AWARD NO. 1
CASE NO. 1

ARBITRATION COMMITTEE
UNDER THE
NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS
(IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 29690)

RAILROAD YARDMASTERS OF AMERICA	)	
	)	
vs.	)	FINDINGS & AWARD
	)	
SOUTHERN RAILWAY COMPANY	)	

QUESTION AT ISSUE:

"Was Mr. W. H. Herman displaced and/or dismissed as a result of the Southern Railway acquisition of the Kentucky and Indiana Terminal Railroad Company as defined by the New York Dock II Conditions?"

BACKGROUND:

In Finance Docket No. 29690, decided December 8, 1981, the Interstate Commerce Commission (the "ICC') approved application of the Southern Railway Company (the "Carrier") to purchase and operate the Kentucky and Indiana Terminal Railroad Company (the "KIT").

As a condition of its approval, the ICC, among other things said the following relative to labor protective conditions:

"Employee protections. - Our approval of SOU's [Carrier's] purchase of KIT must be conditioned on SOU's agreement to provide 'a fair arrangement at least as protective of the interests of employees who are affected by the transaction' as the labor protective provisions imposed in control proceedings prior to February 5, 1976. 49 U.S.C. 11347. In New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), affirmed sub. nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979), we described the minimum protection to be accorded employees under the statute in the absence of a voluntarily negotiated agreement. 4/ We may, if we choose, fashion greater employee protective conditions, tailored to the special circumstances of an individual case. Burlington Northern, Inc. - Control & Merger - St.L., 360 I.C.C. 784, 946 (1980)."

The footnote reference in the above excerpt read:

"4/ Applicants have not negotiated any agreements with

labor unions which establish employee protection in excess of the protections provided in New York Dock. Applicants have commenced negotiations with labor unions to obtain implementing agreements to effectuate the proposed transaction. One agreement has been reached with the Brotherhood of Maintenance of Way Employees."

The KIT was coordinated with the Carrier effective January 1, 1982. Prior to and at the time of coordination, Mr. W. H. Herman (the "Claimant") occupied the position of Assistant Trainmaster, a position not represented by the Railroad Yardmasters of America (the "Organization"), party to this dispute, or by any other labor organization.

On January 6, 1982 Carrier's Vice President, Personnel, addressed the following letter to Claimant:

"I want to take this opportunity to add my welcome to others you will receive as a member of the Southern Railway System.

Now that we have the final approval of the Interstate Commerce Commission, we acquired the assets of K&IT at midnight, December 31, 1981. Thus, the K&IT has ceased to exist as an operating railroad and what had been K&IT is now a part of Southern Railway Company.

As part of its formal approval of this transaction, the Interstate Commerce Commission has provided protection for any K&IT employee who may be adversely affected by reason of this transaction. While technically such statutory protection is not applicable to you as a railroad officer, Southern, nevertheless, intends to continue your employment and to protect your current salary and fringe benefits until 1988.

You will continue to be employed by Southern in Louisville in substantially the same position you now occupy. Your salary will continue at the same rate.

We look forward to having you with us.

If you accept this offer of employment and appointment, please signify by signing below and returning copy of this letter to me."

Claimant placed his signature above a statement on the letter which read: "I hereby accept this position offered by this letter."

On March 19, 1982, Carrier again wrote Claimant. In this letter it stated:

"Southern's experience with operating the former K&IT since the acquisition indicates that we have overestimated our need for supervision of yard operations at

Louisville. I am sorry that we were not able to anticipate this at the time I wrote in early January concerning your employment.

However, Southern's commitment to continue your employment and protect your current salary still stands as stated in my letter of January 6. We are prepared to offer you the same two options that were afforded former K&IT employees who were asked to transfer in January: to either transfer or accept separation pay.

Effective April 16, 1982, we intend to rearrange our supervisory forces. In connection with this rearrangement, your current position will be abolished on April 15, 1982. Effective April 16, 1982 you are appointed Assistant Trainmaster at Chamblee, Georgia. Your salary will remain at $30,180 per year.

Acceptance of this appointment will involve a change of residence. Therefore, if you accept the appointment, you will be subject to the benefits of Southern's relocation policy, which is attached.

If you choose not to accept this appointment, you may opt to have Southern pay you a one-time cash payment of 12 months pay.

In order to simplify your handling of these options, I have provided below two spaces with which you may signify your election. If you sign the first space, you will be exercising Option No. 1, which is your acceptance of the position offered herein and a commitment that you will report for duty on the effective date, in that capacity. A signature in the second space would indicate your election of the alternative, which is a declination of this offer of employment and your election to take a separation allowance of $30,180, less deductions for necessary taxes. You should understand that in exercising this option, you would simultaneously be separating yourself permanently from the service of Southern Railway Company. This act would sever your employment relationship including any and all seniority rights and other service benefits, except vested pension rights.

If you accept this offer, Superintendent Hawkins will be in touch with you regarding the details of your relocation and assumption of your new position.

I would appreciate your advice and indication no later than April 12, 1982."

The Claimant did not accept either of the two options set forth in the above letter. Instead, on April 14, 1982 Claimant advised the Carrier that he was going to exercise his seniority rights as a Yardmaster and stay in Louisville, Kentucky.

On July 11, 1983, or some 15 months later, Claimant submitted to the Carrier a completed copy of a Request for Entitlement to Benefits form. This form is used to assist both employees and the Carrier in determining whether an employee has been adversely affected by a merger, coordination or consolidation. Claimant, in completing the form, listed his occupation as Yardmaster. He maintained that he was entitled to protective benefits under the "New York Dock Agreement." He listed as the first date he had been placed in a worse position or deprived of employment as April 16, 1982, stating it was account his position as Assistant Trainmaster having been abolished at Louisville, Kentucky. Under a section of the form which called for an explanation in detail as to how the coordination changed a work situation and caused an adverse affect, Claimant wrote: "Job abolished - exercised seniority back to yardmaster craft."

Carrier responded to the filing of the above claim form by letter dated August 12, 1983. In addition to reviewing the facts of record, the Carrier said the timing of the request raises a question involving the principle of laches. It concluded its letter as follows:

> "Based upon a review of the record herein, it is apparent that any diminution of your earnings was not due to the coordination, rather it was because of an intervening cause -- your choice to exercise your seniority to a lesser paying scheduled yardmaster position. Had you accepted the transfer, there would have been no diminution of earnings. Therefore, your request for protective benefits is hereby respectfully declined."

Thereafter, by letter dated October 3, 1983, the Organization wrote the Carrier, stating in part here pertinent, the following:

> "Under the provisions of Appendix III, sub-paragraph 11(a) of Finance Docket 28250, 'New York Dock Protective Conditions,' which were the conditions imposed in the Southern acquisition of the KIT at Louisville, Kentucky, this will serve as official notice of the Organization's request to arbitrate the following disputes concerning the acquisition at Louisville:
>
> * * * * * * *
>
> W. H. Herman - Request to Entitlement to Benefits concerning the reduction from Assistant Trainmaster to Yardmaster and a reduction in earnings as a direct result of the Southern acquisition of the KIT at Louisville, Kentucky. Reference Director of Labor Relations, D. R. Johnson's letter of August 12, 1983, to Mr. Herman."

During subsequent conference between the Organization and the Carrier it was agreed to place the dispute before this Board.

POSITION OF THE CARRIER:

It is the position of the Carrier that Claimant's petition to be recognized as a protected employee under the New York Dock II Conditions is without merit for the following reasons:

> " - Mr. Herman neither meets the criteria of a 'displaced' nor a 'dismissed' employee as defined by the New York Dock II Conditions.
>
> - Mr. Herman's decision to exercise his seniority rather than accept a comparable non-contract position placed the consequences of future effects on him.
>
> - The operational change made by the Carrier on April 16, 1982, was not made 'pursuant to' any authority given to it by the ICC in Finance Docket 28250 and as such, does not provide employees affected by such changes with any protection."

The Carrier further asserts: "[Employee] protection agreements, such as the Washington Job Protection Agreement of 1936, Amtrak Protection Agreement (Appendix C-1), Article XIII of the January 27, 1972, UTU National Agreement, etc., as well as the New York Dock II protective conditions were designed to provide protection to employees against adverse effects flowing from the transaction involved and not adverse effects arising from other unrelated causes, as in the instant claim."

It says that the touchstone for determining whether an employee qualifies for either a displacement or a dismissal allowance, is whether such employee is adversely affected as to compensation due to the loss of employment, or from being involved in a chain of displacements that resulted from the transaction. In this regard, it states that Claimant neither lost a regular job, nor was he involved in a chain of displacements that resulted from the transaction. It says the situation in which Claimant finds himself is as the direct result of Claimant himself having made a personal decision in connection with an operational change made by the Carrier "subsequent to" and not "pursuant to" the KIT acquisition. Therefore, the Carrier says that any adverse effect Claimant may have suffered because he made his election to return to a Yardmaster position is outside the umbrella of protection afforded by the ICC.

POSITION OF THE ORGANIZATION:

The Organization does not deny that at the time of Carrier's acquisition of the KIT that Claimant was employed in a position not represented by it, i.e., Assistant Trainmaster. However, the Organization states:

> "Article IV, paragraph 1 of Finance Docket 28250, New

York Protective Conditions, which was the conditions imposed by the ICC relative to this acquisition states as follows:

> '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 conditions.'"

Therefore, the Organization asserts, simply because Claimant was not a member of any labor organization, it did not serve to defeat his application nor his rights relative to the New York Dock Conditions.

The Organization maintains that since the KIT consisted of but one Terminal at Louisville, Kentucky, it must be recognized that the Carrier could only have abolished Claimant's position at that location and offered him employment elsewhere on the Carrier's property, i.e., Chamblee, Georgia, only as the result of the Carrier acquisition of the KIT and a transaction taken pursuant to the ICC approval of Carrier's acquisition of KIT. Thus, the Organization states, it follows that the subsequent abolishment of Claimant's position placed him in a worse position with respect to his compensation and Claimant became a displaced employee as defined in Section 1(b) of the New York Dock Conditions, and which reads:

> "'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."

The Organization also asserts that it cannot be argued that Claimant failed to exercise his seniority rights or failed to become a protected employee by failing or refusing to take the position offered by the Carrier at Chamblee, Georgia at a comparable rate of pay since acceptance of such position would have required a change in his place of residence. In this respect, the Organization submits that the New York Dock Conditions provide under Section 5(b) as follows:

> "If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline."

In this connection, the Organization states that if Section 5(b) does not require employees to change places of residence to assignments to which they have seniority rights, and Claimant was entitled to the same levels of protection as employees repre-

sented by labor organizations, it must necessarily follow that Claimant could not be required to move 375 miles from his home in Louisville, Kentucky. It also says that by Claimant electing to utilize his seniority to a lesser paying assignment of Yardmaster does not diminish nor defeat Claimant's entitlement to the protective benefits of the New York Dock Conditions.

FINDINGS AND OPINION OF THE BOARD:

There is no doubt that acquisition of the KIT by the Carrier and its subsequent rearrangement of work forces had caused Claimant's non-contract position as Assistant Trainmaster to be abolished on April 16, 1982.

Despite such conclusion, this Board is not persuaded that the circumstances of record support a holding that Claimant be considered either a "displaced" or a "dismissed" employee subject to benefit of the New York Dock Conditions as imposed by the ICC in approving acquisition of the KIT by the Carrier.

As noted above, Claimant was offered opportunity of a comparable non-contract position at another location, or the option of a severance allowance. He rejected both options. Instead, of his own volition, he exercised seniority to a contract position of Yardmaster so as to remain at Louisville, Kentucky. In doing so, this Board believes Claimant forfeited any right he may have had to contend that he had been adversely affected as a result of a transaction made in pursuance of the ICC approval of Carrier assuming KIT's common carrier obligations.

Claimant did not have the right, in the opinion of this Board, to unilaterally place himself in a lesser paying contract job and then maintain that he be granted a displacement allowance. To sanction such unilateral action on the part of an employee would be to subject the Carrier to a liability which we do not perceive to be a part of the protective benefit features of the New York Dock Conditions, even if we were to consider the Claimant to have been entitled to such benefits.

If indeed Claimant was of the belief that he was entitled to full benefit of the New York Dock Conditions; if he believed he was adversely affected as a non-contract person; or, if he was of the belief that he did not have to accept a position requiring a change in his place of residence, then he should have pursued such argument in a direct and timely manner with the Carrier.

As Carrier argues, regardless of the merits of the claim, the doctrine of laches must be considered applicable to the dispute.

Black's Law Dictionary, revised fourth edition, states as follows concerning Estoppel by Laches:

> "A failure to do something which should be done or to claim or enforce a right at a proper time.

An element of the doctrine is that the defendant's alleged change of position for the worse must have been induced by or resulted from the conduct, misrepresentation or silence of the plaintiff. Croyle v. Croyle, 184 Md 126, 40 A.2d 374, 379"

Here, the incontrovertible record reveals Claimant had been notified of his employment status with the Carrier as a consequence of its acquisition of KIT. The Carrier set forth the manner by which it planned to protect the then existing employment relationship. The Claimant acknowledged and acceded to the conditions outlined by the Carrier. The Carrier thereafter gave Claimant timely notice when it reportedly found operating conditions made it necessary that his position of Assistant Trainmaster at Louisville, Kentucky be abolished. The Carrier extended two options which it believed to represent fair and equitable protective treatment of a person in a non-contract position with the company. The Carrier said, and it has remained unrefuted, that these were the same options that were afforded former KIT employees who were asked to transfer in January 1981, i.e., to either accept transfer or accept separation pay.

Instead of placing Carrier on notice that he disputed such action as violative of the New York Dock Conditions, as he now contends, Claimant remained silent. Under the circumstances, it must be held that by such silence and by reason of Claimant taking a third personally perceived option of an exercise of seniority to return to the represented craft of Yardmasters, that such action was taken at his own peril. He may not be heard to say, some 15 months later, that he was entitled at the time to benefit of the New York Dock Conditions as a displaced or dismissed employee.

Accordingly, the Carrier having interposed the defense of estoppel by laches to the Question at Issue here presented, and this Board finding merit to such argument, the claim is barred.

AWARD:

The Question at Issue is answered in the negative. Mr. W. H. Herman was not displaced and/or dismissed as a result of the Carrier's acquisition of the KIT as defined by the New York Dock II Conditions.

Robert E. Peterson, Chairman
and Neutral Member

K. J. O'Brien
Carrier Member

J. L. Roy
Organization Member

Atlanta, GA,
May , 1987