In The Matter Of Arbitration Between:		
United Transportation Union and The Chesapeake and Ohio Railway Company		Interstate Commerce Commission Finance Docket No. 28905 Dispute Concerning Protection Under New York Dock Conditions After Subsequent Decline In Business

Arbitration Panel:	Robert J. Ables, Chairman and Neutral Referee, Washington, D.C. John O'B Clarke, Jr., Esq., Washington, D.C., Employee Member Howard S. Emerick, Director, Labor Relations, CSX-T/Carrier Board Member, Jacksonville, Florida
Appearing For The United Transportation Union:	John O'B Clarke, Jr., Esq., Washington, D.C.
Witnesses Called By The Union:	Damien J. Lamb, Local Chairman, UTU H.C. Jones, Transportation Clerk Robert Malcolm, General Chairman, BRAC, C & O
Also Present:	Hugh A. Cobb, General Chairman, UTU H. Keith Sanders, Vice Local Chairman, UTU

Appearing For The Carrier:	Ronald M. Johnson, Esq., Washington, D. C. Nicholas S. Yovanovic, Esq., General Attorney, CSX-T, Jacksonville, Florida
Witness Called By The Carrier (and By The Union):	Aubrey S. Tatum, Retired Assistant Superintendent, Operations, C & O
Proceedings:	May 1, 1986, appointment by National Mediation Board of Robert J. Ables as Neutral Referee. Arbitration hearing: December 17, 1986; Washington, D. C. Witnesses at arbitration hearing not sworn; not sequestered. Opening briefs and supporting exhibits by each party: December 17, 1986. No transcript. No post-hearing briefs.
Date of Proposed Decision by Chairman and Neutral Referee:	January 16, 1987.

ARBITRATION AWARD

United Transportation Union

and

The Chesapeake and Ohio Railway Company

Dispute Concerning Continuing Protection
Under New York Dock Conditions After
Subsequent Decline in Business

OPINION

The narrow but difficult question is whether the employer, Chesapeake and Ohio Railway Company, can suspend paying "protection" money to employees who, the employer and the organization representing its employees, United Transportation Union, agree, have been adversely affected by a "transaction" authorized by the Interstate Commerce Commission, based on a "decline in business", unrelated to the transaction triggering the employer's obligation to pay such protection.

The parties do not differ about eligibility, coverage, amount, duration of benefits, etc., under the protective conditions imposed by the I.C.C. in an authorized consolidation of this carrier's operations and as adopted in their implementing agreement; they differ whether agreed protection (under New York Dock conditions) applies at all, if the carrier can make the case that events after the approved transaction -- and not related to the transaction -- caused the existing worsening of the protected employees' compensation.

The organization argues, essentially, that once protection is in place, it can be interrupted only for the conditions specified in the protection, which do not include decline in business. The organization relies on an interpretation of statutory language and certain arbitration decisions.

The carrier argues, essentially, that a decline in business, unrelated to the authorized transaction, is an intervening event justifying suspending paying protection. The carrier relies on an interpretation of statutory language and certain arbitration decisions.

The carrier makes the more persuasive case.

I. FACTS

A. Development Of Protection

The protective conditions themselves are not directly in issue but a brief comment about those conditions will set the stage for review of the issue in dispute.[1/]

Since 1933, employees in the railroad industry have been protected from adverse effects in their jobs resulting from actions by railroads to coordinate, consolidate, lease, merge, etc., ("consolidate") facilities and operations.

Through the years, by agreement,[2/] statute changes[3/] and I.C.C. and federal court decisions, employee protection generally has increased as consolidations were authorized by the Interstate Commerce Commission ("I.C.C. or Commission"). Oklahoma, New Orleans, Appendix C-1 and New York Dock conditions are the names of familiar protective conditions.

1/ For a recent, comprehensive review of protective conditions, see New York Dock Ry v. United States, 609 Fed. 2d 83 (2nd Cir. 1979).

2/ For example, Washington Job Protection Agreement of 1936.

3/ Including 49 U.S.C. §5(2)(f) (now 49 U.S.C. 11347) and 45 U.S.C. §565.

B. Transaction

By order of the I.C.C., served September 25, 1980, in Finance Docket No. 28905, CSX Corp.-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521 (1980), the Commission approved the acquisition of control by CSX, Inc. of the railroad subsidiaries of Chessie System, Inc., including the Chesapeake and Ohio Railway Company (C & O) and the railroad subsidiaries of Seaboard Coast Line Industries, Inc., including the Seaboard Coast Line Railroad Company (SCL).

A relevant coordination in this control case was the movement of C & O and SCL traffic to and from the Portsmouth/Newport News area in Virginia.

The C & O had moved traffic to and from Portsmouth by transhipping it across a car ferry between Portsmouth and Newport News and then by rail between Richmond and Newport News. SCL moved traffic to and from Portsmouth via a land line through Weldon, North Carolina to Portsmouth. The two carriers proposed to coordinate the movement of their traffic at Richmond and then for the C & O to ship Portsmouth traffic over the SCL's line through Weldon to Portsmouth. As proposed, C & O traffic, mainly grain and other merchandise which moved over C & O tracks from Richmond to Newport News and then via C & O's Newport News car ferry to Portsmouth and Norfolk, was to move over SCL tracks in an all-land route to Portsmouth. This coordination made the C & O's car ferry operation unnecessary and eliminated the need for many employees at Newport News to handle both the car float operation and the Portsmouth traffic.

According to the carriers, they anticipated that the coordination would save $578,000, annually, eliminate 58 employee positions and coordinate 54 other jobs. Twenty-one clerical jobs were to be abolished; 24 were to be consolidated. Eighteen trainmen and 6 enginemen positions were to be abolished. Sixteen trainmen and 11 enginemen positions were to be consolidated.

C. Conditions

In its decision on September 25, 1980 authorizing the requested consolidation, the Commission authorized the Portsmouth coordination and the car ferry abandonment. Pursuant to 49 U.S.C. §11347,[4/] the consolidation was made subject to New York Dock conditions for the protection of employees.[5/]

4/ Section 11347 provides in pertinent part:

> When a rail carrier is involved in a transaction for which approval is sought under §§11344..., the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under 565 of title 45...

5/ New York Dock conditions were imposed in New York Dock Ry.-Control, 360 I.C.C. 60 (1979(; aff'd. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979). During the proceeding before the I.C.C., the unions sought additional protection by asking for a "conclusive presumption" that "a displaced or dismissed employee is presumed to have been affected by the transaction for a period of ten years following consumation..." The I.C.C. found that such "attrition-type" condition not to be warranted and New York Dock conditions to be the appropriate level of protection.

D. Implementing Agreement

On January 8, 1981, the UTU entered into an implementing agreement with the C & O and SCL applying New York Dock conditions to the Portsmouth coordination.

As pertinent to this dispute, the parties agreed that: the New York Dock conditions would apply "to both road and yard employees" determined to be "displaced employees" or "dismissed employees", "as a result of the coordinated road operation..." (Section 15(a)); and that a "displaced" or "dismissed" employee who also is otherwise eligible for protected benefits and conditions under some other job security or other protected conditions or arrangements shall be required to elect between such benefits. (Section 16).

An attachment to the implementing agreement provides, as pertinent to this dispute, that any employee whose regular yard or road assignment is abolished as a result of the implementation of the coordinated service, plus all employees who, in turn, are displaced by such employees, will be recognized as having established a valid basis for protective benefits if "placed in a worse position with respect to his compensation".

The New York Dock conditions incorporated by reference in the implementing agreement as "Attachment A" provide, as pertinent to this dispute, that:

-- the labor protective conditions, imposed with respect to these "railroad transactions", were adopted by the I.C.C. pursuant to 49 U.S.C. 11343 et seq.;

-- "Transaction", by definition, means "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed";

-- "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";

-- "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 a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction";

-- "Protective period" is defined to mean "the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom...".

Section 5 of the New York Dock conditions covers "displacement allowances". Paragraph (a) provides that: "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...".

Paragraph 5(c) provides that 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."

Section 6(d) concerning dismissal allowances provides that a dismissal allowance shall cease prior to the expiration of the protective period "in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement."

In Attachment "B" to the implementing agreement, the parties agreed to certain interpretations of stated questions covering the coordination of the C & O and SCL operation between Richmond, Virginia and Portsmouth, Virginia, including that:

-- a displaced employee failing to exercise his seniority to an equal or higher paying job will be treated, for the purposes of the "guarantee", as occupying an available higher paying position (Q&A, No. 1);

-- it is not necessary that an employee be displaced from his assignment or position in order to establish eligibility for protective benefits "provided it can be shown that as a result of the involved 'transaction' such employee 'is placed in a worse position with respect to his compensation' " (Q&A, No. 6);

-- an employee with a certain guarantee per month, who fails to exercise seniority to a position posted with higher earnings, is not due any payment, subject to the "one-for-one principle" (Q&A, No.7);

-- an employee marking off his regular assignment during a stated month is "not available for service", resulting in a deduction from his guarantee (Q&A, No. 11);

- in computing monthly guarantees, a protected employee may not be charged with voluntary absence when directed or summoned by the company to attend investigation, court, rules classes, etc., so long as the loss of time "is necessary in order to reasonably comply with such directive or instructions." (Q&A, No. 19).

E. Decline In Business

The coordination was implemented on March 15, 1981, resulting in the abolition of five yard crew assignments at Newport News. No employees were furloughed as a result of the coordination since open jobs existed on the extra board, however, six designated conductor/brakeman employees were displaced and acknowledged by the carrier to be entitled to protective benefits, in accordance with New York Dock conditions.[6/]

Claims of such employees for protection were paid by the carrier until November 1, 1984, at which time the carrier denied employee claims for protection upon a determination by the carrier "that the displacement or furlough status of a number of employees is the result of declines in business and not the result of the coordination which gave rise to the award of New York Dock protection. Upon such findings, protection payment to such employees will be suspended."

The carrier attributed the decline in business at its Newport News terminal to a general falling off of coal exports and to the opening of two new customer-owned transloading facilities with certain ground storage capacity.

6/ Claimants: T.R. Johnson, W.F. Blake, L.R. Spiggle, R.S. Latta, N.D. DeBerry and W.J. Edwards.

The parties disagree about the responsiveness of the carrier to the requests by the union about the specific bases for the carrier's determination on loss of business.[7/] By the time of the arbitration hearing, however, the carrier showed that the introduction of the competitors' ground storage transloading facilities had a direct negative impact on the carrier's need for yard crews (for switching activity); and that, instead of the expected surge in coal export business, export coal fell substantially in 1983 and 1984.

In response to the organization's challenge of the basis for the company's action in suspending protection payments, the carrier advised the organization that it had not abolished or terminated the guarantee payments of the claimants but, rather, had suspended such benefits "because they had been affected by causes other than the I.C.C.-approved transaction."

II. ARGUMENTS

A. Organization

The United Transportation Union argues that the applicable New York Dock conditions do not contain an exception for decline in business, authorizing the carrier to suspend a covered employee's

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7/ Discovery is not a normal part of the pre-hearing stage in the arbitration process but arbitrators, typically, draw adverse inferences against the party not making necessary information available to the other side.

protective benefits. The organization emphasizes that a decline in business is not one of the listed exceptions and notes that the underlying statute, 49 U.S.C. §11347, specifically requires that benefits provided by New York Dock conditions be no less protective of the interests of employees than those established under the New Orleans conditions and those established under 45 U.S.C. §565, i.e., Appendix C-1 conditions which insure that a protected employee shall not be in a worse position with respect to compensation after a consolidation for the designated period.

Further, the organization argues, based on the historical development of protective conditions, that because of employees' dissatisfaction with the need to establish a causal connection between the consolidation and the worsened pay position of the employee, there was developed an "attrition agreement" to apply to all "protected" employees, guaranteeing them a job at a pay level for the remainder of their working lives. Such attrition agreements do not require a showing of a cause and effect before the protections attach; rather the agreement guaranteed a job and a pay level to all employees with an employment relationship on a specified date. By the mid-1960s, a standard feature of such agreements was a "decline in business" formula, which allowed modifications in protective benefits in the event a carrier's business, as measured by a specific formula, declined by a certain percentage.

Only attrition agreements, according to the organization, have a provision for decline in business. Cause and effect protective arrangements, such as is in issue in this dispute, do not have such provisions because, unlike an attrition agreement, before an employee is entitled to benefits under a cause and effect plan, there must first be a showing

that a transaction affected the employee. Once such a causal connection is established, the employee is entitled to the benefits for the duration of his protective period without a further showing of cause and effect for each variation in pay or hours worked.

The UTU supports its conclusion that protection continues under New York Dock conditions, despite a subsequent decline in business, on the decisions of arbitrators in the following cases:

-- Washington Job Protection Agreement, Docket 67, BRAC v. Erie Railroad Co., Bernstein. (Undated in Organization Exhibit No. 22. The coordination concerning which the dispute was decided arose in 1956);

-- Sheet Metal Workers International Association v. Seaboard System RR, Award No. 1 (R.E. Peterson, neutral) (C-1) September 16, 1986);

-- Cincinnatti Union Terminal Company v. BRAC, Issues 7 and 7A (M.M. Rohman, neutral) (C-1) (1973).

Finally, the organization argues that this carrier has previously accepted the union's positio. in this case, that protection continues whatever the business condition after the consolidation. The organization features an argument by the C & O, on brief in another arbitration in 1982, involving the Masters Mates and Pilots over a car float abandonment, in which the C & O is said to have argued that decisions by neutral referees had established that "where the employee is adversely affected at the time of the original transaction and is put under a guarantee, such employee, once under a guarantee, will continue to collect his guarantee, regardless of whether or not his subsequent adverse affect is by an event related to the original transaction."

Since the New York Dock conditions provide minimum protection required by 49 U.S.C. §11347 and the C & O's "new construction" of those conditions to require repeated showings of cause and effect for each variation in earnings is not consistent with the intent of New York Dock conditions, and because of supporting arbitral decisions on the conclusion that protection continues for the guarantee period, except if a stated exception is triggered, the union concludes that the carrier improperly introduced "a decline in business" formula in the New York Dock conditions and, accordingly, that the carrier should be required to pay the claimants past due allowances, retroactively, with interest on those payments, in accordance with 28 U.S.C. §1961.

B. Carrier

The carrier argues that suspension of labor protective payments is required under New York Dock conditions when the adverse impact is not caused by an I.C.C.-approved transaction, and that the suspension of payments in this case was justified because the employees were not adversely affected by the I.C.C.-approved transaction.

The carrier emphasizes that 49 U.S.C. §11347 requires a causal connection between the I.C.C. transaction and entitlement to protection, featuring that part of the statute which states that an employee affected by an I.C.C. authorization will not be put in a worse position related to his employee "as a result of the transaction" authorized by the Interstate Commerce Commission.

Accepting the burden of showing that an intervening event was the actual cause of the present adverse condition of the employee,

and not the transaction initially entitling the employee to protection, the carrier argues that a decline in business is an appropriate basis to suspend payment of protection money. The carrier argues that the Commission repeatedly has held there must be a direct causal connection between the I.C.C. transaction and the injury to an employee as, for example, Southern Ry. Co.-Control Central of Georgia, Ry. Co., 317 I.C.C. 729 (1963).

"Importantly", the carrier argues, "the New York Dock conditions nowhere limit the causation requirement to the first time an employee is adversely affected by an I.C.C.-approved transaction", (brief at 16), and that the I.C.C. specifically rejected the organization's argument in the basic CSX Control Case that the New York Dock protections be modified to conclusively presume that any adverse impact on employees within ten years was as a result of the I.C.C.-approved transactions, deciding instead to apply the New York Dock protections without change.

In support of its position that a decline in business condition may be the basis to suspend protection payments, the carrier relies on the following decisions by neutral referees:

-- Seafarers International Union of North America and the Chesapeake and Ohio Railway Company, Rodney E. Dennis, April 22, 1985;

-- International Brotherhood of Teamsters v. Conrail, Fred Blackwell, August 9, 1984;

-- Case No. 10, Special Board of Adjustment, No. 675 (Douglas);

-- Special Board of Adjustment No. 770, Guthrie, 1972;

-- Awards Nos. 1, 2 and 3 of Public Law Board No. 2416, Searce, 1980;

-- Award No. 436 of Special Board of Adjustment No. 605, Eischen, 1984.

The carrier cites other similar awards on Special or Public Law Boards to support the proposition that protection is authorized upon a showing that the adverse effect is a result of the transaction authorized by the Interstate Commerce Commission but relies mostly on the decisions by neutral referees Dennis and Blackwell to support its conclusion that it may show an intervening event after the I.C.C. transaction, as the cause of existing adverse circumstances.

The carrier accepts that the claimants, "unquestionably", were placed in a worse position in 1981 as a result of the elimination of five yard assignments which worked the car ferry. The carrier argues, however, that by November 1984, when the carrier suspended protection payments, these claimants were being impacted by the decline in export coal business and the two ground storage loading facilities, and that the adverse impact of the I.C.C.-authorized coordination had no relationship to and did not contribute to the adverse impact flowing from the decline in coal export business. Thus, the carrier concludes it was justified in suspending protection payment to the claimants.

III. FINDINGS

The ultimate question in this dispute is whether the carrier has authority to suspend paying protection money because of a decline in business unrelated to the transaction which triggered the carrier's initial obligation to pay such protection.

One problem needing no resolution here is determining which party has the burden to show that an intervening event is the cause of the employee's worsened position with respect to his compensation, or rules governing his working conditions. The carrier accepts it has that burden.

Another problem not argued by the parties (because they have argued on an all-or-nothing basis), but which is potentially in the wings here and in other similar cases, is whether payments can, or must, be reduced, pro-rata, to the degree of known decline in business applicable to the job performed by the protected employee, as compared, for example, to a decline in business on the segment involved in the consolidation, or, possibly, to an offset for profits systemwide. This is too heavy a question to be considered in this arbitration proceeding, efficiency of the litigation process and containment of costs being certain goals in the process. The point is made because it and others like it support the conclusion in this decision that the parties debated and argued long and hard, over many years, on when and how much protection should be provided after consolidation, but did not answer important questions how implementing problems, such as decline in business, would actually affect imposed or agreed protection.

A. Arbitration Decisions Do Not Decide Questions About Decline In Business

Arbitration decisions through the years do little more than provide a box score of wins and losses for each side. The decision here could readily fall in line on either track -- probably, more on the employees' side, on the reasoning of arbitrator Bernstein that when an employer gives a guarantee to get something it wants in order to improve its business, the employee should not be on the end of a string, controlled by the employer, as to the effect of subsequent business decisions, as distinct from decisions controllable by the employee (possibly excluding death), such as retirement, resignation and dismissal for cause.

1. Carrier Awards

The arbitration decisions relied on by the carrier are impressive in their length, if not in their depth.

Arbitrator Blackwell was probably wrong on the merits. (Carrier Exhibit "O"). A signalman displaced by a transaction to a job as a patrolman, injured on the job,[8/] should not have been docked in protection pay on some strained reason that his worsened position, with respect to pay (while injured), was not as a result of the transaction.

The Dennis award on a case squarely in point in this dispute, involving as it did the same parties, the same transaction, the same car ferry, and the same question about the effect to be given to decline

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8/ For unstated reasons. It could have been while acting to protect life or property.

in business, should have provided useful guidance for the present case. (Carrier Exhibit "N"). It did not. The arbitrator seems only to have checked the box scores, decided that the carrier had more favorable decisions, and declared the carrier the winner. No case decision was cited, much less analyzed. No distinction was apparent whether the arbitrator was deciding the case based on the immediate effects of the transaction or the effects of the later, unrelated, intervening event.

The other awards cited by -- and favoring -- the carrier turn on such matters as changes in external law; outside strike; a (questionable) finding that the burden is on the employees to establish a direct relationship between the furlough and the coordination agreement, if the decision is intended to apply to subsequent events (which is the subject of the instant proceeding); weather-related emergency, outside the carrier's control; inability of a protected employee to pass a physical to perform available work; a (questionable) determination that employees did not show, as it was their duty to do, in order to be entitled to protection payments, that their adverse effect was traceable to the transaction[8a/]; and a one-liner opinion in a case before a Special Board of Adjustment applying an offset for a decline in business.

The line of cases cited by the carrier, cumulatively, support the carrier's argument in this dispute about intervening events interrupting paying protection money, but the basic thrust of those cases is that a one-time, special, outside event, not within the carrier's control, will support a decision of the carrier to interrupt payments. Those decisions do not make a solid case for the proposition, bitterly protested by the employees here, that the carrier can interrupt payments based on decline in business. To this proposition, the employees effectively

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[8a/] Like the finding above, if, as seems to be the case, the burden is meant to apply to initial protection, the case decision is irrelevant to this proceeding.

say it amounts to a rhetorical question how they can ever second-guess the carrier as to that condition, when the carrier provides no yardstick as to where, when, what, who or how, the decline started -- or ended. Thus, the employees imply, if a decline in business condition is accepted as policy or precedent, protection is a euphemism.

2. Organization Awards

The arbitration decisions relied on by the organization maintain its respectability in the dispute, but they do not dictate a decision favorable to the employees in this policy dispute.

As noted, the Bernstein explanation is attention-getting because it is good contract law that exceptions stated in a contract do not permit implying other exceptions when applying the agreement and because there is no effective governor on the exercise of the carrier's claimed right to suspend protection payments based on decline in business.

The Rohman decision against the carrier, which argued that abolished jobs were as a result of "fluctuations and changes in volume or character of the employment brought about by other causes" (causes other than the transaction), supports the organization's position in the present dispute, generally -- but no more -- since the decision was based on a finding of fact that the abolishments were directly related to the transaction and not to the loss of business; thus, the arbitrator never reached the point of how he would decide if the finding were that the adverse job effect was caused by business decline and not the transaction.[9/]

9/ The Rohman decisions do not all favor the organization, as it implies. One of his awards denies a claim based on loss of tenants renting office space and not the transaction.

The Peterson award, so recent as to carry special weight (September 16, 1986) -- and after the contrary Dennis award, which Peterson notes but does not distinguish -- deals directly with business decline: the furloughs involved were "as a result of what Carrier says was a severe decline in business systemwide." In an extended, but not otherwise illuminating analysis, the arbitrator concludes that the employee claims on protection should be sustained because furlough is not one of the stated exceptions to applicable Appendix C-1 conditions. The finding, therefore, is limited to the application of one familiar rule of contract interpretation: do not imply other exceptions where exceptions are expressly stated in the agreement.

Arbitration decisions, as recently as a few weeks before the hearing in the present case, on either side of the question of decline in business as an exception to continuing protection payments, and the arguments over the decades, through able and experienced counsel, as here, presenting sophisticated arguments and almost countless supporting exhibits and case citations, suggest that a decision here will only add to the referenced box score, to be accorded ever-diminishing weight as the numerator in the equation increases as compared to the number of decisions on the same point -- unless additional persuasive information is available to help decide the question.

There is such information.

B. Experience Under Railroad Protection Plans Supports Finding That Decline In Business Is An Exception To Payment

The Report of the Presidential Railroad Commission, Washington, D.C., February 1962, in Appendix Volume III, "The History Of and Experience Under Railroad Employee Protection Plans", pp. 107-191, Robert J. Ables, ("Report"), provides the only known information, reported publicly, about making and implementing employee protection plans in the railroad industry, including experience for decline in business after a consolidation.

Disputes between railroads and their employees, through their organizations, about employee protection upon railroad consolidations, reaching public attention, as in proceedings before the Interstate Commerce Commission, Congress, or federal courts, have focused on the kind and degree of protection that should be provided in the event of a railroad consolidation, not on actual experience under those plans as an influencing factor in determining such protection.

The Emergency Railroad Transportation Act of 1933, the first legislation in this country to provide protection after railroad consolidation, included a job freeze condition. This condition was not generally continued in subsequent agreements of the parties, conditions imposed by the I.C.C., statutory changes, or decisions by courts. Rather, the Washington Job Protection Agreement of 1936 and subsequent protection conditions, such as the Oklahoma and Burlington conditions in 1944, the New Orleans conditions in 1952, the Appendix C-1 conditions of 1971, and the New York Dock conditions in 1979, focused on the scope of protection to be provided as a result of a transaction authorized by the Interstate Commerce Commission. Debates and the decisions

by public authorities on protection to be provided contributed no new intelligence on how protection was to be administered under the prescribed conditions. This objective was left to the implementing agreements of the parties. It is those agreements which provide the only discoverable information to determine whether matters of decline in business can be relied on by the carrier to interrupt its obligation to make payments for protection under prescribed conditions.

If, as seems clear, New York Dock conditions are the present extension of the Washington Job Protection Agreement, which formed the base for the New Orleans conditions, to which were added the conditions of Appendix C-1, any known experience of how those conditions were actually applied in making payments on the property, would be helpful in judging what the parties understood, explicitly or implicitly, in trying to persuade the Interstate Commerce Commission, Congress or the courts, what they intended under any of the prescribed conditions, as those conditions were translated into operating decisions on the property to make, or not to make, protective payments.

The Report, certainly available to these parties who were represented in the year-long proceeding before the Presidential Railroad Commission, included a case study of the merger of the Chesapeake and Ohio Railway Company and the Pere Marquette Railway Company (p. 161).

This case study, as well as others, on the matter of the effect of decline in business affecting the obligation of the carrier to pay its guarantee, suggests most strongly that such changes, unrelated to the action triggering the protection, may be taken into account in determining employee rights to continued protection.

The section of the Report entitled "Exceptions to Coverage" makes this clear. It was found that: "All of the agreements studied included limitations on the applicability of protection." In the Norfolk and Western agreement (cited), employees were found not to be protected when furloughed "because of reduction in forces due to seasonal requirements or general economic conditions or other such causes unconnected with the merger or related transactions of the two railroads" (p. 121). This exception is noted with a series of other exceptions to coverage.

The Report also notes that the degree to which a plan for protection achieved the purposes for which it was provided, rested as much on the administration of that plan as on its contents. Such administration was said to be "not easy." The Report found that:

> Exceptions to coverage of protection, such as reductions in business and technological changes; the operation of the seniority system which accepted 'bumping' as a normal procedure, but which by its nature obscured the identity of the specific employees adversely affected by a consolidation; the confusion resulting about which provisions governed when one set of protective conditions incorporated conditions of another set and then superimposed all on still another agreement, all made administration of the plan complex. (pp. 121-122)

The most difficult problem in administering benefits under the protective plans studied was said to be "to distinguish between reduction in business and the effects of the consolidation, as the reason for the worsened employment situation of affected employees. It was very difficult in all the plans in which the problem arose, for the carrier, as well as the employees, to determine if the 'proximate consequence' of the adverse effect was due to the consolidation." (p. 122)

In the case of the N & W merger,. examined in the Report, deductions were made to the protective allowances due, based on reductions in business, even where the carrier agreed that the employee was adversely affected by the consolidation.[10/]

In the case study of the merger of the Louisville & Nashville Railroad, with the Nashville Chattanooga & St. Louis Railroad, involving the New Orleans conditions, in a section entitled "Displacement Due To Merger or Business Decline" (p. 139), it was found that management did not set forth precise rules or procedures for deciding these cases. Rather, it appeared that the carrier decided an employee was not adversely affected by the merger, if he was not working in "regular" employment immediately prior to the merger. In those cases where an employee was working in such regular employment at the time of the merger, but was furloughed subsequently, the carrier exercised its "judgment" whether this was due to the merger or to declining business.[11/]

In the case study of the lease of the Chicago, St. Paul, Minneapolis & Omaha Railway Co. by the Chicago & North Western Railway Co. involving the Oklahoma conditions, and on the question of displacement due to merger or business decline, the Report found that no operating changes had been made under the lease at the time but that the company had instructed supervisors in making this judgment to have

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10/ Contrary experience with respect to the L & N was that where an employee was determined to be adversely affected by the consolidation, he continued to draw his displacement allowance for the period of his protection whenever he did not earn his test period average.

11/ This case study also examined the question of employees affected in anticipation of the merger.

on hand a ready account of the previous business done in their divisions, supporting the conclusion in the instant case, as in other consolidations studied, that the problem of distinguishing between loss in business and the consolidation, as the cause of the adverse effect on the employee, even after the consolidation, was a live question early in the administration of these protection claims.

In the study of the merger of the Chesapeake & Ohio Railway Co. and the Pere Marquette Railway Co., involving the Washington and North Western conditions, a significant provision was included in the implementing agreement concerning the effect of business. Rather than choose a day in the summer when regular employment was high, a day in the winter, when employment was relatively low on this railroad was chosen to set the date for benefits. The reason given by the employees for selecting this date was that employees are furloughed either because of a reduction in business or because of the consolidation. "With the knowledge that the carrier is not obliged to pay protection when the employee is furloughed due to losses in business, the employees reason that if they were to set the cutoff date during the summer, in a period of good business and high employment, then because the consolidation was to take effect in the winter, the carrier could argue that the furloughed employees were not adversely affected by the consolidation. Conversely, by setting the cutoff date in the winter, in a period of reduced business and low employment, the carrier would have a more difficult time to take the position that furloughed employees were not affected by the consolidation." (p. 164).

Deliberations and agreement with respect to consolidations as, for example, the C & O in 1947, suggest most strongly that economic

conditions were influential, if not critical, in forming protection plans, not only with respect to the amount of protection due and owing but, in some cases, whether the carrier had an obligation to make such payments later. Also, the experience reflected in these case studies suggests that protection of four, five and, later six years resulting from a transaction, was well accepted by employees, organizations and carriers as including not only stated exceptions but the unstated exception of decline in business in judging what agreement to make to implement an authorized consolidation.

Forty years later, under the present consolidation, it seems that the employees are still conscious of events other than retirement, resignation, death, and dismissal as exceptions to their guarantee of protection, even after having been acknowledged by the carrier to be an employee adversely affected by the transaction. Thus, in Attachment "B" to the current implementing agreement, in a series of 21 questions and answers, the employees understood clearly that many events aside from stipulated exceptions in the New York Dock conditions could influence their guarantee, including decisions on exercising seniority and marking off time. While there is no evidence that the parties specifically covered the contingency of decline in business, the long history of struggling with this problem in implementing agreements, which was known, or should have been known to the employees in this organization, support a finding that the employees were at their peril in not concluding an agreement specifically excluding a decline in business as a basis for reduction or suspension of protective payments.[12/]

12/ It is not known whether the organization in the proceeding before the I.C.C. with respect to this transaction, asking for a conclusive presumption for 10 years that employees were adversely affected by the transaction, was stimulated by the decline in business question, but the signs point in that direction.

IV. CONCLUSION

Under the Washington Job Protection Agreement, Oklahoma, Burlington, North West, New Orleans, Appendix C-1 and New York Dock conditions, the parties did not exclude decline in business as a basis for denying protection payments; but such exception has been part of the experience of the parties in implementing employee protection plans about 50 years. Thus, there is no basis, now, to preclude the carrier considering decline in business as a reason to suspend protection payments, so long as the carrier shows that the cause of the existing adverse economic effect on its employees is unrelated to the transaction authorized by the Interstate Commerce Commission. Accordingly, the claim for payment of unpaid protection must be denied.

V. DECISION

The claims are denied.

Robert J. Ables
Chairman & Neutral Member

Date: January 16, 1987

Howard S. Emerick, Director
Labor Relations, CSX-T
Carrier Board Member

Date: March 19, 1987

John O'B Clarke, Jr., Esq.
Employee Member

Date: April 8, 1987
(Separate Dissent Attached)

ARBITRATION AWARD

Brotherhood of Railway, Airline and Steamship Clerks

and

The Chesapeake and Ohio Railway Company

Dispute Concerning Continuing Protection Under New York Dock Conditions After Subsequent Decline In Business

OPINION

This dispute involves the same facts, conditions and circumstances as decided this day in the dispute between the United Transportation Union and The Chesapeake and Ohio Railway Co., accordingly, the decision in that case applies with equal effect to this dispute.

Robert J. Ables
Chairman and Neutral Referee

Date: January 16, 1987

Robert M. Curran
Employee Board Member

Date: March 20 1987
Dissenting

Catherine A. Szeremi
Carrier Board Member

Date: March 12 1987

Before a New York Dock
Article 1, Section 11 Disputes
Resolution Committee

United Transportation Union

and

The Chesapeake and Ohio Railway Company

DISSENTING OPINION

Dissents, especially dissents from arbitration decisions, are usually a futile gesture which are frequently ignored. However, this case requires that a dissent be filed, because the Neutral's decision in this case has no basis in law or in fact. Instead of interpreting the intent of the employee protective conditions actually imposed in this case by the Interstate Commerce Commission ("ICC" or "Commission"), the Neutral has taken it upon himself to decide what Congress and the Commission should have imposed. Since Mr. Ables is neither the Congress nor the ICC, he does not have this power.

Several years after agreeing to provide the New York Dock benefits to its employees, and after accepting the economic benefits of the Interstate Commerce Commission's orders upon which those benefits were imposed by taking actions which adversely affected the claimants in this case, the Chesapeake & Ohio Railway Company (C&O) decided that it no longer owed a protective obligation to the claimants. According to the C&O,

the initial adverse impact upon the employees was sufficiently long ago and attenuated by other causes that the initial adverse impact was no longer the cause of the loss of earnings which the claimants are still experiencing. Believing that this conclusion gave it a right to discontinue employee benefits during the employees' protective periods, the C&O informed the claimants in November 1984 that it was suspending their protective allowances "due to a decline in business." However, it did not at that same time reinstate the work which it had removed in 1981 when it initially affected the employees by rerouting their work across the C&O's sister carrier pursuant to the ICC order. In fact, that work is still being performed today, but by employees who had no claim to it before the 1981 coordination. To the discredit of the arbitration process, the C&O's decision was upheld by the Neutral in this case.

In upholding the carrier's decision to suspend the New York Dock protective benefits, the Neutral in this case did not rely upon any specific provision of the protective conditions. Indeed, he could not rely upon the terms of the conditions, because the plain language of those provisions rejects his novel and previously discredited construction of these statutorily mandated protections.

Article 1, Section 5(a) of the New York Dock conditions provides that (emphasis added):

> 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 . . . .

Article 1, Section 6(a) of the New York Dock conditions is similar in that it provides that (emphasis added): "A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period . . . ." Those provisions are not silent on whether these allowances may be stopped mid-term, for both provisions provide that the protective allowances "shall cease prior to the expiration of the protective period in the event" of certain enumerated occurrences, none of which include a decline in business or an attenuation of the initial impact. See, Article 1, §§5(c), 6(d).

Since the language used in Sections 5(c) and 6(d) clearly shows that the specifically enumerated causes were intended to be exclusive, and were not intended to be representative of the types of circumstances which would lead to a cessation of the protective allowances, it is erroneous to infer the presence of other, unstated causes--such as a decline in business exception. This conclusion is compelled by the familiar maxim of construction expressio unius est exclusio alterius, which means literally that the expression of one thing is the exclusion of others. See, In re Chicago, Milwaukee, St. Paul & Pac. R.R., 658 F.2d 1149, 1158 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

Besides being contrary to the plain language of the protective conditions, reading a decline in business provision into the New York Dock's displacement and dismissal allowances is

prohibited by the intent and "legislative history" of those provisions. Contrary to the C&O's implied belief, the New York Dock conditions did not suddenly appear out of the blue. Rather, those conditions have a definite history which shapes their meaning. Moreover, those conditions are required by statute to provide certain minimum levels of protection which the ICC, and, thus, an arbitrator, do not have the power to abrogate.

Section 11347 of the Interstate Commerce Act, 49 U.S.C. §11347, expressly states that whenever the Commission approves a unification application, it must require the applicants to provide a fair arrangement to protect the interests of employees who are affected by the transaction being approved. While the ICC has a broad discretion to devise what is fair and equitable in a particular case, Congress has qualified that discretion by providing that the fair arrangement shall be "at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." It is now settled that in control cases that:

> [T]he plain language of 49 U.S.C. §11347 requires that the ICC, in formulating a new set of employee protective conditions, combine those benefits provided under both the "New Orleans Conditions" (as clarified in Southern Control II [Southern Ry.--Control--Control of Ga. Ry., 331 I.C.C. 151 (1967)]) and the Appendix C-1 conditions. Obviously, where conflicting benefits are provided under each of the two sets, the ICC is to select the more beneficial of the two for inclusion in the new set. . . .

New York Dock Ry. v. United States, 609 F.2d 83, 94 (2d Cir. 1979). According to the ICC and the Second Circuit, the New York

Dock conditions accomplish this combining of benefits for control cases, such as the one involved in this case.

In light of this background, it should be obvious to all that prior interpretations of the protective conditions which are the building blocks from which the New York Dock conditions have been constructed, are not only relevant, but may well be controlling. Any doubt as to the obligation to look to prior interpretations of the New Orleans conditions (including, in particular, the Washington Job Protection Agreement (WJPA) portion of those protections) and of Appendix C-1, should be laid to rest by Article V of those conditions which provides that: "[T]he terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45 [here, benefits established under New Orleans and Appendix C-1]." Art. V, §1.

As may be expected, the C&O's belief that the New York Dock conditions contain a decline in business exception to a carrier's obligation to provide allowances to displaced and dismissed employees during their protective periods, is not novel, for it was raised and soundly rejected prior to 1976 in both WJPA and Appendix C-1 cases.

In WJPA Docket 67, Referee Bernstein addressed this issue, and concluded that the plain language of the WJPA's displacement allowance provision (WJPA §6) did not support the carrier's argument that an admittedly non-merger related subsequent loss of earnings justified a cessation of the employee's displacement

allowance. Referee Bernstein buttressed his conclusion by explaining that the carrier's position was contrary to the intent of the protective arrangement, for as he explained:

> The five year protection period [here, a six year protective period] for a displaced employee would make little sense and provide little protection if each subsequent loss of earnings had to be directly related to the coordination. It is the first adverse effect of a coordination which makes the employee eligible for the benefits of Section 6 [i.e., WJPA displacement allowance] . . . . Thereafter the protection of the Agreement is his for the specified five years in the ordinary case.

WJPA Docket 67 at 3 (emphasis in original). That decision has been the consistent interpretation of the WJPA and, I submit, is controlling here in view of both the specific commands in Section 11347 and the ICC's rule of construction set forth in Article V, Section 1 of the New York Dock conditions.

Referee Bernstein's decision does not stand alone, for it was followed by Mr. Murray Rohman in Arbitration Under Art. 1, §11 of Appendix C-1 Between Cincinnati Union Terminal and BRAC, issued July 13, 1973 (M.M. Rohman, Neutral). Shortly after Appendix C-1 was promulgated by Secretary of Labor James D. Hodgson in 1971, the C&O, on behalf of the Cincinnati Union Terminal, took the position that C-1's displacement and dismissal allowances had a decline in business exception and could be suspended if the employees were subsequently affected by a decline in business or non-transaction related cause. Mr. Rohman addressed that argument under two separate formulations and rejected it after looking to the language of C-1's displacement

and dismissal allowance provisions; as Mr. Rohman stated (Id. at 16):

> Thus, it is apparent that an employee who is affected by a transaction and placed in a worse position or deprived of employment, is entitled to the protective benefits of Appendix C-1. These benefits may be forfeited or suspended subsequently, only within the explicit provisions of Section 5(c) or Section 6(d) of Article 1, Appendix C-1.

Mr. Rohman's decision does not stand alone, for Robert E. Peterson reached an identical interpretation of Appendix C-1 in Arbitration Under Art. 1, §11 of Appendix C-1 Between SMW and Seaboard System R.R., issued September 16, 1986 (R.E. Peterson, Neutral).

Since the New York Dock conditions' displacement and dismissal allowance provisions are essentially identical to similar provisions in Appendix C-1, which in turn were intended to provide the displacement and coordination allowances of the WJPA (with certain modifications not relevant here),[1/] it logically follows that a displacement or dismissal allowance under the New York Dock conditions may not be suspended due to a subsequent decline in business. Indeed, this is the interpretation which has been given to the New York Dock conditions by Charles M. Rehmus, a noted Railway Labor expert, in Arbitration Under Art. 1, §11 of New York Dock Conditions Between Union Pac. R.R. and UTU, issued February 14, 1986 at 15-16 (C.M.

1/ See, Affidavit of Secretary of Labor James D. Hodgson, filed in CRU v. Hodgson, D.D.C. Civil Action No. 825-71, at 4-5, 9.

Rehmus, Neutral), and which had been accepted by the C&O until November 1984. See, Ables' Opinion at 12.

In November 1984, the C&O decided to assert that the New York Dock conditions gave it the right to claim once again that the protective conditions had a decline in business exception. That argument was accepted by Rodney E. Dennis in a New York Dock Art. 1, §11 Arbitration Between SIU and C&O, issued April 22, 1985, in an opinion which did not discuss the language of Article 1, Sections 5 and 6 of the protective conditions or even acknowledge Referee Bernstein's or Mr. Rohman's awards on this issue under New York Dock's predecessor protections. Indeed, it appears that Mr. Dennis was totally unaware of the fact that, until his decision, neither the New York Dock conditions nor either of its predecessor protective arrangements had been construed as giving a carrier the right to suspend protective allowances due to an implied decline in business formula.

In this case, the Organization relied upon the plain language in the protective conditions and upon the manner in which they have been applied since WJPA Docket 67 to argue that the C&O's position should be rejected. Indeed, Mr. Ables noted that Referee Bernstein's decision "is attention-getting because it is good contract law . . ." (Opinion at 19). Nevertheless, Mr. Ables surmised that a decision for either side in this case would only add to a "box score" of decisions on which the parties would rely in future cases, and he therefore concluded that he should look to "additional persuasive information" to settle this question once and for all. Opinion at 20. To the dismay of the

employees who have been deprived of statutorily mandated benefits by this decision, the "additional information" which Mr. Ables found to be so persuasive, was a twenty-five year old report which he himself had made of merger and coordination cases that had occurred three and four decades ago. After reexamining his report, which not even the C&O had considered to be relevant, Mr. Ables concluded that the Organization and the employees acted "at their peril in not concluding an [implementing] agreement [under Article 1, Section 4] specifically excluding a decline in business as a basis for reduction or suspension of protective payments." Opinion at 26 (footnote ommitted). That conclusion, I submit, is ludicrous and totally ignores the role of an arbitrator under Article 1, Section 11 of the New York Dock conditions.

In concluding that the parties should have addressed this issue in an implementing agreement, Mr. Ables failed to recognize the differences between the agreements he examined in writing his report in the early 1960's and implementing agreements under the New York Dock conditions. Agreements between rail labor and management in 1940 and 1950 were not implementing agreements as that term is commonly understood today, but rather, were basic protective arrangements devising the protective formula itself or were agreements implementing general protective conditions such as the Chicago & North Western conditions, 261 I.C.C. 672 (1946), which provided that for four years from the effective date of the ICC order, the "transaction will not result in employees of the carrier or carriers by railroad affected by such order being

placed in a worse position with respect to their employment . . . ." 261 I.C.C. at 675. For example, the C&O's acquisition of the Pere Marquette Railway Company in 1947 involved both a negotiated protective arrangement to which Mr. Ables referred, and the imposition of the Chicago & North Western conditions for non-agreement employees. Pere Marquette Ry.--Merger, 267 I.C.C. 207, 253 (1947). Those agreements are far different in intent and effect from an implementing agreement under Article 1, Section 4 of the New York Dock conditions.

A New York Dock implementing agreement has two specific purposes: The first is to apply the terms and conditions of the protections to the particular transaction at issue; and the second is to provide a basis, "accepted as appropriate" in the particular case, upon which the selection and assignment of forces "made necessary by the transaction shall be made . . . ." Art. 1, §4. While the parties may agree in the implementing agreement under post-1976 ICC protective conditions to increase the basic levels of protection, they may not decrease those levels of protection. Norfolk & Western Ry. v. Nemitz, 404 U.S. 37 (1971). If, as the plain langugage of the New York Dock conditions makes clear, there is no decline in business formula in the conditions which would authorize the suspension of displacement or dismissal allowances, providing for such a suspension in an implementing agreement would substantially abrogate levels of protection provided by an ICC order, and would, therefore, be unlawful. Norfolk & Western Ry. v. Nemitz, supra, 404 U.S. at 44-45.

Mr. Ables' reliance on the UTU's "failure" to address the decline in business question in its 1981 implementing agreement in this case, is a non sequitur because it begs the question presented for decision. If the conditions do not provide for a suspension due to a decline in business, then the "failure" to address this issue in an implementing agreement shows nothing. The question presented here must be decided by examining the language and, if necessary, the intent of the provisions to determine the substantive protections provided by the conditions. Unfortunately, Mr. Ables has not done this.

A fundamental and most egregious error in Mr. Ables' decision in this case, is found in his determination to ignore his role under Article 1, Section 11 of the New York Dock conditions. An appointment as a neutral does not give an arbitrator license to apply his own personal opinions and bias in deciding a claim. See, Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149 (1968). This is particularly true here, for an arbitrator appointed to construe employee protective provisions imposed by the ICC under 49 U.S.C. §11347, must construe those employee protective provisions so as to enforce the intent of Congress and the ICC in imposing those conditions. Obviously, to perform this function, the Neutral must examine the language of the conditions (e.g., Reiter v. Sonotone, 442 U.S. 330, 337 (1979)) and, if that language is ambiguous, he may then examine its "legislative history." E.g., TVA v. Hill, 437 U.S. 153, 184n.29 (1978). Mr. Ables looked neither to the language nor to its history in deciding the issue

in dispute. Instead, he looked to an outdated, wholly irrelevant study which he himself had made years ago to decide what he believes should be the intent of the New York Dock conditions. Simply put, neither Congress nor the ICC gave Mr. Ables the power to reform the intent of the New York Dock conditions.

Once Mr. Ables acknowledged that the awards upon which the C&O relied were either flawed or irrelevant, and that the awards upon which the Organization relied were persuasive (e.g., "the Bernstein explanation is attention-getting because it is good contract law that exceptions stated in a contract do not permit implying other exceptions when applying the agreement" (Opinion at 19)), his resolution of this dispute should have turned upon an examination of the applicable language and indications of ICC intent. Instead, he turned to his personal opinion and found that "persuasive." In doing so, he exceeded his jurisdiction under Article 1, Section 11 of the New York Dock conditions, and has imposed a view of the employee protective conditions which effectively nullifies the protections provided by those protective conditions by requiring employees to reprove that each decline in earnings is attributable to the initial transaction. See, WJPA Docket 67.

Mr. Ables' decision has also left many questions unanswered. For example, while the decision states that the carrier has the burden of showing that an intervening event is the cause of the employee's worsened position (Opinion at 16), the decision contains no such showing. Here, the undisputed evidence established that the carrier did not include in its

decline in business calculations any allowance for the work which was transferred in 1981, the removal of which caused the initial adverse effect. On the other hand, the Organization presented evidence which it asserted showed that if this work were returned, the employees would not have sustained the same loss of earnings. But as an examination of Mr. Ables' decision shows, that evidence was ignored, and, indeed, the decision is totally silent on the facts which the Neutral concluded were sufficient to establish the carrier's admittedly heavy burden.

If this case were one concerning the initial entitlement to a displacement or dismissed allowance, the employees should have prevailed, for as Secretary of Labor Hodgson explained in promulgating Appendix C-1:

> [The railroad, to meet its burden in determining whether an employee has not been affected by a transaction] must show affirmatively that something other than any transaction affected the employee. Further, it is intended that a claiming employee shall prevail if it is established that a discontinuance had an effect upon the employee, even if other factors may also have affected the employee. . . .

CRU v. Hodgson, supra, Affidavit of James D. Hodgson at 8. Surely, the railroad's burden should be more difficult to sustain in suspending protective benefits. New York Dock's silence on this point, I submit, is strong evidence that there is no decline in business formula in Article 1, Sections 5(a) or 6(d) of those protections.

Another question left hanging by Mr. Ables is what formula should be used to determine whether there has been a decline in business. Should the parties look to system gross tonnage or

revenues, or should they look to the amount of work performed on the particular line or at the shop in which the employees work? Further, are the protections suspended for an indefinite time period? And, if so, who has the burden of showing that the suspension should end? Also, is the protective period extended by the length of the suspension? And finally, if the protections are suspended during a decline in business, are they also suspended (with a correlative increase in the protective period) in cases where an employee's earnings exceeds his protective guarantees due to an upturn in business unrelated to the transaction?

I agree that these questions are to be resolved by negotiations between the Organization and carrier, but not in negotiations for an implementing agreement under the New York Dock conditions. Rather, these questions are all relevant to attrition agreements--an entirely different species of employee protection. They are foreign to a New York Dock implementing agreement, because New York Dock does not contain a decline in business formula authorizing the suspension of displacement or dismissal allowances.

For these reasons I dissent.

John O'B. Clarke, Jr.
Organization Member