ARBITRATION PURSUANT TO SECTION 11(a)
OF NEW YORK DOCK CONDITIONS
(I.C.C. FINANCE DOCKET NO. 29486)

PARTIES:

CONSOLIDATED RAIL CORPORATION
(CONRAIL)

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
SYSTEM COUNCIL NO. 7

STATEMENT OF DISPUTE:

1. That under the current Agreement, as amended, particularly by Interstate Commerce Commission Finance Docket 29486, effective May 27, 1981, the Consolidated Rail Corporation fails to grant the New York Dock Labor Protective Conditions as prescribed therein, to certain enumerated employees, who have been adversely affected with respect to their compensation and conditions of employment as a result of the transaction covered in the aforesaid Finance Docket 29486.

2. That accordingly, the Consolidated Rail Corporation be ordered to

grant New York Dock Labor Protective entitlements as provided by the Interstate Commerce Commission Finance Docket No. 29486 to the Claimants for the entire pay period they are adversely affected with respect to compensation or conditions of employment, from the first day of the aforementioned period and as long thereafter as they are due such protective conditions.

BACKGROUND:

On November 29, 1984, the National Mediation Board nominated the undersigned Neutral to sit with the Consolidated Rail Corporation and the International Brotherhood of Electrical Workers, pursuant to Section 11(a) of the New York Dock Conditions, to resolve a dispute involving I.C.C. Finance Docket No. 29486, Delaware and Hudson Railway Company - Purchase Portion - Consolidated Rail Corp.

The Board met in Philadelphia, Pennsylvania on March 6, 1985, and a subsequent executive meeting of the Board was held on April 15, 1985. The Consolidated Rail Corporation (hereafter "CONRAIL") was represented by Robert O'Neil and Janet Goodheart, and the International Brotherhood of Electrical Workers, System Council No. 7, (hereafter "IBEW") was represented by Spartaco Mazzulli and Edward J. Lachowicz.

STATEMENT OF FACTS:

On September 22, 1980, the Delaware and Hudson Railway Company (hereafter D&H), filed an application for authority to acquire and operate the

Conrail line (Scranton-Binghamton) and reiterated a request for temporary authority to operate the line during the pending of the Commission's deliberations. The D&H and Conrail had been in negotiations for approximately two (2) years and the parties entered into an Agreement of Sale dated September 8, 1980. In a letter to the Interstate Commerce Commission also dated September 8, 1980, the D&H made application for temporary emergency operations of the Conrail Line. In the D&H temporary emergency application that Carrier stated that its line was in urgent need of substantial rehabilitation and for reasons of financial need as well as efficiency of operations, immediate operation over Conrail's Scranton-Binghamton Line is both preferred and required by the public interest. The D&H further stated:

> "D&H and Conrail have agreed that, if any employees of either party are affected by the grant of authority here requested, each party will bear the cost of protecting its own employees in accordance with conditions customarily imposed by the commission in transactions of this kind."

Conrail asserted that in fact it had ceased operating the Line in 1978.

On September 26, 1980, the I.C.C. by Service Order No. 1486 granted D&H authority to operate over the Conrail Line described in the September 18, 1980 Sales Agreement from 12:01 A.M., September 27, 1980, the effective date of the Order, until its expiration date of 11:59 P.M., January 31, 1981.

On October 7, 1980, Conrail notified employee groups of the D & H Sales Agreement. Service Order No. 1486 expired January 31, 1981, but on January 27, 1981, ICC Finance Docket No. 29486 permitted continued operation of the Line by D & H from February 1, 1981 and imposed the employee protective provisions commonly referred to as the New York Dock Conditions (NYDC) until a final decision was rendered. Finally on May 27, 1981, the ICC approved the D & H purchase of the Line with the imposition of the employee protective conditions (discussed in New York Dock Ry - Control - Brooklyn Eastern District 360 ICC 60 (1979.)

In the meantime, IBEW claimed that on September 27, 1980, Conrail abolished three (3) Communications Maintainers Positions, Communication Construction Foreman, and several other positions which adversely affected seventeen (17) employees. (Eighteen (18) positions were involved, but one employee held two (2) of them).

On February 25, 1983, which was approximately twenty-nine (29) months after D& H began operation of the Line, IBEW initiated a formal claim for the affected employees for the protective entitlements of NYDC. The basis of their claims is alleged to be adverse effects on their compensation and conditions of employment as a result of the transaction covered in Finance Docket No. 29486 of May 27, 1981.

On April 18, 1983, Conrail denied the claim on the basis that the Claimants:

> "...were not performing any service on or in connection with the Binghamton to Scranton Line and were not affected by D&H's acquisition of the operation of such line... The closing of the Scranton Engine House in March of 1981 was a continuing part of Conrail's overall plans of consolidation and centralization of forces key locations" .

In addition, Conrail asserted that only six (6) Claimants were headquartered in Scranton and that the Six (6) of them transferred elsewhere. In summary, Conrail asserted that none of the Claimants was"affected by D&H's operation, maintenance and control of the Line effective September 27, 1980 or the authorization contained in I.C.C. Finance Docket No. 29486 or the subsequent sale of the Line."

The carrier also asserted that the claim should be dismissed because of laches and lack of specificity.

DISCUSSION:

1. PROCEDURAL ISSUE:

The Carrier argued preliminarily that the claim should be dismissed because the Organization's February 25, 1983 letter failed to meet the criteria required under 11(e) of NYDC. That section reads:

> "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 asserted that in violation of the foregoing, the claim was presented by the Organization and not by the "particular employee" alleged to have been affected, the transaction was not identified, the facts of the transaction were not specified, the date of the adverse effect was not indicated, and in any event, that the Organization was guilty of laches. The last point was based on the fact that the claim was filed on February 25, 1983 and relates to a transaction covered in Finance Docket No. 29486, dated May 21, 1981, a span of some twenty-one (21) months. In addition, D&H first started its operation on the Line in September, 1980, well over two (2) years earlier. Finally, the Carrier maintained that some of the named employees are Claimants whom the Organization cannot represent, viz. one is a general foreman, and another is a member of the Signalman craft.

The contention of the Carrier is not without merit. However, the protective conditions concept in Railway Law is particularly attuned to the rights of employees. In the absence of very compelling facts, the panel would not be inclined to find a fatal defect in the Organization's claim letter. Obviously, at some point in time, a period of delay

would constitute laches. Here, the organization and carrier have a running dispute concerning the organization's allegation that the carrier failed to give notice to the employees of the transaction or any changes it contemplated in connection with such transaction. The Carrier countered by reference to its October 7, 1980 notice to the organization of the impending sale of the Line and of the content and provisions of I.C.C. Service Order 1486. This was further discussed on October 8, 1980, and the Carrier maintained that no further notice was required.

The organization's February 25, 1983 letter refers to the sale by the Carrier to D&H, it identifies the individual employees by name, and seeks the NYDC "for the entire period (the employees) are adversely affected". The Carrier's letter of April 18, 1983 constitutes a formal answer to the claim and covers the history of Conrail's reduction of service from the 1978 closing of the Scranton Yard to discontinuance of virtually all service and eventually leading to the D&H operation of the Line effective December 27, 1980. This suggests that the Carrier was sufficiently informed of the specifics and was prepared to meet the claim. There was also a substantial amount of arbitral law indicating that standard time limit provisions are not applicable to disputes arising under employee protective agreements.

The Board is satisfied that the February 25, 1983 letter constitutes a proper and sufficient claim for benefits under NYDC, and no fault can be assessed against the organization for failing to meet its burden in that regard. It rightfully could stand in for its members in the presentation of the claim. (The issue regarding its authority to present claims for certain non-bargaining unit employees becomes moot in view of the Board's Award on the merits).

2. SUBSTANTIVE ISSUE:

The principle involved here is to protect the interests of employees of railroad carriers who are dismissed, displaced, or adversely affected by a transaction, all of which is defined in Finance Docket No. 28250. The NYDC constitute an obligation of fair treatment for such employees, but it is not an ironclad or automatic right. The Carrier correctly characterizes the process in stating:

> "...the approval of the acquisition of the Binghamton-Scranton Line by D&H in Finance Docket 29486 by itself does not grant blanket or unconditional protection to the Claimants. There must have been some other Carrier action directly related to the transaction, which action had a causal or proximate nexus to the sale of the line and which adversely affected the Claimants with respect to their compensation or employment. Absent a causal nexus, there was no 'transaction' which activated the protective conditions of NYDC". (Carrier Brief, pp. 6-7).

In United Transportation Union and San Diego and Arizona Eastern Railway Transportation Company, Chairman and Neutral Member Gil Vernon, clearly defined the meaning of cause and effect:

> "...the language of the conditions clearly sets forth that, to be considered protected, an employee must be adversely affected as a'result' of a transaction. Thus, it is clearly implied that factors other than a transaction which may adversely affect an employee do not turn on the protective provisions. Only adverse effect as a 'result' of a transaction qualifies an employee for protective benefits and no benefits flow from adverse impact due to other causes. Certainly, the Neutral cannot ignore that the use of the word 'result' requires a causal relationship between the transaction and the adverse impact..." (P. 5; July 20, 1984).

Also, Arbitrator Nicholas Zumas,stated in Missouri Pacific Railroad Company and American Train Dispatchers Association:

> "...the Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue...there must be a causal connection..." (p. 11; July 21, 1981).

In the Missouri Pacific Railroad Company case, the Carrier

action was consolidation of train dispatching officers. That consolidation occurred after the merger. Nevertheless, the Board concluded that "the decision to consolidate was made well before the merger." (P. 12)

And in New York Dock Railway and Brotherhood of Railway, Airline and Steamship Clerks, Arbitrator Zumas, also stated:

> "In order for the protective benefits to apply, however, the displacement or dismissal must be caused by the transaction authorized by the I.C.C. The question here is whether the action taken by the Carrier in April, 1981 was the result of the 1980 coordination or whether the elimination of the positions in question was the result of some other force or factor..." (P. 4; SBA No. 915, April 22, 1983).

Arbitrator, Jacob Seidenberg, in AMTRAK (1979) summarized the issue when he said:

> "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 (sic) case by a statutorially authorized discontinuance of railroad passenger service."

The bottom line issue, therefore, in this case is whether the Carrier's sale of its Binghamton Line to D&H adversely affected Claimants.

The facts are not complicated. In January, 1978, Conrail reduced service on its Binghamton-Scranton Line to a local freight operation and the Scranton Yard was closed. Later, but for occasional on-demand service, virtually all service was discontinued on the Line. The Scranton Diesel Shop remained open. It had no local work to do but handled only overflow work from Conrail's Altoona & Enola Locomotive Repair Facilities.

Early in 1981, the Carrier undertook to reduce its forces because of economic conditions. On March 10, 1981, the Scranton Diesel Shop was closed and eight (8) positions (including a foreman and a laborer) were abolished. Five (5) of the employees obtained positions in Bethlehem, Two (2) in Pittston, and One(1) was transferred to Enola. Those jobs were part of Two Hundred Eighty-Five (285) positions in Locomotive Shops throughout the Carrier's system that were abolished. Prior to the March 10, 1981 closing, Conrail had met with the General Chairman of eight (8) Organizations including IBEW and confirmed the following day by letter that the force reductions were to take place. (Note is made that none of the other seven (7) Organizations had instituted a claim under NYDC until February 21, 1985, when one (1) local Chairman for one (1) union filed a claim for two (2) employees including himself. Conrail referred to it as "a much belated claim" and suggests that that Organization is simply riding the coat-tails of IBEW here.)

There is substantial authority holding that a reduction in business volume is a legitimate defense under NYDC. Thus, Arbitrator Gil Vernon, in United Transportation Union and San Diego & Arizona Eastern Railway Transportation Company, previously referred to, stated:

> "It is noted that other arbitrators have held the reduction in business volume is a legitimate defense under New York Dock Conditions..." (Citing Cases: P. 6).

Arbitrator Vernon, goes on to say in that matter "the Neutral finds that the decline in business defense is not only available but a plausible explanation." (P. 7).

Likewise in "The Labor Lawyer", Volume 1, No. 1, Winter 1985, published by the American Bar Association, Section of Labor and Employment Law, the Committee report in this general area states:

"Several labor protection arbitration awards warrant discussion. In Chesapeake & Ohio v. RYA (April 30, 1983), the Board held that the union failed to prove that furloughs were in anticipation of an abandonment, rather than a business decline. In New York Dock Railway Co. v. BRAC (April 22, 1983), the Board accepted the carrier's explanation that business decline was the cause of furloughs." (P.178)

In an earlier volume of "The Labor Lawyer", Volume 1, No. 4, Fall, 1985, the Committee report relating to this general area stated:

"In Railway Labor Executives'Association v. I.C.C., 735 F.2d 691 (2d Cir. 1984), the Second Circuit upheld a Commission order denying employee protective benefits to employees affected by the entire Line abandonment in the New York Dock Railway/ Brooklyn Eastern District Terminal case. The Court expressed misgivings with the Commission's decision, but deferred to the ICC's general policy not to impose protective conditions in connection with entire line abandonments." (P. 973).

The organization offered for review and consideration the opinion and award of Neutral Member, H. Stephan Gordon, in Delaware and Hudson Railway Company and Brotherhood Railway Carmen of the United States and Canada (March 1, 1984). The case provides an excellent reference, although the carrier/sought to exclude consideration here of it on the basis that it was not introduced during the handling of the dispute on the property. The Carrier argued that any evidence or contentions not introduced during the handling of the dispute on the property are not admissible, if it is first presented when the dispute has progressed to the National Railroad Adjustment Board (or other equivalent tribunal). Specifically, it sought to bar from consideration the offer of the interim and final awards in the case, even though it concerns acquisition of Conrail's Binghamton Line by D&H.

In support of its position, the Carrier cited numerous precedents relative to late introduction of evidence. While the principles enunci-

ated in those cases may be accurate, they are not applicable here. The awards offered for consideration by the organization do not constitute evidence. Case citations are not akin to the introduction of new facts. Furthermore, the contentions or arguments arising therefrom are not new. They present no surprises and are submitted to buttress or reinforce previously stated positions. As such, the Board had the right to evaluate same.

The D&H and BRC case concerns the same transaction and protective benefit issues as in the instant case. In the D&H and BRC case, the Carrier:

> "...attributed its personnel changes to such factors as the Russian grain embargo, the age and deterioration of its equipment, the loss of certain accounts...reduction of the number of trains, it failed...to introduce any evidence which would have connected these alleged economic factors at least in point of time to the operational and personnel changes...it consistently failed to respond to questions how its allegations related to the situation...on or about the time the changes were actually instituted." (PP.3-4).

On the other hand, the organization in that case offered evidence which demonstrated that "the classification and switching operations previously accomplished at Oneonta were no longer performed there, since the acquisition of the Binghamton facility rendered such an operation obsolete." (P.4) The Board found that the operational and personnel changes instituted by D&H at its Oneonta and Green Ridge facilities were due to the acquisition and operation of the Conrail Line, and that such acquisition and operation had an adverse impact on the employees. The Board specifically found that:

> "...the elimination of the switching and classification operations at Oneonta would have not been feasible without the

utilization of the Binghamton Line. Similarly, the transfer from Green Ridge could not have been accomplished without the acquisition of the Taylor Yard...the operational and personnel changes in issue completely coincided in time with the acquisition of the Conrail Line and, indeed, were anticipated both in the purchase agreement and the company's representations to the Interstate Commerce Commission...the conclusion is inescapable that these changes were occasioned by D&H's acquisition of the Conrail Line." (PP 5-6).

What is of significance is that the argument raising the defense against imposition of NYDC was raised late in the dispute and the Board presumably questioned the bona fides of such an argument when it said:

"With respect to the contention that the personnel changes at Oneonta and Green Ridge were solely occasioned by adverse economic conditions and were unrelated to the acquisition of the Conrail Line, it must also be noted that throughout the rather lengthy negotiations between D&H and the Organization, this contention was never made and the issue was raised for the first time at the hearing." (P. 18) (Emphasis Added).

All of the foregoing leads the panel to conclude that the Carrier here sustained its burden of proving that factors other than the transaction affected these employees. Conrail's discontinuance of its Binghamton-Scranton Line, the closing of the Scranton Yard, and the later closing of the Scranton Diesel Shop were truly part of a force reduction throughout its entire system - they were not due to the D&H acquisition.

Portents of this conclusion may well be suggested in Service Order 1486 dated in September, 1980. That Order did not include language referring to NYDC, and the Carrier's argument is well taken that this may have been so because the Carrier had closed the line, and there were no employees to protect. The Board is of the opinion that had there been

no take over by D&H, Conrail still would have effected a reduction in force. The Carrier properly argues:

> "It is well established that a carrier action taken even within a short time of the transaction for which protection is granted, does not activate the protective provisions of the NYDC, unless the carrier action was the direct result of the transaction...the action complained of was taken for reasons other than the sale of the Binghamton-Scranton Line to the D&H..." (Carrier Brief, Ppll-13).

The final succinct conclusion is that Conrail made no changes resulting from its sale of the Line which adversely impacted on the Claimants. That is not to say that Claimants are in the same position now as they once were. However, those changes cannot legally under the circumstances be attributed to the transaction in this case. Accordingly, the Claimants are not entitled to the benefits of the protective provisions developed in NYDC.

A W A R D

The employment conditions of the listed employees of the Consolidated Rail Corporation were not adversely affected by D&H's acquisition of the Conrail Line. The claims are denied.

R. O'NEILL,
Carrier Member

SPARTACO MAZZULLI,
Organization Member,
Dissenting

LOUIS E. SELTZER,
Neutral Member

Date: December 16, 1985