ARBITRATION COMMITTEE

In the Matter of the Arbitration Between	)	
	)	Pursuant to Article I, Section 11 of the New York Dock Conditions
BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA,	)	
	)	I.C.C. Finance Docket No. 28583
Organization,	)	
and	)	Case No. 1 Award No. 1
BURLINGTON NORTHERN RAILROAD COMPANY,	)	
	)	OPINION AND AWARD
Carrier.	)	

Hearing Date: January 20, 1987
Hearing Location: St. Paul, Minnesota
Date of Award: May 20, 1987

MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz
Carrier Member: J. N. Locklin
Neutral Member: John B. LaRocco

QUESTION AT ISSUE

Is the closing of the Springfield Car Shop and the transfer of work and employees, from Springfield to Havelock Shops, in accordance with the Carrier's notice dated May 14, 1986, a transaction under the "New York Dock Conditions," imposed in connection with the Burlington Northern-Frisco Merger?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In 1980, the Interstate Commerce Commission (ICC) approved the merger of the St. Louis-San Francisco Railway (Frisco) into the Burlington Northern Railroad Company. [ICC Finance Docket No. 28583; 360 I.C.C. 784] To compensate and protect employees adversely affected by the merger, the ICC imposed the employee merger protective conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the merged Carrier pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347. The merger was consummated on November 21, 1980.

At the Arbitrator's request, the parties waived the Section 11(c) limitation period for issuing this decision.[1]

II. BACKGROUND AND SUMMARY OF THE FACTS

On May 14, 1986, the Carrier notified the Organization that it intended to transfer all freight car heavy repair work at the Springfield, Missouri Consolidated Car Shop to Havelock, Nebraska on or about August 15, 1986. The Springfield facility was the only back shop on the former Frisco Railroad. Havelock is a point on the pre-merger Burlington Northern Railroad. To

[1]All the sections relevant to this case are found in Article I of the New York Dock Conditions. Thus, the Committee will only cite the appropriate section number.

accomplish the transfer, the Carrier contemplated abolishing the remaining 23 carman and two carman painter positions at Springfield and to simultaneously establish the same number of carman and carman painter jobs at Havelock. Although the notice was silent, the Carrier informed the Organization at a June 30, 1986 conference that the notice was issued under the auspices of the September 25, 1964 Agreement as opposed to Section 4 of the New York Dock Conditions.

Because the Organization characterized the transfer of work from Springfield to Havelock as a New York Dock transaction, the Organization petitioned the United States District Court to enjoin the work transfer until the Carrier served a notice satisfying Section 4 of the New York Dock Conditions and either negotiated or arbitrated a New York Dock implementing agreement. Burlington Northern Joint Protective Board v. Burlington Northern Railroad Company, Civ. No. 86-3458-CV-S-4 (W.D. Mo. 1986). On September 4, 1986, the Court dismissed the Organization's action for want of subject matter jurisdiction. The Court observed that the basic factual issue before it was whether the work transfer constituted a New York Dock transaction. The Court ruled that final and binding arbitration pursuant to Section 11 of the New York Dock Conditions was the mandatory and exclusive forum for determining if the Carrier had engaged in any activity within the definition of a transaction as set forth in Section 1(a) of the New York Dock Conditions. Thus, the parties progressed the issue to this Committee.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

From the Organization's perspective, manpower adjustments which occurred during the six-month period preceding the May 14, 1986 notice are relevant to demonstrating the Carrier's motive to systematically reduce forces at Springfield in anticipation of closing the shop. Specifically, the Carrier furloughed 67 Springfield carmen on December 30, 1985 and 12 additional carmen on May 2, 1986. The Organization charges that the Carrier furloughed these workers to limit its liability for the imminent shop closure.

If the 1980 merger had not occurred, Frisco rolling stock would have continued to be repaired at Springfield, the only major repair facility on the former Frisco territory. Absent the merger, the Carrier would be unable to transfer the heavy car repair work from a former Frisco point to a Burlington Northern repair facility. Obviously, the transfer arose as a direct result of the 1980 merger.

The New York Dock Conditions do not contain any time limitation. Thus, employees affected by a transaction are entitled to protective benefits even if the transaction is implemented long after the actual merger. This Committee lacks the authority to read an express or implied time limit into the New York Dock Conditions.

The Carrier, not surprisingly, labels the work transfer an operational change (instead of a transaction) simply because the benefits under the September 25, 1964 Agreement are inferior to

the protective entitlements flowing from the New York Dock Conditions. However, Section 3 of the New York Dock Conditions recognizes that employees might be covered by more than one protective arrangement. Pursuant to Section 3, the employees and not the Carrier have the right to select whether they want benefits under the September 25, 1964 Agreement or the New York Dock Conditions. Therefore, even if the transfer of work was an operational change as defined by the September 25, 1964 Agreement, coverage of the 1964 Agreement does not preclude application of the New York Dock Conditions.

Since the transfer of work constituted a New York Dock transaction, the Carrier's May 14, 1986 notice was invalid.

B. The Carrier's Position

The transfer of work plainly and exclusively falls within the purview of the September 25, 1964 Agreement. The Organization has failed to show a proximate nexus between the 1980 merger and the 1986 transfer of work from Springfield to Havelock. Instead, the Organization misplaces its reliance on the "but for" argument. However, not every post-merger change is necessarily connected to the merger. The transfer was accomplished six years after the merger. It was simply a change in operation conducted within the normal course of business and completely unrelated to the merger.

The Carrier vigorously denies that it furloughed workers in anticipation of closing the Springfield shop. The May 2, 1986 furlough was directly attributed to the cancellation of a special program to retrofit a hundred air slide cars for an important

shipper. In addition, both the December, 1985 layoffs and the transfer of work were caused by factors factors wholly unrelated to the merger. The other factors were a decrease in available work, a decline in business volume, reduced capital expenditures and a reduction in the size of the Carrier's car fleet. More specifically, the number of cars repaired in shop programs decreased from 6,235 in 1983 to 3,326 (an estimate) in 1986. The Carrier's car fleet decreased by 44,000 in the last five years. Since deregulation, there has been an increase in non-Railroad-owned freight cars and those Carrier cars in service are newer. Newer cars require fewer repairs. Finally, the Springfield Region experienced a more severe business loss than the rest of the system. The amount of work dissipated to such a low level that the Carrier could not justify retaining the 25 carmen at the Springfield shop. In summary, economic conditions caused a reduction in repair work with the commensurate decrease in Springfield car forces.

IV. DISCUSSION

Section 11(e) of the New York Dock Conditions sets forth the Organization's burden of going forward and the Carrier's burden of proof. As the moving party, the Organization must identify a Section 1(a) transaction and specify "...pertinent facts of that transaction relied upon." The Carrier's burden of proof is conditional. If the Organization first fulfills its burden of going forward, then the Carrier assumes the burden of proving "...that factors other than a transaction affected the employee." On the other hand, if the Organization fails to

either identify a transaction or state pertinent facts linking the transaction to an adverse effect suffered by the Springfield carmen, the Carrier prevails regardless of whether or not it has satisfied its burden of proof.

The gravamen of this dispute is whether the transfer of freight car heavy repair work from Springfield to Havelock was a Section 1(a) transaction. Section 1(a) provides that a transaction is: "...any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." While the effects of a railroad merger might be felt long after the merger is actually consummated, not every employment adversity occurring subsequent to a merger presumptively entitles workers to the comprehensive protective benefits contained in the New York Dock Conditions. Conversely, the mere passage of time does not conclusively mean that a transfer of work is wholly remote from a much earlier merger. Each post-merger employment change must be evaluated on a case by case basis. Nonetheless, since six years elapsed between the Frisco merger and the transfer of work herein, it becomes more difficult for the Organization to show a rational relation between the change in operations and the merger. BRC v. BN, NYD § 11 Arb. Award No. 4 (Vernon, 1/3/86). A federal court recently ruled that the time interval between the merger and employment status change is of some significance when analyzing the underlying cause of railroad employee layoffs. Mees v. Burlington Northern Railroad Company, Civ. No. 86C0461 (N.D. Ill. 1986).

In this particular case, the Organization has failed to present pertinent facts to overcome the lapse of time between the 1980 merger and the 1986 transfer of work from Springfield to Havelock. Instead of developing relevant facts showing a coherent connection between the transfer of work and the merger, the Organization relies exclusively on the "but for" argument. Adopting the Organization's "but for" contentions would be tantamount to ruling that every Carrier activity initiated subsequent to the merger was per se related to the merger. ATDA v. MP, NYD § 11 Arb. (Zumas, 7/31/81). Such a finding would effectively nullify the Organization's burden of going forward. MP v. BRC, NYD § 11 Arb. (Sickles, 7/30/82). This Committee is unable to construe the work transfer as a transaction within the definition of Section 1(a) of the New York Dock Conditions solely on the basis of the vague "but for" contention. Public Law Board No. 3764, Award No. 2 (Vernon).

Inasmuch as the Organization has failed to satisfy its burden of going forward, this Committee need not address or consider the rights of Springfield carmen under any other protective arrangement including the September 25, 1964 Agreement. Most importantly, we need not address or pass judgment on the Organization's allegation that the Carrier furloughed workers in anticipation of closing the Springfield Shop. Finally, our decision is confined to the peculiar facts and evidence in this record.

AWARD AND ORDER

The answer to the Question at Issue is "No."

Dated: May 20, 1987

Dissenting

R. P. Wojtowicz
Employees' Member

J. N. Locklin
Carrier Member

John B. LaRocco
Neutral Member

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June 15, 1987

Hon. C. E. Wheeler
General President
Carmen Division
Brotherhood of Railway and
Airline Clerks
4929 Main Street
Kansas City, MO 64112

RE: Burlington Northern Joint Protective Board, etc. v. Burlington Northern Railroad Company, et al., Case No. 86-2170WM

Dear Sir and Brother:

As you may know, arbitrator John LaRocco, on May 20, 1987, rendered an unfavorable award in the New York Dock arbitration underlying the above-referenced civil action. In his award, arbitrator LaRocco ruled that the closing of the Springfield Car Shop and transfer of work and employees from Springfield to Havelock pursuant to the carrier's notice dated May 14, 1986 did not constitute a New York Dock transaction. Arbitrator LaRocco essentially ruled that the Union had failed to prove sufficient facts showing a connection between the merger and the closure of the Springfield facility and transfer of work and men to prove that same constituted a New York Dock transaction.

Since the arbitration award may significantly affect the Court of Appeal's decision, we have advised the Court of Appeals panel of the arbitrator's decision by letter dated June 4, 1987, a copy of which is attached hereto. This letter is self-explanatory.

In the event you have any questions or desire to discuss any of the matters concerning the Springfield Shop closure, the arbitration award, or the pending case in the Court of Appeals, please advise.

With best wishes and warmest personal regards, I remain,

Fraternally yours,

C. Marshall Friedman

CMF/tlt
Enclosure

cc:
Mitchell Kraus
R. K. Schafer, Jr.
J. I. Coble
S. E. Taylor

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KENNETH E. RUDD

June 4, 1987

Mr. Robert D. St.Vrain
Clerk, U.S. Court of Appeals
Eighth Circuit
1114 Market Street
St. Louis, MO 63101

RE: Burlington Northern Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada, AFL-CIO-CLC v. Burlington Northern Railroad Company, et al., No. 86-2170WM

Eighth Circuit Court of Appeals Panel Composed of Chief Judge Lay, Judge Wollman and Senior District Judge Bogue; Oral Argument on April 17, 1987

Submitted Pursuant to Rule 28(j) FRAP

In the Matter of the Arbitration Between Brotherhood Railway Carmen etc. and Burlington Northern Railroad, I.C.C. Fin. Doc. 28583, Case No. 1, Award No. 1, May 20, 1987

Dear Mr. St.Vrain:

This letter and the accompanying authority are submitted pursuant to Rule 28(j) FRAP.

Since the argument of the appeal before the above-referenced panel on April 17, 1987, a New York Dock Committee has rendered an award. The New York Dock Committee determined that the Union had been unable to present sufficient relevant facts showing a coherent connection between the merger and the transfer of work so as to establish that this was a "transaction" within the meaning of Section 1(a) of the New York Dock Conditions.

The enclosed arbitration award, therefore, is a significant and pertinent authority with respect to plaintiff union's contentions (Plaintiff-Appellant's Brief, pp. 42-48, Plaintiff-Appellant's Reply Brief, pp. 17-26) that it was statutorily entitled to compel disclosure of the requested information and facts--pursuant to Section 2, First and Second (45 U.S.C. §152,

First and Second) of the Railway Labor Act, that the disclosure of the requested information was crucially important to plaintiff union's effectively negotiating and arbitrating the New York Dock dispute, and that disclosure of the requested information was necessary for plaintiff to effectively discharge its duty of fair representation to its members.

Furthermore, the enclosed authority is pertinent and significant with respect to plaintiff union's contentions (Plaintiff-Appellant's Brief, pp. 32-42, Plaintiff-Appellant's Reply Brief, pp. 11-17) that the defendants violated 45 U.S.C. §152, First during the on the property conferences required by 45 U.S.C. §152, Second.

Finally, the enclosed authority is pertinent and significant with respect to refuting defendants-appellees' contentions in their brief (Part D, pp. 19-21; Part II, 21-25) and in oral argument that they were excused, relieved or exempted from complying with Section 2, First and Second of the Railway Labor Act because of the ICC's approval of the Burlington Northern-Frisco merger.

Indeed in light of the significance of the arbitration award to the posture of the appeal before this Court, plaintiff-appellant would be most willing to brief the issue of the effect of said arbitration award should the panel desire such briefs.

Very truly yours,

Kenneth E. Rudd

KER/tlt
Enclosure

cc: Thomas J. Knapp
Atty. for Defendants-Appellees
w/enclosure