

ARBITRATION BOARD

(ESTABLISHED PURSUANT TO ARTICLE I, SECTION 11
OF THE EMPLOYEE PROTECTIVE CONDITIONS IN NEW
YORK DOCK RY. - CONTROL - BROOKLYN EASTERN DIST-
RICT, 350 I.C.C. 60 (1979) AS PROVIDED IN I.C.C.
FINANCE DOCKET NO. 30,000)

BROTHERHOOD OF RAILWAY CARMEN OF)
THE UNITED STATES & CANADA)

vs.)

UNION PACIFIC RAILROAD COMPANY)

FINDINGS AND AWARD

QUESTION AT ISSUE:

"Whether or not Carmen J. P. Rindone, A. M. Ellis, R. B. March, R. E. McKern, and T. E. Harvey, Council Bluffs, are entitled to benefits contained in Article I, Section 6, of the New York Dock Conditions as a result of their being furloughed from service effective close of business April 26, 1984."

BACKGROUND:

On October 20, 1982, in its Finance Docket No. 30,000, the Interstate Commerce Commission (ICC) approved applications which had been submitted to it for the merger of Union Pacific Railroad (UP or Carrier), Missouri Pacific Railroad Company (MP), and Western Pacific Railroad Company (WP) to be effective December 22, 1982.

As a condition of its approval, the ICC imposed labor protective conditions commonly known as the New York Dock Conditions (New York Dock Ry. - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979)).

In that part of the ICC decision which dealt with the issue of common point consolidations in general, and with the Omaha and Council Bluffs consolidation in particular, the ICC said:

"To maximize operating savings and service efficiencies, applicants propose numerous coordinations and consolidations of facilities. At Omaha/Council Bluffs, the applicants propose that UP will operate the terminal under a joint facility agreement with MP. All MP road train operations will be conducted out of the UP's Council Bluffs Yard. Switching of industries presently served by MP will be assigned to Eighth Street Yard, and MP will acquire trackage rights over UP between Omaha and Council Bluffs. These changes will result in reducing interchange delays and will improve car utilization by

eliminating duplicate handling of cars. The MP's Nicholas and Grace Street Yards will be utilized as storage facilities for UP's Omaha Shops, thus separating shop support operations from industrial support and train operations."

On February 14, 1983, pursuant to Section 4 of the New York Dock Conditions, notice was given to the Brotherhood of Railway Carmen of the United States & Canada (BRC) by the UP and MP of its desire to coordinate certain MP Mechanical Department forces at Omaha, Nebraska, with UP Mechanical Department forces at Council Bluffs, Omaha, and to thereafter perform such operations on a consolidated basis under the UP Schedule Agreement effective on or about May 16, 1983. In this regard, it was proposed there be a transfer of 10 Carmen positions from Omaha to Council Bluffs. It was additionally proposed to transfer the work of two MP positions headquartered at Omaha to Atchison, Kansas, to perform emergency road service. The foregoing proposals notwithstanding, it was determined upon subsequent review of the work to be performed at Atchison, to transfer 11 MP Carmen to Council Bluffs and one to Atchison.

Although agreements were voluntarily reached between the UP and MP with labor organizations representing certain other employees involved in the consolidation, an implementing agreement in pursuance of the ICC imposed conditions was not consummated by the UP and MP with the BRC. The dispute between the UP and MP with the BRC was therefore submitted to arbitration, with the following Questions at Issue being placed before Neutral Referee William E. Fredenberger, Jr.:

"1. The manner in which Union Pacific and Missouri Pacific journeyman Carmen's seniority rosters are to be consolidated.

2. The question of whether or not the furloughing of Union Pacific Carmen at Kansas City and Council Bluffs on or about April 11, 1983 and any subsequent furloughs were a result of a 'transaction' authorized by Finance Docket No. 30,000.

3. Whether one MP position formerly at Omaha can be transferred to Atchison, Kansas."

Neutral Referee Fredenberger issued a decision on the dispute on December 6, 1983. Basically, with respect to Question No. 1, it was held as follows:

"It is this Neutral's conclusion that dovetailing the MP

and UP journeyman's seniority list on the basis of existing seniority represents the most appropriate basis for the assignment of forces made necessary by the transaction in this case. Accordingly, the attached arbitrated implementing arrangements include such provisions."

As concerned determination of the second Question at Issue, the Referee basically held as follows:

"[The] system-wide furlough of shop craft employees relates more reasonably to the system-wide decline in business than it does to the consolidation of Mechanical Department facilities at Kansas City and Omaha/Council Bluffs.

Accordingly, this Neutral concludes that the furloughs of shop craft employees in April and June of 1983 were the result of a decline in business and were not the result of a transaction as provided in the New York Dock Conditions."

In determination of Question at Issue No. 3, the Referee held:

"The transfer of a single Carman from Omaha to Atchison to perform this work seems consistent, as the Carriers contend, with the principle that employees should follow their work."

The arbitrated implementing arrangements which were made a part of the Referee's decision as to the appropriate bases for the selection and rearrangement of forces pursuant to the transaction which gave rise to the proceeding, included, as concerned consolidation of the Omaha and Council Bluffs rosters, the following provisions:

"4. (a) On the effective date of this Agreement, all Carman positions on the MP at Omaha will be abolished; one position will be bulletined on MP at Atchison, Kansas, and the remainder will be bulletined on the UP at Council Bluffs.

(b) Within ten (10) working days after the execution of this Agreement, notice will be posted for ten (10) working days on MP at Omaha advertising the positions to be established pursuant to Section 4(a). The Carmen presently working from the MP Omaha roster will be required to submit a bid on the positions at Council

Bluffs and Atchison. If there are no bidders for the positions at Atchison, the junior Carman from Omaha will be assigned to Atchison.

(c) Upon expiration of the ten (10) working day bulletin, the jobs will be awarded to the senior bidders. Effective with the date of coordination, their seniority dates on the Omaha roster will be date dovetailed on the Council Bluffs Carmen seniority roster. The Carman assigned to Atchison will be given a seniority date on Carmen's roster at Atchison and Kansas City as of the first day worked at Atchison. The eligible employees who elect not to bid on the positions at Council Bluffs or Atchison will be assigned to vacancies on the Council Bluffs or Atchison Carmen seniority rosters.

(d) With the exception of the employee assigned at Atchison, MP Carmen seniority roster at Omaha will be integrated with UP Carmen seniority roster at Council Bluffs by date dovetailing seniority of all employees on the two rosters. Those employees who are furloughed on the effective date of this agreement will also be identified as furloughed on the combined seniority roster. In the application of the seniority rights of those employees who will be in a furloughed status as of the effective date of this Agreement and whose dovetailed seniority will be greater than junior employees who hold a regular assignment at that time, it is understood that such employees will not be subject to recall to service until such time as a permanent position becomes vacant which is not filled by an employee in service holding a regular assignment as of the effective date of this Agreement. This will not, however, preclude the utilization of such employee on a temporary basis pending bulletin assignment. Upon assignment to a permanent position and thereafter, such employee's exercise of seniority rights shall be governed by the applicable provisions of the Schedule Agreement between UP and BRCUS&C. Employees identified as furloughed will not be able to activate their seniority to a regular assigned position until such time as a regular assigned position is bulletined due to resignation, transfer, retirement, increase in force, etc., of any of the current active employees."

The Referee's decision was placed into effect on January 1, 1984. However, an understanding was entered into between the Carriers and BRC on January 13, 1984 to provide clarification of Section 4

of the above imposed Memorandum of Agreement. This understanding provided as follows:

"In the event no bids are received for the position at Atchison from active MP employees at Omaha, the position will be offered in seniority order to furloughed MP Carmen at Omaha. If no applications are received from furloughed MP Carmen at Omaha, then the junior employee holding seniority on the MP Carman Roster at Omaha shall be assigned and such employee's name shall be removed from the Omaha MP seniority roster.

Since there are only eleven UP positions available at Council Bluffs, if one of the twelve active MP employees at Omaha is unable to secure a position at Council Bluffs, then such employee shall forfeit protective benefits pursuant to New York Dock Conditions if he elects not to bid on the position established at Atchison and will be placed in a voluntary furlough status on the dovetailed seniority roster covering Omaha/Council Bluffs. Such employee will be subject to recall under terms of Section 4 of the Memorandum of Agreement."

Claimants Rindone, Ellis, March and McKern held regular assignments on December 31, 1983 at Council Bluffs, or immediately prior to the date the rosters were consolidated by dovetailing seniority of MP Omaha Carmen with UP Council Bluffs Carmen. Claimant Harvey did not, however, hold a regular assignment at Council Bluffs. He had been furloughed on December 2, 1983, and recalled to temporary service on January 3, 1984.

The other Claimants were furloughed on April 26, 1984.

On May 3, 1984 the Claimants submitted a joint claim, requesting a monthly dismissal allowance as provided in Article I of the New York Dock Conditions.

Article I, Section 1(c), of the New York Dock Conditions defines a "dismissed employee" as follows:

"(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."

The claim was denied by the Carrier, and when appeals handling on the property failed to resolve the dispute it was agreed between the parties to place the Question at Issue as set forth above to this Arbitration Board.

POSITION OF THE BRC:

The basic thrust of the BRC is that "had the eleven (11) Missouri Pacific Carmen not been placed on the roster ahead of the Union Pacific Council Bluffs Carmen, Claimants would not have been furloughed April 24 and 26, 1984 [and they] are, therefore, entitled to the benefits set forth in Article 1...of the New York Dock [Conditions]." It contends the Claimants lost their jobs as a result of the exercise of seniority by MP employees whose jobs were abolished as a result of the coordination and moved to Council Bluffs.

The BRC also maintains that the Carrier has not shown by convincing evidence that the Claimants were furloughed as the result of a decline in business rather than as a result of the transaction. In this respect, the BRC cites the closeness of the furloughs to the date of the consolidation in support of its contention that the furloughs were directly related to the transaction as opposed to any decline in business.

The BRC further asserts that the Claimants had, in good faith, properly identified the transaction and "had shown beyond reasonable doubt that had same not occurred, Claimants would not have been dismissed."

POSITION OF THE CARRIER:

The Carrier maintains the Claimants were furloughed as a result of unfavorable economic conditions and budget reductions. In this respect, the Carrier submits that a number of economic indicators, such as freight locomotive miles, freight train miles, gross ton miles, carloadings, freight revenue, and total operating revenues, all reflected the declining state of business during the six-month period commencing January 1, 1984. This decline, the Carrier states, made it necessary there be a reduction of 903 positions in the Mechanical Department during the period April to July 31, 1984, with 321 Mechanical Department jobs being abolished in the month of April 1984.

In this regard, the Carrier directs attention to awards of past arbitration boards which have supported the principle that a carrier has a right during unfavorable business conditions to reduce its force without incurring protective payments to employees.

In addition, the Carrier contends that the BRC has presented no evidence to establish the Claimants were furloughed as a result of a "transaction," as that term is defined in Article I, Section 1(a), of the New York Dock Conditions, that is: "[Any] action taken pursuant to authorizations of this [Interstate Commerce] Commission on which these [New York Dock Condition] provisions have been imposed." It submits that the Claimants did not identify any evidentiary facts in their May 3, 1984 claim.

The Carrier also asserts that the general statement offered by BRC that the dovetailing of employees on a seniority roster has resulted in the furloughing of the employees is unfounded. In this regard, the Carrier submits that the transfer of 11 MP Carmen to Council Bluffs was in January 1984, and that the five Claimants were not furloughed until April 1984, or approximately three months later. Moreover, the Carrier says the rosters were consolidated according to the findings and award rendered by Referee Fredenberger and that this did not result in MP Carmen being placed at the top of the roster, but rather their ending up on the top of the roster as a result of seniority being dovetailed.

FINDINGS AND OPINION OF THE BOARD:

Turning first to the placement of Claimants' names on the consolidated seniority roster, this Board finds no reason to hold that the names of either the Claimants or other employees were placed on the roster in a manner other than as determined to be appropriate by Referee Fredenberger in his award of December 6, 1983.

Now, as concerns the burden of proof arguments of the parties. Section 11(e) of the New York Dock Conditions places the burden of proof upon the parties to a dispute in the following manner:

"(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."

Insofar as the Claimants and the BRC are concerned with respect to their obligations under Section 11(e), they merely offer the fact that the Claimants came to be furloughed some three months after the date of the transaction. In the Board's opinion, this is not sufficient to satisfy the dictates of Section 11(e) so as

to entitle the Claimants to protective allowances. It must be shown that there is a causal nexus between a furlough and the transaction. The Claimants or the BRC were thus obliged to have come forward with specific facts to show, for example, the Claimants were bumped or displaced as a direct result of the transaction; or, the Claimants were affected by a series of bumps brought about by the transaction. In other words, it was the responsibility of Claimants or the BRC to have described the precise manner in which it had reason to believe that each furlough was as a direct result of Carrier activity made in pursuance of an authorized transaction.

As concerns the Carrier obligation with respect to Section 11(e) of the New York Dock Conditions, we believe it was able to fully demonstrate that factors other than a transaction affected the employees. It showed by substantial probative evidence there was a direct relationship between an analytical study of declining business conditions and the furlough of the Claimants three months after the date of the consolidation as part of extensive force reductions on a system-wide basis. This furlough was not unlike that furlough which had taken place a year earlier, and found by Referee Fredenberger to likewise be the result of a system-wide decline in business rather than a furlough resulting from the consolidation of facilities.

The furloughing of the Claimants must, therefore, be viewed as having essentially represented work force determinations which the Carrier had the right to make under normal circumstances when there is a business fluctuation. The mere fact that Claimants were on a merged seniority roster that had been brought about by reason of a consolidation of facilities and operations did not automatically entitle them to a protective allowance under the New York Dock Conditions, since it must be presumed that even had the seniority rosters not been consolidated the Claimants would nonetheless have been furloughed as a result of the decline in business.

It being evident from studied consideration of the record that external factors, i.e., a decline in business, caused the adverse affect upon the Claimants, the contention that Claimants be considered as dismissed employees entitled to benefits contained within the meaning of Article I, Section 6, of the New York Dock Conditions must be held to be without appropriate support, and must, therefore, be denied.

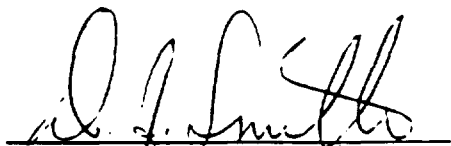
AWARD:

For those reasons as stated in the above Findings and Opinion,

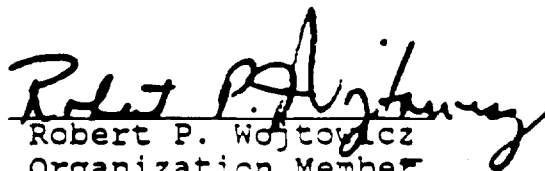
this Board finds that the Question at Issue must be properly answered in the negative. The Claimants are not entitled to the benefits of the New York Dock Conditions as a result of their being furloughed from service effective the close of business April 26, 1984.



Robert E. Peterson, Chairman
and Neural Member



Douglas J. Smith
Carrier Member



Robert P. Wojtowicz
Organization Member

St. Louis, MO
July , 1986