In the Matter of Arbitration Pursuant to Section 11 of the New York Dock Conditions In the Matter of Michael J. Gilchrist and the Delaware and Hudson Railway Company-ICC Finance Docket 29772 : AWARD AND DECISION

Background: As a result of a dispute between the Grievant and the Carrier regarding purported coverage, and rights and privileges under the New York Dock Conditions, the National Mediation Board, on July 12, 1985, appointed the Undersigned to serve as the Neutral Referee to resolve this dispute. The NMB acted pursuant to a request from Grievant's attorney.

On August 29, 1985 the parties in interest met in Boston, Massachusetts and presented evidence and oral arguments in support of their respective positions. The parties stipulated the issue in dispute to be:

> "Is the Grievant entitled to a Section 7 allowance under the New York Conditions as a result of being transferred from Colonie, N.Y. to North Bellerica, Massachusetts?"

The parties agreed that the Undersigned should act as the Sole and Neutral Member of the Board of Arbitration rather than function as the neutral member of a tri-partite Section 11 Arbitration Committee. The Undersigned stated that he would submit a draft of his Award to the parties before being finally adopted.

The parties further agreed to waive the time limits prescribed by the New York Dock Conditions.

The genesis of the dispute resulted from the fact that Guilford Transportation Industries acquired the Delaware and Hudson Railway Co in 1984 pursuant to ICC Finance Docket No. 29772. The ICC had imposed the New York Dock Conditions incident to its approval of the transaction. Guilford Industries had previously assumed control of the Boston and Maine Company and the Maine Central Railway Company.

Following these acquisitions, Guilford Industries decided to merge and restructure some of the departments of these three railroads and to centralize their activities and functions at its corporate headquarters, North Bellerica, Massachussetts.

The Grievant has had a service relationship with the D&H RR Co. starting in June 1961. He commenced his work relationship as a Yard Clerk. He resigned to return to school but was re-employed as a Yard Clerk in 1962. He held numerous bargaining unit positions with the D&H RR from 1962 to July 1966. All these positions were within the scope of the collective bargaining Agreement in effect between the Carrier and the Brotherhood of Railway and Airline Clerks (BRAC) of which the Grievant was a member. The BRAC Agreement permits bargaining unit members who accept official positions with the Carrier to retain their seniority on the roster (Rule 6-d).

When the Grievant was promoted in 1966 to Supervisor of Car Dispatchers, he took a position that was outside the scope of the union agreement. On June 21, 1972 the Grievant was promoted to Credit Manager and in 1973 was made Assistant Manager of Industrial Development. He remained at this position until January 1, 1981 when he was promoted to be Assistant to Vice President-Sales and Marketing.

On October 1, 1982 he was promoted to Assistant Vice President-Customer Service, which is his present position. He held this position as well as his other positions at Colonie, New York, the headquarters of the D&H RR.

On May 1, 1984, Guilford Transportation Industries transferred the Grievant to North Bellerica, Massachusetts with the same title but he now executed his duties for all three acquired railroads. The Grievant testified at the August 29, 1985 Arbitration Hearing that his principal duties were to handle

customer complaints dealing with lost freight cars and delayed freight cars. He testified:

> "We try to interface between sales and marketing group and the operations group such as unit trains, scheduling, whatever help we can give operations people so far as what business we know is developing." (Tr. 15)

He stated he supervised three people in his Office: Manager of Customer Service, Assistant Manager of Customer Service and a Clerk (Tr. 15-16).

The following are the relevant statutory and contract provisions in this dispute:

Railway Labor Act

"Section 1, Fifth which states in part:

> Fifth. The term 'employee' as used herein includes every person in the service of the Carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders ...."

New York Dock Conditions

"Article 1

1. Definitions -

> (c) 'dismissed employee' means an employee of the railroad who, as 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 exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

...

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

...

"Article IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and condition."

Grievant's Position

The Grievant, preliminarily, interposes the procedural objection that he did not receive the requisite 90 day prior notice provided for by Article I, Section 4 of the New York Dock Conditions, but was merely told to report for duty on May 1, 1984 to North Bellerica. He denies that he ever received the form letter which the Carrier alleges was sent to all employees being transferred.

The Grievant's substantive contention is that he is an employee of the Carrier within the meaning of the New York Dock conditions. As such he is entitled to the benefits thereof, which directly relate to the BRAC Stabilization and Implementing Agreements of October 17, 1984.

The Grievant asserts that the Carrier is in error when it contends that a person is not an employee of the railroad industry based on the Carrier's unilateral denomination of the person as an "official" without regard to the nature and scope of his duties.

The Grievant notes that there are several statutes pertaining to "employee" in the railroad industry, and in none of these statutes except as hereinafter noted, is the term "employee" specifically defined or restricted other than to whom the railroads designate as "officials". For example, the Grievant notes the Railroad Retirement Act states "employee" means:

"Any individual in the service of one or more employers for compensation."

It further notes that under the Railroad Unemployment Insurance Act an

"Any individual who is or has been (1) in the service of one or more employers for compensation" and further "the term 'employee' includes the term 'officers of an employer'."

The Grievant asserts that these two statutes specifically provide who is not being included as an "employee" but they make no reference to anyone who has been designated as an official. The Grievant states that under the definition of these two aforementioned statutes anyone from the President of the Railroad down, is encompassed within the provisions of the respective laws. The Grievant further asserts the Federal Employer's Liability act does not state who is or who is not an employee within the meaning of the Act. However, the Federal Courts have held that the term "employee" used in that Act must be used in its natural and conventional relationship of employer-employee.

The Grievant contends that the 1926 Railway Labor Act was enacted to avoid interruption to interstate commerce, to promote free association of employees and to settle disputes between carriers and employees. It contains no language dealing with the specific subject matter of this dispute, and was not designed to deal with this subject. The Grievant adds that, although the RLA deals with collective bargaining between the railroads and railroad unions, it also allows an individual, not represented by a union or not subject to representation by any organization may present a dispute to the National Railroad Adjustment Board for a hearing. The Grievant states that Section 153(j) indicates that the Adjustment Board may hear controversies presented by individuals who are not part of any union or under a collective bargaining agreement. In other words, it asserts that even a railroad official may avail himself of the provisions of the RLA.

The Grievant maintains that in light of the aforementioned statutes and in light of his work duties and responsibilities, the Arbitrator should hold

him to be an "employee" for the purpose of the New York Dock Conditions and the BRAC Implementing Agreements which make the New York Dock Conditions a part thereof.

The Grievant stresses that he had been employed by the Carrier his entire working life - moving from office boy to his present position. The job titles for the positions he held were unilaterally created by the Carrier for its own purposes and were not the result of any statute, public regulation, agreement with an "employee" or by custom or practice.

The Grievant maintains that he had no extraordinary or unique duties and his qualifications for the job were based apparently on his employment record and not because of a specialized experience or training. The Grievant further maintains that he does not have the power to hire or fire. He is paid a salary which is less than wages earned by many engineers or conductors. The Grievant stresses that he was not hired from the outside but has spent all of his work life in the employ of the Carrier. The Grievant emphasizes that his current problem exists because Guilford Industries is carrying out a policy of consolidating the sales and marketing forces of the three carriers.

The Grievant asserts he is not on any policy making level. He is directly under a Vice President to whom he reports and to whom he has to ask for a pay increase. He was given the same sort of treatment with regard to his transfer that was accorded to any employee. He was told to report to his new location and was not consulted in advance about it. He is not a policy maker but is only a "trouble shooter" attempting to satisfy customers complaints. The Grievant asserts the "trouble shooting" function is not unique to the railroad industry and exists in many industries. His job is not normally within the range of the high position of a president or assistant to a president such as

an executive vice president. The Grievant states he is what the Carrier contends he is, i.e., an assistant to a vice president.

The Grievant contends that only one of the judicial decision on protection benefits cited by the Carrier have any relevance to this dispute. That case is Newbourne v Grand Trunk Western RR, CCA 1985 758 F. 2nd 193, and it supports the position of the Grievant. The Court there held plaintiff supervisor was not an employee because the record showed he had transferable skills in that he went from his Grade 13 Supervisor's salary of $43,200.00 to a position of an executive vice president in outside industry at a salary of $45,000.00. However, there is no evidence that the Grievant in the instant case had transferable skills. Nor is the Grievant covered by a Salary Continuation Plan for six months after his dismissal as was the Plaintiff in the Newbourne case. The Grievant noted that the Court did not find the fact that the Plaintiff was a supervisor, or that he received a salary of $43,200.00 or that he supervised five persons to be dispositive of the issue as to whether he was an "employee". The Grievant stresses that the Newbourne case is distinguishable from the present dispute.

The Grievant further maintains that the Union Pacific RR Award involving Messrs. Bond and Topolosky is also distinguishable from the instant case. The Grievant asserts that these employees, (Bond - Assistant Comptroller-Accounting Operations and Topolosky - Manager Personnel Accounting) performed completely different functions and they had a great deal more responsibility. Neither of those employees had worked up through the ranks of the Union Pacific nor had held such menial positions as the Grievant did. They did not have the length of service that the Grievant did. The Grievant adds that in all probability these two individuals were hired for their particular expertise.

The Grievant states that the Arbitrator in the Union Pacific Award relied to a great extent on the provisions of the Railway Labor Act to justify its interpretation of "employee". He stresses the purposes for which the RLA was enacted was entirely different from the problems arising from mergers and consolidations. These merger problems were not part of the consciousness of the legislators who enacted the RLA, any more than it was when they drafted Federal Employers' Liability Act, the Railroad Retirement Act, the Railroad Unemployment Insurance Act or Title 49 of the Interstate Commerce Act.

The Grievant states it is just as reasonable to use the definition of employee in these latter statutes as it is under the Railway Labor Act. The Grievant asserts the Arbitrator in the Union Pacific case failed wholly to distinguish between the purpose of the RLA and that of the New York Dock Conditions. The Grievant adds that Messrs. Bond and Topolosky would be considered employees under the Railroad Retirement Act, Federal Employers' Liability Act and the Railroad Unemployment Insurance Act and be entitled to the coverage thereof. However, for some undisclosed reason, the Union Pacific Award ignored the significance of these Acts in arriving at a definition of an employee.

The Grievant states the Colleen Andrews Award is a valid and binding award under Section 11 of the New York Dock Conditions. It asserts there is nothing in the Award to indicate that it is a "proposed" Award. It was an Award that was signed by the Neutral Member and the Claimant's Member of the Arbitration Committee, and that made it a final and binding award within purport and intent of Section 11 of the New York Dock Conditions. The Carrier is in error in asserting it is a "non-award".

The Grievant states there is no doubt that the parties may settle or adjust an arbitration award on any terms they deem appropriate. This, however,

does not vitiate the award. The Grievant stresses the Colleen Andrews Award has precedential value in determining the grievant's rights. That award as interpreting the rights of management employees under the New York Dock Conditions should be applied to the facts of this claim and be treated as an effective refutation of the Carrier's contentions regarding a "dismissed employee" as well as to the coverage of Article IV of the New York Dock Conditions.

The Grievant also cited the Gershenfeld Award in the Donna Gilchrist case as support of its position in this dispute.

The Grievant states in view of the fact that the weight of the credible evidence and relevant precedents clearly show that the Grievant was an employee within the purview of the relevant provisions of the New York Dock Conditions and the Master Implementing Agreement of October 17, 1984, the Arbitrator should sustain his claim.

Carrier's Position

The Carrier interposed a procedural objection as to the manner in which the Grievant has progressed this Grievance. It asserts that the Grievant failed to hold the required conference on the claim in accordance with Section 11 of the New York Dock Conditions. The Carrier adds that the Grievant erroneously insisted that the conference be held in Albany rather than at the corporate headquarters of the Guilford Industries in North Bellerica where all New York Dock matters are handled. The Carrier asserts that it agreed to progress this claim because the Neutral is experienced in labor protection matters, but it is proceeding without prejudice to its rights to insist that the future procedures for handling New York Dock Condition disputes be in strict compliance with the prescribed procedures.

With regard to the substantive aspects of this dispute, the Carrier

states the claim lacks merit because the Grievant is not an "employee" as the term is used and construed in the railroad industry. Since the Grievant is not an employee he is not entitled to receive a Section 7 New York Dock Conditions allowance.

The Carrier asserts that even if the Arbitrator should find the Grievant was an "employee", he would not be entitled to a severance allowance because he is not a "dismissed" employee.

The Carrier further maintains that the Grievant is not entitled to any of the benefits provided for by the 1984 BRAC Implementing Agreement because he is not currently a BRAC covered employee while he occupies a position as an official.

The Carrier also states that the weight of decided judicial and arbitral authority clearly supports its position rather than that of the Grievant.

The Carrier turns first to the concept of what constitutes an "employee" in the railroad industry. It asserts that when the ICC used this term in the New York Dock Conditions it intended to have these protective conditions apply to unionized employees and to those subordinate officials who are entitled to union representation but who are not so represented. The term does not encompass officials. It states the ICC knew and accepted the industry meaning of the term and used "employee" to exclude officials from New York Dock Conditions coverage. The ICC could have stated that employees and officials were encompassed within New York Dock Conditions, but did not do so.

The Carrier states the 1926 Railway Labor Act defined "Employee" as that of an employee or subordinate official defined in the orders of the ICC. This definition does not include officials. It notes that between 1924 and 1953 the ICC has issued numerous Ex Parte 72 Orders determining whether a given position

was that of an employee, subordinate official or official. It has never found the position to Assistant Vice President-Customer Service to come within the definition of an employee/subordinate official.

The Carrier stresses that the New York Dock Conditions derive its statutory authority from the Interstate Commerce Act. It adds that the other legislation cited by the Grievant such as FELA, the RR Retirement Act and the RR Unemployment Compensation Act, although they apply to the railroad industry, are specialized pieces of legislation dealing with specific functions. This legislation makes an individual an employee for the specific purpose of that legislation, however, it does not mean that the individual is a railroad "employee" for all other purposes.

The Carrier asserts the controlling legislation is the Interstate Commerce Act. The history of labor protective provisions, especially the landmark Washington Job Protection Agreement of May 1936, which was negotiated by major railroad labor organizations clearly reveals it was not intended to apply to railroad officials. It adds that the subsequently enacted labor protection agreements which evolved from the Washington Job Protection Agreement, were also negotiated by labor organizations, and indicated that they were to cover the employees they represented and not railroad officials. The Carrier adds not only were the collectively bargained protective agreements intended to cover employees represented by unions, but the protective arrangements imposed by legislation or imposed by the ICC also were not intended to apply to officials. The Carrier asserts the U.S. Supreme Court in the Lowden case clearly indicated that the ICC labor protection policies were intended to apply to railroad employees.

The Carrier notes that from the 1940 Transportation Act through to the

1976 Railroad Revitalization & Regulatory Act, the afforded protection was couched in terms of employees and nothing therein indicated it was to apply to railroad officials.

The Carrier states that the Grievant was a management official and not an employee. He reported directly to the Vice President for Marketing and Sales. He supervised two officials and one clerk. His salary of $43,826.00 made him the eighth highest paid official out of the 51 officials in the Guilford Transportation Marketing Department. Among the sub-department heads, the Grievant was the second highest paid official among seven.

The Carrier notes that when the Grievant was transferred to North Bellerica he took advantage of the corporate moving and relocation policy for non-agreement personnel. It adds the Grievant was part of the corporate and departmental restructuring that was done pursuant to Guilford's acquisition of control of the three involved railroads. In this restructuring, nineteen Marketing officials were requested to move to North Bellerica - 12 from the D&H and seven from Me C. Of this total of 19, 15 transferred - nine from the D&H and six from the Me C. Those officials who did not transfer elected to resign and secure other employment.

The Carrier states that the distinction between employee and official for labor protection purposes, is well founded and comports to the spirit and intent of the labor protection. From the very outset it was intended to protect the most vulnerable personnel from the dislocation and adverse effects brought about by the restructuring results of mergers, consolidations, etc. This protection was never intended to apply to those individuals who had the capabilities to avoid these adverse effects. The Carrier asserts rank and file employees possess skills that are unique to the railroad industry and these skills are tied to

their own craft in a given seniority district. An official, on the other hand, has transferable managerial skills that can be utilized within the same company or to other companies or other industries.

The Carrier agrees with the Grievant that his duties were not of an extraordinary or unique nature. It states customer service is commonly found in most railroads as well as in non-railroad industries. The Carrier denied, however, that the Grievant rose to his post of Assistant Vice President solely on length of service.

The Carrier agrees that some engineers and conductors may earn more than the Grievant. But when they do so, it is due to the compensation and work rules governing their class or craft. Nevertheless, the ICC considers them "employees" under the Interstate Commerce Act by virtue of their unionized state and low level of decision making.

The Carrier states that the treatment accorded the Grievant was not the treatment given to an employee, but rather the treatment afforded all other officials. Employees who were covered by the New York Dock Conditions were afforded the benefits prescribed by the NY Dock Conditions, but since the Grievant was not an employee, he was not so treated.

The Carrier states that its position has been sustained by four court decisions that were relevant to this dispute. The Carrier further states the Grievant in his Submission summarily passed over three of the court decisions and has erroneously interpreted the Newbourne case.

The Carrier maintains that the Grievant was in error in maintaining the Plaintiff in the Newbourne case was an official with substantial responsibilities as distinguished from the Grievant. The Carrier states the Grievant seeks to convey that his duties were inconsequential or menial. This is a misrepre-

sentation in as much as he had important policy and decision making responsibilities in his Customer Service sub-department.

The Carrier states the Grievant was also in error when he contended the Plaintiff in Newbourne was a person with skills that were useful in outside industry but this was not true of the Grievant. His own statements contradict that contention. He stated his duties were ordinary or unique and exist in other industries. The Carrier adds evidence of transferability of these marketing skills may be gleaned from the fact that Mr. Benham, when he resigned from the Carrier as a Market Manager-Industrial, secured a position of a vice president for a warehousing company.

The Carrier stresses that it was error for the Grievant to maintain that his case was different than the Plaintiff in Newbourne because the latter had transferable skills which he did not possess. The Carrier states it was also untrue to assert that the Plaintiff in Newbourne was different than the Grievant because the former obtained a position outside the railroad industry at a higher salary. The Carrier asserts that since the Grievant has remained employed with the Carrier, he cannot be compared to that Plaintiff. However, there are other Carrier marketing officials with comparable positions, who, after resigning, secured comparable or more responsible positions in and outside of the railroad industry.

The Carrier further stressed that the recent Award in the Union Pacific New York Dock Conditions case is directly in point. It states that Award held that an Assistant Controller Bond-Accounting Operations, and Manager Topolosky - Personnel Accounting - were Carrier officials and not entitled to receive the protective benefits of the New York Dock Conditions.

The Carrier maintains that the Grievant has erroneously placed great reli-

ance on the Colleen Andrews case. It reiterates its arguments that there was no valid and binding award rendered, and states further it never took the position in that case that Ms Andrews was an official. It did not raise this issue.

The Carrier asserts that even if the Arbitrator found that the Grievant was an "employee" within the purview of the New York Dock Conditions, he still would not be entitled to a Section 7 separation allowance because he was not a "dismissed" employee. The Carrier states the Grievant was and has remained an employee of the Carrier. He has not been deprived of employment. He was transferred with his same position to North Bellerica in May 1984 and continues to function as Assistant Vice President of Customer Service. It is noteworthy that in the course of his transfer, the Grievant took advantage of the Guilford's corporate relocation policy.

The Carrier states that the Grievant's transfer was part of a larger transfer of a group of officials, brought about by a comprehensive consolidation of departments of the three railroads. Under the facts of this case, there is no merit for granting the protection benefits of Section 7 of the New York Dock in as much as the Grievant was not a dismissed employee but rather a transferred official continuing to work at his regular position.

The Carrier maintains that the Grievant was also not entitled to any of the benefits prescribed by Implementing Agreements or Stabilization Agreements negotiated with its several labor organizations, because they cover employees and the Grievant was an official. The Carrier states that the Grievant was an employee covered by the BRAC Agreement when he entered its employ and continued to be a covered employee until he was promoted to an official position on July 1, 1966. The Carrier notes that the D&H RR- BRAC Agreement permitted a promoted individual to continue to retain and accrue seniority rights while

holding a position as an official. This means he could bid into, or displace into, a BRAC scope job, if he was relieved from his official position. But, as long as he was an official he did not come within the scope of the BRAC Agreement and was not entitled to any of the benefits or privileges prescribed by the BRAC Agreement for covered employees.

The Carrier asserts the Grievant is in error in maintaining he retains the full range of BRAC employee rights merely because he still has seniority rights under the BRAC Agreement.

The Carrier states that the Grievant is misconscruing the intent of Article IV of the New York Dock Conditions. The language of Article IV refers to "employees" of the railroad and not to officials. It was intended to cover employees, who although not represented by a labor organization, were subject to union representation, and therefore might receive the same level of benefits that union represented employees or subordinate officials could receive. Accordingly, the Carrier maintains that since the Grievant is an official he is not entitled to receive New York Dock Conditions Benefits nor any benefits resulting from an agreement negotiated with BRAC or any other agreement negotiated with a labor union for covered employees.

The Carrier notes that the October 1984 Implementing Agreement as well as the Stabilization Agreement were negotiated after the Grievant transferred and so these Agreements were not in place at the time of his transfer. For him to rely on these Agreements is in the nature of an ex post facto claim. Secondly, and more important, the Grievant is not eligible for the benefits provided therein: because he is not an "employee"; because he is not a BRAC covered employee; and because he was not a dismissed employee.

The Carrier stresses that with regard to the negotiated 1984 Stabiliza-

tion Agreement it is applicable only to "protected" employees under the BRAC Agreement and the separation allowance was granted to BRAC protected employees in order to effect an accelerated attrition program. The Carrier stresses it has not negotiated separation allowances for other crafts and classes of employees because they are not in a surplus category, and the Carrier has a need for their services. Therefore, it does not seek to attrit them on an accelerated basis, and consequently they have not been offered the option of electing to take a separation allowance in lieu of a transfer.

The Carrier states since there is no surplus of officials on the Guilford railroads, there is no corporate policy to offer officials such an option.

In summary, the Carrier asserts the Grievant did not follow the procedures prescribed in New York Dock Conditions to get a Section 11 Arbitration Committee established. He is also not eligible for New York Dock Conditions benefits because he is an official and not an employee. He cannot qualify under Section 7 of New York Dock because he has not been deprived of employment but has continued to work at his regular position as Assistant Vice President. Furthermore, he is not entitled to any of the protective benefits that are subsumed under the Implementing Agreements negotiated with BRAC because the Grievant is not currently covered under that Agreement while holding a position as an official, and the fact that he retains his seniority under the BRAC Agreement while functioning as an official does not make him a contractually covered employee.

For all these reasons, the Carrier request the Arbitrator to deny the Claim.

Findings:

After a careful review of the voluminous record, we find that the Grievant is not entitled to the protective benefits prescribed by the New York Dock

Conditions or the provisions of the 1984 Implementing and Stabilization Agreements negotiated with the Brotherhood of Railway and Airline Clerks.

We find that the Grievant is not qualified to receive the aforementioned protective benefits because he is not an "employee" within the purport and tenor of the New York Dock Conditions; because he is not a "dismissed employee" within the meaning and intent of Section 7 of Article I of the aforesaid Conditions; because he is not an "employee" within the meaning of Article IV, and because he is not a "protected" employee within the purpose and intent of the Implementing and Stabilization Agreements of October 17, 1984.

We find that, while the Grievant had an employment relationship with the Carrier since he was not a volunteer and was gainfully employed by the Carrier, he was not an "employee" as the term is used in railroad labor relations and therefore not entitled to the protective benefits prescribed by the New York Dock Conditions.

The history of protective benefits in the railroad industry, in modern times, stems from the May 1936 Washington Job Protection Agreement, negotiated between the Carriers of the country and the 21 principal railroad labor organizations then functioning, although there were relevant antecedents to this Agreement in the 1933 and 1940 Transportation Acts of Congress.

The Washington Job Protection Agreement was negotiated for the protection of the employees represented by the contractually participating unions and there is not a scintilla of probative evidence even to suggest that this Agreement was intended to apply to railroad officials.

The U.S. Supreme Court held in 1939 in the Lowden case that it was appropriate for the Interstate Commerce Commission to prescribe protective labor conditions to mitigate the hardships that might result to railroad employees in

executing the national policy of railroad consolidation. Again there is no indication in that decision that the Court intended that railroad officials be covered by the ICC prescribed protective provisions.

In subsequent years the Interstate Commerce Commission prescribed variations of the protective provisions set forth in the Washington Job Protection in transactions such as acquisitions, mergers, consolidations or abandonments. These varying Conditions are denominated as the Oklahoma, The Burlington, the New Orleans and the Southern-Central of Georgia Conditions. In all of these ICC prescribed conditions, the coverage is couched in terms of "employee" without any suggestions that these Conditions were intended to cover railroad officials. The New York Dock Conditions issued in 1979 continued coverage in the same vein, i.e., for "employees", not officials.

We find on these historical facts and antecedents that the New York Dock Conditions were intended to apply to "employees" of the affected carrier. It is the ICC's language and intent that is dispositive as to who is covered by its promulgated protective conditions. The 1926 Railway Labor Act which is the basic legislation governing the collective bargaining relations between carriers and the duly constituted representatives of the employees of the carrier, vests in the Interstate Commerce Commission the duty to define work of an "employee" or "subordinate official". The ICC's legislative authority to define these classes of employees stems from the 1920 Transportation Act. The ICC, in executing this responsibility, for the period from 1924 to 1953, has issued 23 Decisions as to what classes of work are included in the term "employee/subordinate official". These Decisions do not place or hold any position equivalent to Assistant Vice President-Customer Service to be encompassed within the concept of "employee-subordinate official".

We find unpersuasive the Grievant's contention that because Congress has given a broad definition of employee in the Railroad Retirement Act and Railroad Unemployment Insurance Act, as have courts in administering the Federal Employers' Liability Act, that such a definition governs the concept or term "employee" in protective labor conditions. The fact that the Congress and the Courts have wanted to invest a broader coverage to the purposes and objectives of these laws, does not mean a broader coverage was to be imputed to protective labor conditions in railroad consolidations, acquisitions, etc. The universe here covered was more limited than railroad unemployment or railroad retirement or railroad occupationally connected accidents or injuries. Therefore the drafters of labor protection provisions believed it was more appropriate to confine the relief granted to rank and file employees and not include carrier officials. We find nothing inconsistent in Congress prescribing broad coverage for one kind of situation and a more limited coverage for another kind of situation or condition. Protection for individuals affected by mergers, consolidations, etc., is different than protection for retirement or temporary unemployment. One situation is not integrally related to the other. Moreover, labor protective provisions have been a prominent feature in the railroad industry at least since 1936 (WJP) and there is no indication that either Congress, the ICC or the negotiators of protection Agreements attempted to dilate upon the concept of "employee".

We find that the Grievant has misconstrued the provisions of the Railway Labor Act pertaining to the National Railroad Adjustment Board. The RLA provides for the NRAB to be composed of an equal number of carrier representatives and labor union representatives. The NRAB has jurisdiction over disputes between an employee or a group of employees growing out of grievances or out of

interpretations or applications of collective bargaining agreements concerning rates of pay, rules or working conditions. A covered employee may appear before the NRAB either in person, by counsel or by any other representative he or she may chose. However, the Grievant is in error if he believes that Paragraph (J) permits a non-union member to progress a claim or grievance before the NRAB. Certainly there is no legislative sanction for a carrier official to utilize the procedures of the NRAB.

We also find no support for the Grievant's position in Article IV of New York Dock Conditions. First it is addressed to "employees" of the railroad, but to those employees not represented by a labor organization. We find this provision to mean "employees" and subordinate officials, who are of class of employees or subordinate officials who could be represented by a labor organization except for some internal organizational reason that makes it inappropriate for this class of employees to occupy a given position and still be a member of a union, such as holding a position where confidentiality was an essential component of the job, and were it not for this component, there would be no doubt the job would be included in the requisite bargaining unit. In short, we find Article IV to apply to those employees who could properly be represented by a labor organization except for extraneous aspects of the job that make it inappropriate for the incumbent to be a member of the union. Article IV does not apply to those positions where the administrative, managerial or supervisory responsibilities of the position would legally bar the incumbent from being a member of the designated collective bargaining unit. We find that an appropriate administrative Agency such as the National Mediation Board would find that an Assistant Vice President with the duties and salary of the Grievant could not properly be a member of the bargaining unit currently represented by BRAC, and that his position was such that it was not subject to being included

in a collective bargaining unit. Consequently, we find that Article IV is inapposite to support the Grievant's claim for protective benefits.

We find that the Grievant is neither an "employee" nor a "protected" employee within the purview or scope of the 1984 Implementing and Stabilization Agreements. The fact that he retained his clerk's seniority under the BRAC Agreement after he was promoted to an official position, does not bring him within the coverage of the aforesaid Agreements. There is nothing in the language of the aforesaid Agreements to suggest that it is applicable to currently functioning carrier officials.

Since we have found that the weight of the probative evidence clearly shows that the labor protection benefits and privileges were intended to encompass "employees" and not carrier officials, we now set forth our reasons why we find the Grievant to be an official rather than a covered employee.

We agree that this determination has to be made on the nature of the job duties rather than on the title of the said job. However, when the evidence shows that the Grievant as Assistant Vice President, also has a Manager and an Assistant Manager and Clerk reporting to him, it is difficult to avoid the conclusion that he holds a managerial post, and is not a rank and file employee. This conclusion is fortified by the fact that the Grievant reports directly to the Vice President for Marketing and Sales, and among the sub-department heads, he is the second highest paid among the total of seven officials who were sub-department heads. Out of 52 officials in the Guilford Marketing Department, he is the eighth highest paid officer.

The Grievant testified that he exercises independent judgment in the exercise of his job, receives no overtime pay and is subject to work on holidays without holiday pay if the exegencies of the job so demand. We find that these

are the attributes of an official rather than a bargaining unit employee. There are no aspects to his job to indicate he was a rank and file employee.

We find no support for the Grievant's position in judicial decisions and arbitral awards contained in the record of this case. In all of the cited cases, the courts or the arbitrators held the Claimants to be officials, and therefore not covered by the requisite labor protection provisions. For example, in the McDow case the Federal District Court held the Vice President and General Manager of the railroad did not come within the ICC definition or meaning of "employee"; in the Edward case, the Federal Circuit Court of Appeals held that the Chief Engineer and son of controlling stockholder did not come within the provisions of the Oklahoma Conditions based on the legislative history of the protective benefits provisions of the Interstate Commerce Act and other relevant railroad labor law; in the Zinger case, the Federal Circuit Court of Appeals held that an in-house attorney was not an employee under the ICC Act for protective benefits.

In the Newbourne case, the Court of Appeals held that the Plaintiff, who was a Supervisor-Grade 13 (not an Assistant Vice President) and who reported directly to a Vice President -Grade 17 - and who supervised five persons was not a subordinate employee but a management official, and therefore not entitled to the labor protection benefits.

We find that the Grievant is in error in distinguishing his case from the Newbourne case, on the basis that Newbourne was able to transfer to and obtain a higher paying job in outside industry. Since the Grievant has continued to work at his regular position, but in North Bellerica, there is no proof of record whether his skills were transferable. However, we must note that the Carrier has cited several instances of officials in its Marketing Department, who

transferred to comparable or better jobs in outside industry. In any event, we find that an individual with marketing and sales skills, has more transferable skills than a railroad conductor or engineer. The evidence shows that it was the latter class of employee to whom the labor protection benefits were directed and not to individuals exercising and possessing administrative and managerial skills.

We likewise find no support for the Grievant's position in the Colleen Andrews or the Donna Gilchrist cases. Colleen Andrews was a cashier for the Maine Central RR which position was not within the scope of the BRAC Agreement. However, the Carrier never raised the issue as to whether the Claimant occupied an administrative or managerial position. It raised the issue as to whether an employee who refused a transfer was a "dismissed employee".

The Arbitrator in that case issued an award, and we will not go into the question as to whether it was or was not a valid and binding award in which he held that the benefits of Article IV must be awarded to Ms Andrews as a non-contract employee. There was no issue, since neither party raised it, as to whether Ms Andrews was an official or an employee. One might state that a cashier could be covered by Article IV because that position was of the class that could be subject to coverage by collective bargaining unit.

In any event we find that the Colleen Andrews case is no binding precedent for the instant dispute.

Likewise the Donna Gilchrist case is not relevant to the issue in this case. Ms Gilchrist was a secretary to the President of the D&H RR, and while her job was not within the scope of the BRAC Agreement, there was no dispute that she was not an official of the Carrier. The dispute devolved as to whether the Claimant lost her position as a result of an Article III "transaction"

or for economic reasons. The Arbitrator found that the Claimant had been adversely affected when her position was abolished as a result of her immediate supervisor, i.e., the President of the D&H RR's position being terminated in Albany, and his assuming the post of President in North Bellerica of the three railroads acquired by Guilford. None of the issues raised in the instant case were raised or involved in the Donna Gilchrist case and consequently the latter lends no support to the Grievant.

In conclusion we are constrained to state that these cited arbitration awards and judicial decisions dealing with coverage of labor protection benefits arising out of statutory or ICC imposed conditions do not support the Grievant's position. We note the Grievant has not cited any case where a carrier official has been awarded protective benefits under these conditions. We find this is so because there are no such cases.

Since we have found that the Grievant was not an "employee" within the term "employee" as used in the New York Dock Conditions, and since we found he was not a dismissed employee in as much as he continues to occupy his regular position but in a new location, and since we have found he is not an "employee" encompassed by the terms of Article IV, we do not find it necessary to discuss in detail whether he is an "employee" or a "protected" employee within the ambit of the 1984 Implementing and Stabilization Agreements.

In light of the foregoing findings, we have no recourse but to deny the Grievant's claim for benefits under the requisite provisions of the New York Dock Conditions.

AWARD: Claim denied.

Jacob Seidenberg

Jacob Seidenberg, Sole Arbitrator

December 2, 1985