAC agreement, that position was abolished "due to economic conditions."
April 4, 1984	Letter to D&H Director of Labor Relations M. F. Melius requesting benefits under NYDC.
May 1, 1984	Reply from M. F. Melius, stating that termination was not related to a "transaction" under NYDC and that position was abolished "because of adverse financial conditions."
May 14, 1984	Request for arbitration of employee's claim.

Certain other facts are also not in dispute: Where the grievant files her claim as a "dismissed employee" under the NYDC definitions, there are no disciplinary implications in the termination of her employment. Further, as a managerial secretary, Ms. Gilchrist claims no seniority rights under a labor agreement. Although she refers to work performed by a "junior" employee, there is no issue before the Arbitrator relating to access to a bargaining-unit roster.

The issues that are in dispute relate to the Company's basis for abolishing her position as Secretary to the President, essentially whether the reason was economic or caused by the GTI acquisition and associated Company actions.

Ms. Gilchrist contends that during the consolidation of the three railroads, other employees were dismissed with protective settlements or transferred and kept on D&H payrolls. According to her position, while the Company was authorized under the ICC approval to reduce and realign its work force, the purpose of the New York Dock Conditions was to protect employees adversely affected in the process. As far as her job is concerned, the grievant argues that the closing of the President's office is understandable to avoid duplication with a single President for the three systems, but the Company's action constitutes a "transaction" under NYDC definitions and she was adversely affected.

The Company maintains that ICC approval of the GTI consolidation and imposition of New York Dock Conditions does not provide blanket protection to employees for all carrier actions. According to the Company, in this case there was a succession of job abolishments caused by a severe decline in business, which affected her position along with others. Following the reasoning of other arbitration awards under New York Dock Conditions, the employer argues that the grievant has a burden to prove a "causal nexus" between the GTI acquisition of D&H and the abolishment of her job. In the Company's view, the relationship has not been proved.

The positions of the parties lead to an examination of their arguments under the following headings:

1. Occurrence of a "Transaction."
2. Economic Conditions.
3. Relationship to the Acquisition and Consolidation.

Occurrence of a "Transaction"

The Company cites Article I, Section 11 (e), of the New York Dock Conditions, which is repeated here for convenience:

> 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 Company argues that Ms. Gilchrist failed to identify the transaction that affected her employment. In particular, the carrier quotes from Attorney Peters's letter of May 31, 1984, that "approval of Finance Docket 29972 [sic] by the ICC and the employee protection provided proves the inaccuracy of" Mr. Melius's statement that NYDC did not apply. The Company also points to a statement in the grievant's submission that: "The approval of Finance Docket 29772 in itself constitutes a transaction as defined within the 'New York Dock Conditions'." According to the Company, the claimant

incorrectly assumes "blanket and unconditional protection" as a result of the ICC approval of the Finance Docket.

The Arbitrator agrees with the employer that approval of the Finance Docket by itself is not a "transaction" that affected the employee. However, the letter of May 31, 1984 prior to arbitration need not be considered the primary basis for the grievant's claim, and the statement in the grievant's submission follows recognition that the ICC referred to the acquisition of control by GTI as a transaction/consolidation. Unlike other arbitration cases submitted by the parties, this matter involves the special circumstance of a non-agreement position, where the employee pursued her claim without representation by a labor organization experienced in handling New York Dock Conditions. She did not receive written notification of an intended transaction such as that required in NYDC Section 4 to provide negotiations with employee representatives. The Company states without contradiction that notice was not required in this case. As a result, the facts relied on by the grievant were not fully developed until the arbitration proceeding.

The Company cites an arbiration case between the Chicago and North Western Transportation Company and the American Railway Supervisors' Association (1980), where Arbitrator Richard R. Kasher found "no argument or evidence introduced to [the] committee" to support the obligation of the Organization under Section 11 (e) of NYDC. While it will be seen below that the argument and evidence in this case warrant a different conclusion, it can be noted that the Kasher committee's findings were based on testimony and documents presented at the arbitration hearing. Similarly, the Arbitrator here is not bound by preliminary statements of the grievant's claim but has considered the detailed presentations of both parties at the hearing.

In identifying a transaction, the claimant points to Finance Docket No. 29772 to show that the ICC uses the term "transaction" in examining events that gave rise to this case. A few illustrations follow:

> Implementation of the B&M and D&H transactions will create a consolidated three railroad system under the control of GTI.
>
> We are approving the application because we find that the transaction is consistent with the public interest.
>
> In determining whether the primary application is consistent with the public interest, we have considered the effect of the proposed transaction on the interest of carrier employees.
>
> The primary public benefit of the proposed transaction is the lifeline it will provide to the ailing D&H. Absent this consolidation, it is unlikely that D&H could continue to operate in light of its continuing losses and negative cash flow.

The claimant adds that ICC's discussion of the Company's intent to consolidate pursuant to the Finance Docket is based on information supplied by the Company itself.

The Arbitrator observes that acquisition of D&L by GTI is clearly treated as a transaction by the Commission. The first statement in its concluding findings is: "We find that, subject to the terms and conditions discussed above, (a) acquisition by GTI of D&H is a transaction within the scope of 49 U.S.C. 11343. . . ." Consolidation efforts anticipated in the Finance Docket would require further transactions under the definition in NYDC, Article I, Section 1, that is, actions taken pursuant to authorization under the Finance Docket. Such transactions occurred when GTI combined the executive and administrative offices of D&H with those of the other two railroads. Closing the Albany office of the President was one of several actions taken before and after the actual acquisition to realign Company facilities and staff under GTI's Rail Division.

Contrary to the Company's charge of failure to identify a transaction under Section 11 (e), the Arbitrator finds that closing the Company President's office was a transaction that could have caused Donna Gilchrist's dismissal. The essential question of whether this action by the Company actually caused the abolishment of her position is considered below. First, in accordance with Section 11 (e), the carrier presents its argument that the Company's financial picture caused the grievant's termination.

Economic Conditions

In his letter abolishing the position of Secretary Anne Pope, General Superintendent C. P. Belke cited "economic conditions." Donna Gilchrist was not offered an explanation until she wrote to M. F. Melius, who replied:

> Your position was abolished because of adverse financial conditions on the Delaware and Hudson Railway Company. These conditions required an overall retrenchment of forces and realignment of work among remaining Delaware and Hudson employees. In your particular case, certain positions and functions that you formerly supported, such as the special assistant to the President, the General Manager and the Industrial Engineering function, were eliminated.

In support of its claim of poor financial health, the Company submits data showing, for the years 1979 through 1983, losses in net income and cash income and declines in employment and car loadings. The grievant supplies information from the New York State Department of Transportation showing increases in car loadings for the first four months of 1984 over the first four months of 1983. The Company does not dispute these figures but indicates that income figures barely turned from negative to positive balances.

The Arbitrator notes that D&H demonstrated financial difficulties to the ICC in 1982 in the Finance Docket. To repeat a statement quoted earlier from the decision:

> The primary public benefit of the proposed transaction is the lifeline it will provide to the ailing D&H. Absent this consolidation, it is unlikely that D&H could continue to operate in light of its continuing losses and negative cash flow.

Apparently an expected "infusion of energy, capital, and management experience" by GTI as well as run-through trains and minimum duplication within the combined system produced the desired turnaround in 1984.

The Company stresses the need to relate a transaction to the claimant's loss of employment. Similarly, it is important here to relate the changing economic picture to Donna Gilchrist's employment. She was hired in 1977 and worked regularly during the years 1979 to 1983, when Company losses increased from $8 million to $16 million. She was terminated in March 1984, when economic conditions were not as severe. The claimant presents a persuasive argument that she worked "regardless of the ebb and flow of traffic" until GTI consummated the acquisition of D&H in 1984 and changes occurred in the President's office.

The Company contends that restructuring efforts took place internally to overcome economic conditions. For example, when Ms. Gilchrist was appointed Secretary to Mr. McKenna in December 1983, the prior Secretary was transferred to the Engineering Department, leaving one less position in the Executive Department. The Company lists nine management people for whom Ms. Gilchrist did work because of minimal support staff and indicates that they have been reassigned in D&H, transferred to North Billerica, or separated from the Company, and therefore no longer require her services.

The Arbitrator believes, however, that the grievant's position after December 1983 was not dependent on the situation of people she worked for earlier or on an informal basis as needed. Although she continued doing work especially for R. E. Long on a long-distance basis, after becoming Secretary to the President she was assigned specifically to him. The Company does not dispute either Mr. McKenna's reported statement that she was working directly for him or the grievant's statement that she reported only to him. The evidence shows that Donna Gilchrist's position was not abolished until the President's office was moved; literally, her last day of work was Friday, March 30, prior to the move scheduled for Monday, April 2, 1984.

With regard to the Company's claimed basis for its action, the Arbitrator concludes that elimination of the position of Secretary to the President was caused not by adverse economic conditions or overall retrenchment of forces, but rather by the moving of the President's office to North Billerica to establish his headquarters as President of the combined Rail Division.

Relationship to the Acquisition and Consolidation

The Company introduces a series of arbitration awards establishing the need for claimants under NYDC to prove a "proximate" or "causal" nexus between a transaction and the adverse effect on their employment. The reasoning of eight different arbitrators can be illustrated by a few quotations:

Nicholas H. Zumas in Missouri Pacific Railway Company (1981):

> . . . 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.

Joseph A. Sickles in Missouri Pacific Railway Company (1982):

> As a factual matter, in order to bring the activity within the purview of the New York Dock II provisions it is necessary that the Organization show a "transaction" and it must convince the undersigned that the proposed action was one made pursuant to the merger of the Carrier.

Jacob Seidenberg in AMTRAK (1979):

> 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 case, by a statutorially authorized discontinuance of railroad passenger service.

Bernard Cushman in B&M and MCR (1984):

> The leading arbitral decisions stress necessary relationships of cause and effect between the "transaction" and the adverse effect for an employee to achieve entitlement to the whole spectrum of benefits under the New York Conditions. This Referee agrees . . . that there must be a causal connection between the transactions and the claimed adverse effect upon employees.

This Arbitrator does not disagree with the basic principle enunciated or its applicability to the case at hand. As it happens, in the cases cited by the Company a causal relationship was not proved, but the evidence in this case establishes the necessary link between a consolidation transaction of the Company and the adverse effect on the claimant.

As pointed out above in the discussion of economic conditions, the key factor here is the nature of Ms. Gilchrist's singular position as Secretary to the President. At the time of her dismissal, she was not one of a group of clerical workers assigned to a department. In December 1983 her responsibilities changed, and the Form 1380A shows an increase in monthly salary from $1957.99 to $2079.05. It is evident that the President required the services of a Secretary in good times and bad. Regardless of reductions in other administrative positions, it is unlikely that the top executive

officer would operate without clerical assistance or, in the words of the claimant's representative, work "in a void." It can also be noted that the secretary's position is not an independent office that exists apart from the function of the supervisor to whom the employee reports. Donna Gilchrist's position, then, has to be viewed as closely related to and dependent on that of the President.

During the period following approval of the Finance Docket in 1982 and continuing after the actual acquisition in 1984, the Company was involved in a variety of actions to restructure, realign or reduce its work force. Some of the actions may indeed have been to overcome financial problems, as argued by the Company, and some were required to consolidate functions previously performed by three separate systems. One effort was to centralize executive headquarters for the Rail Division, including naming C. R. McKenna as President for the combined operation. While changes in other departments and positions are introduced by the parties, the Arbitrator focuses here on decisions affecting the President's office and therefore the grievant's position.

There is no doubt that moving the President's office to North Billerica was a "transaction" carried out by the Company to accomplish the consolidation authorized by the Commission. When the office in Albany was closed, the impact on Donna Gilchrist's employment was direct and immediate; her function was eliminated and her position was abolished. Both parties acknowledge that President McKenna maintains a subsidiary office near Albany in another Company facility. Evidence is not provided on the nature of clerical services performed at that facility. But, for purposes of this case, it is established that, in preparation for Mr. McKenna's assuming the presidency of the combined Rail Division, the Company decided to eliminate the executive office in Albany.

The carrier argues that since it had the right to abolish the claimant's position through restructuring prior to the GTI acquisition, exercise of the right after the acquisition did not require ICC approval and did not trigger protection under NYDC.

The Arbitrator is convinced otherwise, that the grievant's position was not abolished through general restructuring of D&H forces but came about as a direct result of consolidation in the office of President. Therefore, the Arbitrator finds that Donna Gilchrist has shown the causal link between a "transaction" under New York Dock Conditions and the abolishment of her position.

AWARD

1. The action of the Delaware and Hudson Railway Company constituted a transaction pursuant to Appendix III, Labor Protective Conditions, New York Dock Railway - Control - Brooklyn Eastern District Terminal, when the office of said Company President was closed and the Company dismissed Donna Dae Gilchrist effective on April 20, 1984.

2. Therefore, Ms. Gilchrist shall be awarded a separation allowance as provided in Section 7 of Appendix III, Labor Protective Conditions, computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936.

Gladys Gershenfeld
Arbitrator

November 19, 1984