

ARBITRATION ESTABLISHED UNDER ARTICLE I, SECTION 11 (a)  
OF THE NEW YORK DOCK CONDITIONS

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In the matter of arbitration between: \*

James M. Benham \*

-and- \*

Delaware and Hudson Railway Company \*

\* \* \* \* \*

ARBITRATION COMMITTEE

Robert M. O'Brien - Neutral Member  
Douglas J. Broda - James M. Benham's Member  
Daniel J. Kozak - Carrier Member

APPEARANCES

For James M. Benham - Douglas J. Broda - Attorney  
McClung, Peters and Simon

For Delaware and Hudson Railway Company:

Daniel J. Kozak - Staff Officer - Labor Relations

BACKGROUND

The facts evidence that in 1984, Guilford Transportation Industries (hereinafter referred to as Guilford) acquired the Delaware and Hudson Railway Company (hereinafter referred to as the Carrier. In Finance Docket No. 29772, the Interstate Commerce Commission (hereinafter referred to as the ICC) imposed the labor protective conditions set forth in NEW YORK DOCK RY.- CONTROL-BROOKLYN EASTERN DISTRICT, 360 ICC 60 (1979) (hereinafter referred to as the New York Dock Conditions ) on this acquisition. It should be noted that the Carrier had previously assumed control of the Boston and

Maine Corporation, headquartered in North Billerica, Mass. and the Maine Central Railway Company, headquartered in Portland, Maine. James M. Benham (hereinafter referred to as the Claimant) has submitted the instant claim pursuant to ICC Finance Docket No. 29772.

The evidence reveals that the Claimant entered the Carrier's service on January 14, 1969. He held a clerical position and was represented by the Brotherhood of Railway, Airline and Steamship Clerks (hereinafter referred to as BRAC) until January 14, 1980, when he was promoted to Data Research Analyst in the Sales and Marketing Department. This position was not represented by any labor organization on this property. On November 17, 1982, the Claimant was promoted to the position of Manager, Pricing and Marketing-Intermodal. Mr. Benham held this position until he resigned from the Carrier's service in 1984. This position was also a non-bargaining unit position on this property.

According to the Carrier, in his capacity as Manager, Pricing and Marketing-Intermodal, Mr. Benham was responsible for conducting market analyses and developing marketing and pricing strategies regarding intermodal service. The Carrier contends that Mr. Benham was required to exercise independent thinking and judgment in this position as well as individual initiative. However, Mr. Benham, through his attorney, claims that the Carrier has greatly exaggerated his duties and responsibilities. The Claimant insists that he in no way set or contributed to Company policy. Rather, he merely plugged

raw data into a formula determined by the Carrier to arrive at a price for transactions or shipping. The Claimant explained that while his job title made it appear that he held a managerial position, in actuality his duties were primarily clerical in nature.

On June 15, 1984, Mr. Benham was advised that he was being transferred from Albany, N.Y. to Guilford's corporate headquarters located in North Billerica, Mass., effective July 2, 1984. The Claimant's transfer was part of a corporate and department restructuring brought about by Guilford's acquisition of the Delaware and Hudson Railway Company, the Boston and Maine Corporation and the Maine Central Railway Company. Save for regional sales functions, Guilford consolidated all of its Marketing Department activity in North Billerica. The Claimant was one of nineteen (19) individuals employed by the respective Marketing Departments of both the Carrier and the Maine Central Railroad who were transferred to North Billerica. Fifteen (15) of these employees did, in fact, transfer whereas four (4) elected to resign from their positions with the Carrier.

Mr. Benham elected to transfer to North Billerica and was afforded relocation expenses in accordance with the Carrier's Corporation Relocation Policy. However, Mr. Benham did not find the working conditions at North Billerica favorable and by early August, 1984, he decided to resign from the Carrier's service. On August 6, 1984, he tendered his resignation to Mr. T.C. Perry, Vice President - Marketing & Sales. Mr. Perry agreed to retain the Claimant on the

payroll through October 1, 1984. His resignation was accepted by the Carrier on August 13, 1984. In mid-August, 1984, Mr. Benham obtained employment with Distribution Unlimited, Inc. as a sales manager. Approximately four (4) months later, he was promoted to the position of Assistant Vice President - Sales and Administration for this same company.

Approximately one (1) year after his resignation, James Benham retained the services of Attorney Homer E. Peters of the law firm of McClung, Peters, Simon and Arensberg. On September 10, 1985, Mr. Peters wrote to Mr. B. E. Rice, Vice-President - Human Resources for Guilford, on behalf of the Claimant. In that letter, Mr. Peters requested a separation allowance for Mr. Benham pursuant to Section 7 of the New York Dock Conditions. The Carrier advised Mr. Peters that, in its opinion, Mr. Benham had been an official of the Delaware and Hudson Railway Company and, as such, was not entitled to the protective benefits set forth in the New York Dock Conditions. Mr. Peters requested that the claim of Mr. Benham be submitted to arbitration.

On March 6, 1986, the undersigned Robert M. O'Brien was advised that he had been mutually selected to serve as the Neutral Member of the Arbitration Committee being established under Article I, Section 11, of the New York Dock Conditions to adjudicate Mr. Benham's claim. The aforementioned Arbitration Committee (hereinafter referred to as the Committee) met on May 2, 1986, to hear the claim of James Benham. Mr. Benham appeared at that hearing, represented by

counsel, and proffered extensive evidence in support of his claim for a separation allowance. The Carrier also submitted voluminous evidence to support its position that as an official, Mr. Benham was not entitled to labor protection benefits. In addition, both parties were given the opportunity to submit Reply Submissions to the Committee. The respective Reply Submissions were received by the Committee on or about July 1, 1984. Based on the entirety of the extensive record before us, this Committee renders the following decision.

#### CLAIMANT'S POSITION

Mr. Benham contends that he was an "employee" of the Carrier at the time he was relieved of employment on July 2, 1984, notwithstanding Guilford's argument that he was an "official," not an "employee." The Claimant insists that he had no supervisory authority or policy making responsibility whatsoever; he had no authority to hire or fire; he could not expend funds; he supervised no employees; and he merely set rates from a formula approved by the Carrier. In Mr. Benham's opinion, his duties as Manager, Pricing and Marketing-Intermodal were more clerical than managerial.

The Claimant further avers that the Railway Labor Act definition of an "employee" should be rejected by this Committee since labor protective statutes such as the Transportation Act of 1940 and its progeny, New York Dock, have absolutely no relation to the Railway Labor Act. The Claimant maintains that other Federal statutes have given the

term "employee" a much broader definition. According to the Claimant, the legislative history relating to the Transportation Act of 1940 clearly demonstrates that Congress intended labor protective agreements to encompass all those individuals in its employ, not merely those who are subject to union representation as claimed by the Carrier. For all these reasons, the Claimant insists that he was an employee of the Carrier when his employment terminated and therefore was entitled to the labor protective benefits mandated by the New York Dock Conditions.

Mr. Benham further asserts that the Carrier never gave him advance (i.e. 90 day) notice of his transfer to North Billerica as required by the New York Dock Conditions. Rather, it caused him to believe that he had no choice but to relocate to North Billerica or lose his job. The Carrier therefore violated Section 4 of the New York Dock Conditions, in Mr. Benham's opinion.

Mr. Benham stresses that he was entitled to a separation allowance in accordance with Section 7 of the New York Dock Conditions . He also contends that he was entitled to the protective conditions prescribed by the BRAC Master Implementing Agreement dated October 17, 1984, inasmuch as he was an employee of the Carrier who was not represented by a labor organization. Even outside the New York Dock Conditions and the BRAC Master Implementing Agreement, the Claimant submits that he was entitled to redress under 49 U.S.C 11347 inasmuch as he was placed in a much "worse position" as a

result of his forced transfer to North Billerica in July, 1984.

Based on all the foregoing, the Claimant argues that, under the New York Dock Conditions; the Washington Job Protection Agreement; and the BRAC Master Implementing Agreement, he is entitled to one year's salary less the \$4500.00 voluntarily paid him by the Carrier when he resigned.

### CARRIER'S POSITION

The Carrier interposes three principal arguments to Mr. Benham's claim for a separation allowance. Initially, the Carrier contends that Mr. Benham is not entitled to a separation allowance pursuant to Section 7 of the New York Dock Conditions since he was not an "employee" as that term is customarily used in the railroad industry and applied in the New York Dock Conditions. The Carrier insists that the degree of responsibility and the level of independent judgment required of the Claimant in his capacity as Manager, Pricing and Marketing - Intermodal made him an "official," not an "employee." Yet, according to the Carrier, the ICC always intended labor protective benefits to be afforded only to "employees" of a railroad, and not to its "officials."

Even assuming, strictly arguendo, that the Claimant was protected under the New York Dock Conditions, nevertheless, he was still not entitled to a separation allowance, in the Carrier's opinion, since he was not a "dismissed employee" as that term is defined in Section 1 (c) of the New York Dock

Conditions. The Carrier stresses that Mr. Benham was not a "dismissed employee" since he voluntarily resigned his employment.

Finally, the Carrier avers that inasmuch as Mr. Benham was an official, he was beyond the scope of the BRAC Master Implementing Agreement. Consequently, the protective conditions set forth in that Agreement were inapplicable to him. For all these reasons, the Carrier respectfully requests this Committee to deny the Claimant's request for a separation allowance.

### FINDINGS AND OPINION

While the underlying question before this Committee is whether the Claimant is entitled to any of the protective benefits mandated by the New York Dock Conditions, there are actually three (3) issues which must be resolved, namely whether Mr. Benham was an "employee" or an "official" of the Carrier; if so, was he a "dismissed employee" as that term is defined in Section 1 (c) of the New York Dock Conditions; and finally, was the Claimant entitled to the protective conditions provided by the BRAC Master Implementing Agreement dated October 17, 1984 ? Each of these issues shall be addressed individually in this Opinion.

### WAS JAMES M. BENHAM AN "EMPLOYEE" OR AN "OFFICIAL ? "

This determination is crucial since if, in fact, the Claimant was an official of the Carrier when he left its service in August, 1984, then he is not entitled to the protective conditions provided by the New York Dock



Conditions. Conversely, were he found to be an employee of the Carrier, then Article IV of the New York Dock Conditions would govern his claim for a separation allowance.

Unfortunately, the ICC has never formulated a precise definition of either "employee" or "official." However, as a result of ICC administrative rulings; judicial decisions; and arbitration opinions under the New York Dock Conditions, criteria have evolved to assist us in determining whether Mr. Benham was an employee as he claims, or an official as the Carrier asserts.

For instance, the ICC has considered the level and the amount of supervisory authority held by one claiming New York Dock protection significant. Also, whether the position occupied by one seeking protective benefits was subject to representation by a labor organization, though not actually represented by any organization, has been considered important. Moreover, whether a claimant possessed skills which were readily transferable was deemed a relevant factor. Evidently, it was assumed that such individuals enjoy sufficient skills to enable them to protect themselves from the consequences of a consolidation and therefore do not require the protection afforded those employees whose skills are indigenous to the railroad industry.

An individual's rank and job title have not been considered controlling elements when determining whether an individual claiming protective benefits is an employee or an official. Rather, it is the nature and job content of his/her

position that is determinative. However, one's salary has been deemed a relevant consideration. This Committee wishes to state that, in our view, the degree of supervisory and policy making responsibility required of a position being evaluated must also be weighed.

This Committee agrees with the reasoning of the U.S. Court of Appeals for the Fourth Circuit in Edwards v. Southern Railway Company, 376 F. 2d, 665, wherein it quoted the ICC as follows:

"... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between the work of subordinate officials and that of officials....Each proceeding therefore, must of necessity be decided upon the record."

Though the precise question before the ICC in the above referenced proceeding was whether a subordinate official of a railroad was an employee under the Railway Labor Act, nevertheless the reasoning of the ICC is equally applicable to disputes such as the one at hand. In our judgment, the entire record must be examined to ascertain whether Mr. Benham was an employee or an official of the Carrier when he tendered his resignation in August, 1984.

After thoroughly examining the plethora of evidence and arguments advanced by both the Claimant and the Carrier what is clear to this Committee is that the Claimant possessed attributes of both an employee and those of an official when he held the position of Manager, Pricing and Marketing -

Intermodal . For example, it appears that he did not supervise any employees; he had no authority to either hire or fire employees; his salary was less than that earned by many unionized rank and file employees on the property; and Mr. Benham's supervisory and policy making responsibilities were limited. According to the Claimant, he merely applied rates based on a predetermined formula calculated by management. Were our analysis to end here, this Committee would be inclined to agree with the Claimant that he was an employee, not an official as claimed by the Carrier.

However, the facts also evidence that Mr. Benham's position as Manager, Pricing and Marketing - Intermodal, was never represented by a labor organization on the Delaware and Hudson Railway Company. Nor, evidently, did any labor organization ever attempt to represent this position. Moreover, the Claimant obviously enjoyed skills which were easily transferable. Mr. Benham declared in his Affidavit to this Committee that he obtained employment with Distribution Unlimited, Inc. as a sales manager in the middle of August, 1984. It is significant that Mr. Benham obtained gainful employment approximately two (2) weeks after he tendered his resignation to the Carrier.

It is also noteworthy, in the opinion of this Committee, that in his capacity as Manager, Pricing and Marketing - Intermodal, Mr. Benham was entitled to numerous fringe benefits which were not granted rank and file employees, or if they were, were less beneficial than those afforded him.

Moreover, when Mr. Benham transferred to North Billerica, he was given the relocation expenses that other officials of the Carrier received. Mr. Benham was also retained on the payroll for two (2) months after he tendered his resignation which is not a benefit afforded rank and file employees.

After weighing and evaluating all of the foregoing considerations, this Committee is compelled to conclude that James Benham was not an "employee" of the Carrier and therefore was not entitled to the protective benefits prescribed by the New York Dock Conditions.

WAS JAMES M. BENHAM A "DISMISSED EMPLOYEE ?"

Even were Mr. Benham deemed to be an employee, not an official, of the Carrier at the time of his resignation, he still would not be entitled to the protective benefits of the New York Dock Conditions, in the opinion of this Committee, since he simply was not a "dismissed employee" as that term is defined in Article I, Section 1 (c), of the New York Dock Conditions. Article I, Section 1 (c), defines a dismissed employee as one who is "... deprived of employment with the railroad because of the abolition of his position...."

However, it is obvious that Mr. Benham was not deprived of his employment with the Delaware and Hudson Railway Company. The Claimant's position as Manager, Pricing and Marketing - Intermodal was not abolished by the Carrier. Rather, he voluntarily resigned this position when he found the working conditions at North Billerica not to his liking.

It is clear to this Committee that the separation allowance provided by Article I, Section 7, of the New York Dock Conditions was not available to Mr. Benham since he was not a dismissed employee. By its very terms, Article I, Section 7, provides a separation allowance only to dismissed employees. Moreover, there is no claim before this Committee that Mr. Benham was coerced into resigning his position with the Carrier. It was entirely a voluntary decision on his part for the reasons expressed in his August 6, 1984, letter of resignation which reasons he reiterated in the Affidavit he submitted to this Committee.

Inasmuch as James Benham was not a "dismissed employee" as that term is defined in Article I, Section 1 (c), of the New York Dock Conditions, he would not be entitled to a separation allowance even were he considered an employee of the Carrier at the time of his resignation.

WAS JAMES M. BENHAM ENTITLED TO THE PROTECTION PROVIDED BY THE BRAC 1984 MASTER IMPLEMENTING AGREEMENT ?

It is the considered opinion of this Committee that as an official of the Carrier, the Claimant was not entitled to any of the protective benefits provided by the BRAC Master Implementing Agreement. The provisions of that Agreement were obviously not extended to officials of the Carrier. Furthermore, it must be noted that the BRAC Agreement was executed on October 17, 1984, two (2) months after Mr. Benham tendered his resignation to the Carrier. Even were that Agreement retroactive as he claims, nevertheless Mr. Benham would not be entitled to its protective benefits since his

position as Manager, Pricing and Marketing - Intermodal, never fell within the scope of the BRAC collective bargaining agreements. The Claimant's position was not encompassed within BRAC's jurisdiction even though Mr. Benham retained his BRAC seniority while serving as an official of the Carrier. In our judgment, Mr. Benham was simply not a protected employee working under the scope of the BRAC Agreement and was therefore not entitled to the protective conditions which BRAC secured for its members by the October 17, 1984, Master Implementing Agreement.

AWARD

James M. Benham was not entitled to a separation allowance under the New York Dock Conditions nor was he entitled to the protective benefits provided by the 1984 BRAC Master Implementing Agreement. Accordingly, his claim must be denied.

Robert M. O'Brien  
Robert M. O'Brien, Neutral Member  
Dated: 11/29/86

Douglas J. Broda, Claimant's Member  
Dated:

Daniel J. Kozak - 12/2/86  
Daniel J. Kozak, Carrier Member  
Dated: