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OF RAILWAY CARMEN

ICC FINANCE DOCKET NO. 28490

JOSEPH A. SICKLES, ARBITRATOR

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PROCEDURAL BACKGROUND

This is an arbitration pursuant to Section 11 of the New York Dock II Labor Protective Conditions.¹ These conditions were imposed on the Carrier, the Butte, Anaconda, and Pacific Railroad (hereafter the BA&P) in Interstate Commerce Commission Finance Docket No. 28490. In June 1985, the Carrier and the Brotherhood of Maintenance of Way Employees' Union (hereafter the BMWE) appointed neutral Joseph A. Sickles to hear the dispute between the parties regarding the application of the protective conditions. The first pre-hearing conference in this case was held on August 20th, 1985. On September 5th, the neutral and representatives from both the Carrier and the BMWE signed an order setting forth the manner in which the proceeding was to go forward. On September 16, the BMWE filed a motion in which it requested that the arbitration claims of two other organizations, the Brotherhood of Railway Airline and Steamship Clerks (BRAC) and the Brotherhood of Railway Carmen of the U.S. and Canada (BRC) be joined with the pending claim of the BMWE. By document dated September 30th the Carrier formally agreed to the motion to consolidate the claims of BRAC and BRC with the pending claims of the BMWE.² The Organizations were represented jointly by counsel.

Pre-hearing submissions were filed by all parties in March 1986 and a pre-hearing conference was held on March 19th, 1986. The hearing was held on November 4th and 5th, 1986 in

Anaconda, Montana. The parties were represented at the hearing, and were given an opportunity to present arguments and offer written documents into evidence. A transcript of the hearing was provided to the parties and the neutral. Post-hearing submissions were filed with the neutral in March 1987. At the time of the hearing the parties also submitted as part of the record in this case the entire record of the arbitration regarding the application of New York Dock conditions to employees of the BA&P represented by the United Transportation Union. That record included pre-hearing correspondence, transcripts of the hearing, exhibits, post-hearing briefs, the individual files and claims of the employees involved and various other documents which the arbitrator addressed to the parties in that case. The decision in that case will be discussed below.

HISTORICAL BACKGROUND

The BA&P was incorporated in 1894. It was built primarily for the purpose of transporting copper ore from the mines in Butte, Montana to the smelter in Anaconda, Montana (a distance of approximately 26 miles) and transporting copper anodes and other mineral products of the smelter in Anaconda to the lines of other carriers, who in turn hauled copper and related products to the refinery in Great Falls, Montana. Sometime prior to the early 1970s, all the stock of the BA&P was acquired by the Anaconda Company, a Montana corporation. The

Anaconda Company also owned Toole Valley Railroad (TOV) located in Utah, but the two railroads had no connecting lines.

On January 12, 1977, Atlantic Richfield Corporation (ARCO) purchased all the shares of the Anaconda Company. As a subsidiary of the Anaconda Company, the BA&P was part of this acquisition but the railroad's assets represented only a small part of the purchase price. Pursuant to 49 U.S.C. 11343, the acquisition of the BA&P required approval from the Interstate Commerce Commission (ICC).³ Immediately following ARCO's acquisition of Anaconda, BA&P stock was held in an independent voting trust, pending ICC approval. On January 17th, 1978, the ICC approved the acquisition of the BA&P by ARCO and the independent voting trust was terminated. In its Order the ICC imposed what is commonly referred to as the Oregon Shortline Labor Protective Conditions. The following year the ICC developed a new standard of labor protective conditions referred to as the New York Dock conditions. In 1980 ICC Docket No. 28490 was re-opened, along with seven unrelated dockets, and amended to impose the New York Dock conditions.

NEW YORK DOCK CONDITIONS

As indicated previously, the ICC in its original order in Finance Docket No. 28490, imposed Oregon Shortline Labor Protective Conditions on the Carrier. Subsequently, the ICC

imposed the New York Dock conditions. That set of labor protective conditions is based on the ICC decision in New York Dock Railway - Control - Brooklyn Eastern District Terminal, Finance Docket No. 28250 (February 9, 1979). In that case, the ICC stated

"We feel that the level of protection developed here and set forth in Appendix III to this decision represents a fair arrangement meeting the minimum requirements of 49 U.S.C. 11347 [formerly Section 5(2)(f) of the Act], and appropriate for imposition in this proceeding as well as other proceedings involving rail carriers arising under 49 U.S.C. 11347 et seq. . . .

Appendix III provides, in pertinent part, as follows:

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions.-(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "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.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the

date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

11.(a) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

PREVIOUS AWARD ON THE PROPERTY

In February 1982 the United Transportation Union (UTU) requested arbitration under the New York Dock provisions for losses suffered by employees represented by that organization as a result of changes in operations. Those changes were allegedly caused by the acquisition of BA&P by ARCO. Under the provisions of Section 11 of New York Dock, the National Mediation Board appointed Jack W. Cassle to be the neutral member of a panel to hear that dispute.⁴

In June 1983, the UTU and the Carrier met with neutral Cassle in a pre-hearing conference. Shortly thereafter, at the request of the neutral the UTU set forth fourteen specific "incidents" which it claimed adversely affected UTU members.

The incidents were labeled (a) through (n). Those fourteen incidents became the basis for an order delineating the issues which the neutral considered to be of "primary importance" and, thus, the basis for UTU's case at the subsequent hearing.⁵

At the conclusion of the UTU's case, the Carrier moved to dismiss all claims on the theory that the UTU had failed to establish a prima facie case that the acquisition of the BA&P by ARCO had caused any of the fourteen incidents. In ruling on the Carrier's Motion to Dismiss the neutral found as follows

"1. That the Motion to Dismiss [of] the Carrier relative to the issues raised in Paragraphs 1(a), (c), (d), (e), (f), (g), (h), (i), (j), (k), (m) and (n) should be denied.

"2. That the Motion to Dismiss of the Carrier as it relates to Paragraph 1(b), should be granted, based upon the failure of the Organization to establish a sufficient causal nexus between the acquisition of the Carrier by ARCO under the above-referenced Finance Docket and the change of working conditions (moonlight prohibition) resulting from the Operational Bulletin dated August 26th, 1977.

"3. That the Motion to Dismiss of the Carrier as it relates to Paragraph 1(l) should be granted, based upon the failure of the Organization to establish a sufficient causal nexus between the acquisition of the Carrier by ARCO pursuant to the above-referenced Finance Docket and the leasing of Track Number 6 (Burlington Northern)."

Thus with respect to the large number of incidents argued by the UTU, the Carrier's Motion to Dismiss failed. The Carrier then went on to present rebuttal evidence in an effort to prove that economic conditions in the copper industry, as well as accidents, created the adverse effects.

On September 26th, 1984, neutral Cassle issued a document which was subsequently signed by the UTU member of the panel. The Carrier member wrote a separate dissent. Portions of the majority opinion will be quoted here. At the hearing the Carrier had framed the issue of the case in the following manner:

. . . the important part of our case will focus on the aspect of our case that is legally significant to the resolution of the issues presented here, and that is the causal nexus between the new ownership of the Anaconda and its subsidiary, the BA&P Railroad, and the subsequent events that resulted in the manpower reductions on that railroad. That is, whether or not the events that resulted in the manpower reductions were made, "pursuant to" the ICC approval of the merger in January of 1978 . . .

The UTU had phrased the issue as follows:

. . . the contention of the Organization in this case is that the word "transaction" defines a situation or situations where events occur which cause loss of earnings or loss of job opportunities of BA&P employees, particularly UTU operating employees, and those events which directly resulted from the acquisition of the BA&P by ARCO. In other words to phrase the question in the manner that the Carrier doesn't seem to like would these adverse effects have occurred but for or except for the acquisition of the BA&P by ARCO.

After discussing the statutory scheme controlling acquisitions of railroads, the award found that the Carrier and the UTU had agreed that the acquisition of the BA&P by ARCO was "a transaction" within the meaning of the New York Dock conditions, and that, if employees of the BA&P were effected by such transaction, they were entitled to New York Dock benefits. The award went on to find that in order to determine

if BA&P employees were effected by the agreed upon transaction, it was "imperative" to examine the circumstances surrounding the application for ICC approval. The award then describes and quotes from presentations made by management officials of Anaconda and BA&P to employees concerning ARCO's acquisition. For instance, in July 1976, the company distributed a letter in which management officials claimed that a merger with Atlantic Richfield would be in the best interest of [Anaconda] employees.

The award states:

"The BA&P in its presentation, has sought to avoid payment of New York Dock II benefits on the theory that the reductions in work force subsequent to the acquisition of the BA&P occurred solely in response to changes in the economy of the copper industry and that such reductions were not related in any way to the acquisition which constituted an agreed upon transaction. Such a position is without merit in light of the above-cited applicant's submissions to the ICC and the reasonable conclusions and expectations to be drawn therefrom.

. . .

"The applicants voluntarily provided for employee protection by the statements and representations contained in their application agreeing to the imposition of conditions which extend benefits to employees who will be affected. It is therefore irrelevant that the employees were effected by economic factors which arose subsequent to the acquisition.

"In essence the issue to be determined by this neutral is in the nature of contract interpretation. The applicants, by their notices and announcements to the BA&P employees and to the public, and by their representations to the I.C.C. in their application formed a contract. There was an express contract formed between the applicants and the I.C.C. at the time of the January 17th, 1978 order. There was an implied contract formed when the UTU relied upon the

statements in the application and did not object to the application in which ARCO and Anaconda voluntarily conditioned approval upon the imposition of employee protection benefits.

"The terms of the expressed representation by the applicants relating to employee protection are clear and unambiguous. The question becomes one of application of such provisions to the present situation.

"Changes in economic conditions are foreseeable to such a degree that it is reasonable to impute knowledge of such factors to the applicants in this case. It is inconceivable to this Neutral that the applicants, with their vast collective knowledge of the world mineral market and the analytical resources available to them, could not have foreseen at least a possibility of the decline in copper production and the resulting effect on the employees of the BA&P at the time they made the affirmative representations of "no adverse effect". It does not strain at reason in the specifics of this transaction to find that the purpose of the provision for employee protection benefits as a condition of approval was to protect those employees who were effected by such economic factors. This Neutral cannot reasonably conclude that the statements of the applicants in their application for approval of this transaction were made as a meaningless gesture or put forth in bad faith.

"It is not a proper defense for the BA&P to claim that under its prior ownership or under other, less financially stable ownership, the effects of the economic downturn on the employees of the BA&P would have been more drastic. No person or entity other than ARCO and the Anaconda Company represented admitted to and contracted with the I.C.C., the BA&P employees and the public that the employees of the BA&P would be protected and not adversely effected. No person or entity other than ARCO and the Anaconda Company was granted the right to acquire the BA&P based on such condition."

In the dissent, the Carrier member noted that virtually none of the evidence adduced at the hearing was discussed in the award. Rather the neutral along with the UTU member relied on ARCO's ICC application and the representations included in this application. According to the dissenting Carrier member

"The question was: Was it the merger itself that affected the employees, or were the effects from other subsequent causes? This was the "Causal Nexus" issue which was at the heart of the proceeding. It was argued and referred to extensively by the parties and the Neutral throughout. However, for some unexplained reason the Neutral, in writing his award, does not even refer to this basic issue." (footnote omitted)

At a later date the Neutral and the UTU member issued a Nunc Pro Tunc Order. In this Order the panel found that the January 17, 1978 Order of the ICC was a "transaction" and the panel found that a direct causal connection existed between this "transaction" and the job reductions and changes complained of by the claimants before the panel. The panel then specifically found that employees who had been affected by these job reductions and changes were entitled to receive New York Dock benefits.

POSITION OF THE PARTIES

Since 1980, when UTU first filed for arbitration under New York Dock, the form of the issue(s) to be resolved has been constructed in various ways. Nevertheless, the parties here have consistently recognized that the primary issue is whether adverse affects on employees have been caused by the transaction to which the ICC gave approval, thereby creating liability under New York Dock. Following the pre-hearing conference in September 1985, the Organizations identified the issues which it believed should be decided by this panel. Those issues were stated as follows:

1. The Organizations restate their position that this panel should not relitigate or decide any issues already decided by Jack Cassle in the previous arbitration held between the BA&P and the United Transportation Union. These issues include:

a. A decision that the merger of the Anaconda Company and ARCO with the resulting acquisition of ownership and control of the BA&P was a "transaction" which triggered New York Dock benefits to all employees of the BA&P.

b. A decision that as to issues 1, 2, 3, 4, 7, 8, 11, 13, and 16, listed above, a causal nexus (causal connection) existed which resulted in adverse effect to employees of the BA&P.

2. The members of the Organizations should be required to identify the pertinent facts of the transaction relied upon. This includes operational incidents which directly flow from the transaction but no duplication should be required for those issues already decided by Jack Cassle to adversely affect all employees of BA&P.

3. The burden of proof in this case is on the Carrier, not the Organizations, to show that something other than a transaction (or an operational incident flowing from a transaction) caused adverse effects to the employees.

4. The real issue is the amount of benefits payable under New York Dock to each member of the Organizations involved before this panel. Basically, liability has been established under the awards of Jack Cassle and only damages remain to be determined.

A short time later the Carrier responded with its own list of issues to be litigated:

1. With regard to the operational incidents listed in the Organization's document, the Carrier, while acknowledging the statement of same, submits that the only relevant incident and transaction in these proceedings is Item No. 1, i.e., the merger between ARCO and the Anaconda Company approved by the ICC effective February 15, 1978, which resulted in a change in the ownership of the BA&P railway.

2. The Carrier believes that the following issues are to be litigated by the Arbitrator:

a. Whether or not the merger between ARCO and Anaconda Company which resulted ~~in a~~ change of ownership of the BA&P Railway Company and which was approved by the Interstate Commerce Commission (ICC) effective February 15, 1978, is the only relevant incident that is a "transaction" which would trigger New York Dock II benefits:

b. Whether or not there is a causal nexus between the transaction in question (i.e., ICC approval of the change in ownership on February 15, 1978) and any adverse effects to employees (as that term is defined in Appendix III, New York Dock II) that may have subsequently occurred after 1980.

1. Whether or not any adverse effects to employees that may have subsequently occurred to employees in 1980 and thereafter were caused by the economic, technological and operational changes that were necessitated in response to copper mining and copper industry conditions that occurred after the merger, and the loss of business of the Carrier as the result of these conditions.

c. Whether or not the organizations and their members have properly identified pertinent facts of the relevant transaction relied upon to establish a causal connection between said transaction and adverse affects upon their employment.

d. Whether or not the decision of Jack Cassle in a separate arbitration proceeding is res judicata or otherwise binding upon Arbitrator Sickles in these proceedings, it being the position of the Carrier that this Arbitrator is not bound to follow the decision of Jack Cassle as to any issues decided by him in another proceeding.

e. The burdens of proof of the respective parties.

f. Whether or not individual claimants were in fact adversely affected in their employment, by the transaction in question or otherwise.

g. Whether or not each individual claimant who may show an adverse affect upon employment is further eligible for New York Dock benefits in each individual case, and if so, whether or not

certain limitations upon New York Dock benefits (death, retirement,--etc.) apply in any individual case.

1. The dollar amounts, if any, to which any individual claimant is entitled if the claimant successfully establishes that the transaction triggered New York Dock II benefits.

In its pre-hearing submission, the Carrier summarized its questions as follows:

1. Are the New York Dock II employee protective conditions imposed in Finance Docket No. 28490 (Atlantic Richfield Company and Anaconda Company-Butte, Anaconda & Pacific Railway Company and Toole Valley Railway Company) imposed by the order of the ICC on May 14, 1980 (Appendix "C") pursuant to a previous order of the ICC on January 17, 1978, approving the acquisition of the Carrier by Atlantic Richfield Company (ARCO) (Appendix "B"), applicable to a number of events which occurred several years later when the railroad made certain changes in business operation in response to the inability or failure of the Carrier's primary customers (the Anaconda Company and Anaconda Minerals Company) to utilize the Carrier's facilities, thereby resulting in a loss of railroad business?

2. What is the effect of the so-called Cantrill Agreement, signed on September 30, 1981, by BMWE and BRC (Appendix "D") and signed on November 6, 1981, by BRAC (Appendix "E") between the parties as to the applicability of New York Dock II benefits to those events and occurrences that occurred prior and subsequent to that agreement.

3. The sale of the BA&P, in part, to the State of Montana, and the sale of the rest of BA&P assets to Rarus, Inc. (ICC Finance Docket 30640, Appendix "F"). This transaction, as approved by the ICC, does not contain any provision for job protection.

DISCUSSION

Although the parties have listed disparate issues for resolution, there is consensus between the parties and the

neutral on the central issue here - whether or not the acquisition by ARCO (which the ICC approved) caused any employees to be displaced or dismissed as those terms are defined in New York Dock. Were this the first hearing on this issue on the property, the decision here would simply proceed to identify the events which led to the displacement or dismissal of employees and then analyze whether those events were triggered (or caused by) the acquisition. But as discussed above, this Finance Docket has once before been the source of arbitration under the the New York Dock provisions. This background necessarily raises the following question: What weight is to be given the Cassle award?

The Organizations have argued that the Cassle award is dispositive of virtually all questions of liability. The Carrier, on the other hand, argues that no effect should be given to that award. In its submission, the Carrier argues that previous arbitration awards are not binding precedents, citing Professors Elkouri and Elkouri.

"While prior awards have authoritative force in some situations, the great mass of awards are considered to have persuasive force only (footnote omitted). Nothing is settled by saying that prior awards do or do not have the force of precedent. Rather, it is essential that one recognize that the precedential force of prior awards always is a question of degree. The range is broad, including prior awards that have absolutely no persuasive force, through those with varying degrees of persuasiveness, to those which are binding in future like cases. (emphasis added) The dividing line cannot be drawn with finality, just as the line between authoritative force and persuasive force cannot be established

absolutely. Confusion is avoided by remembering that it is only a question of degree in each particular case"

Elkouri and Elkouri, How Arbitration Works, B.N.A., fourth edition, 1985. Cited at Carrier's pre-hearing submission, page 46.

The case before this panel certainly must be considered a "like case" given the concordance of issues, facts and a common party. However, to find where the case falls on the continuum described by Elkouri above, examination must be made regarding the nature of the earlier proceeding and award. Specifically, (1) what issues were presented to the Cassle panel, (2) what evidence was presented, and (3) what did the panel decide.

1) The issue put before the Cassle panel: Both parties before the Cassle hearing considered the primary issue to be the relationship, or nexus, between the acquisition of the BA&P by ARCO and adverse effects on the employees represented by UTU. (see quotes, supra.)

2) The evidence before the Cassle panel: As indicated previously, the Organization listed 14 incidents which, it contended, arose as a result of the acquisition and which resulted in adverse effects. The precise content of the evidence will be discussed below. At the conclusion of the UTU case, the Carrier moved to dismiss. The Carrier prevailed on

two issues, but the motion was denied as to the 12 others. The Carrier then presented rebuttal evidence.

3) The decision of the panel: The Organization clearly prevailed before the Cassle panel but there was some ambiguity as to the ratio decidendi of the award. The Organizations here claim that the Cassle panel examined the evidence and decided that the each incident listed had created adverse affects. In support, the Organizations point to the Nunc Pro Tunc Order signed several months after the award. The Carrier, on the other hand, notes that the award itself discusses no specific evidence but, rather, discusses at length the statements made in the application of ARCO and the Anaconda Company to the ICC and finds that "the question then becomes whether such representations and the subsequent grant of authority to acquire the BA&P conditioned thereon are sufficient to form a basis for extending New York Dock II, Appendix III, benefits to UTU members employed as of February 15, 1978."

Although the Cassle award would appear to be at least of persuasive force, after examination of the entire record, this panel must reject the use of that award as having a res judicata effect here. Starting with the decision itself, it is impossible to determine the basis for the panel's jurisdiction to enforce statements made in the acquisition application. If, indeed, such statements are enforceable, some forum other than a Section 11 arbitration panel must be found to obtain relief.

Section 11 establishes the parameters of the dispute, and as far as can be determined every arbitration decision which has arisen under Section 11 has confined itself to that area: did or did not the transaction approved by the ICC result in the displacement or dismissal of employees. With respect to this specific question, the Organizations argue that the Cassle panel answered that question in the affirmative: first in the order denying in part and granting in part the motion to dismiss, next in the award itself, and finally, expressly in the Nunc Pro Tunc Order. One cannot deny that on the face of those documents, the panel stated that a causal nexus had been found but no reasoning, explanation, examination or analysis was provided. Thus, there is no way to know whether the panel examined the evidence on both sides, rated its credibility, and applied the body of case precedence to the facts to reach its conclusion. The panel here has no record before it as to what facts neutral Cassle found pertinent to each of the 14 incidents (including the two dismissed at the conclusion of the UTU's case), or the weight that was accorded each side's evidence. Thus, the weight that will be accorded to the Cassle panel award will be limited to the facts found and articulated.

The remainder of this award then will address the following points:

- A) The structure of BA&P prior to the ICC order and after ICC approval of the ARCO acquisition.

B) The evidence presented regarding the incidents common to the UTU and the Organizations here.

C) The evidence regarding the issues exclusive to the Organizations here, including the evidence regarding the copper strike of 1980, and

D) A discussion of the application of the body of law under New York Dock to the evidence described above.

A) THE STRUCTURE OF THE BA&P PRIOR TO THE ICC FINANCE
DOCKET NO. 28490 AND AFTER ICC APPROVAL OF THE ARCO
ACQUISITION.

As discussed above the Butte, Anaconda, and Pacific Railway Company had previously been a wholly-owned subsidiary of the Anaconda Company. The Anaconda Company was acquired in its entirety by ARCO, which initially converted it into a wholly-owned subsidiary and later into an operating division of ARCO. ARCO is a company that was incorporated in 1870 and since that time has been engaged primarily in the exploration for, and the development, production and marketing of natural gas and petroleum, and the products derived therefrom, including petrochemicals. In its application to the ICC, ARCO declared that its acquisition of the Anaconda Company provided it with the opportunity to diversify its activities into non-ferrous metals. ARCO owned no other railroad.

Prior to the acquisition of the Anaconda Company by ARCO, the Anaconda Company had been the target of takeovers by other companies. There was testimony and documentary evidence presented before the Cassle panel on the reasons for the purchase of Anaconda and the likely consequences of successful bids by other companies, such as the Crane Company and Tenneco. Suffice it to say that Anaconda was suffering dire financial problems in the mid 70s, but it sought a "friendly" take over. ARCO was considered a "friendly" purchaser in part because it appeared to have the most substantial resources to assist Anaconda in its financial problems. Indeed ARCO's intention to bolster up Anaconda was the basis for a lawsuit by the Federal Trade Commission opposing the "merger" between ARCO and Anaconda. Because ARCO had publicly stated that it planned to spend over one billion dollars to improve Anaconda's competitive position the FTC claimed that the proposed "merger" between the two companies would substantially lessen competition and unreasonably restrain trade in the production and sale of uranium oxide and refined copper and also in copper mine production. The FTC was unsuccessful in its attempt. The acquisition, or merger, went through and ARCO became the sole owner of the former Anaconda Company, as well as of the BA&P.

In the hearing before the Cassle panel the President and General Manager of the BA&P, Mr. John W. Greene, testified regarding the history of the railroad and the administrative functioning of the railroad prior to ARCO's involvement. As

President, Mr. Greene operated with his own Board of Directors, all of whom were local businessmen. In dealing with the Anaconda Company, Mr. Greene and his staff reported directly to the mining operations group of Anaconda. The railroad handled its own payroll, paid its own bills, charged its customers, including Anaconda, for the service that was provided and paid dividends on BA&P stock. With respect to capital expenditures, Mr. Greene testified that with one exception BA&P financed all its own capital expenditures. Operating expenses (such as upgrading of track) came out of BA&P revenues. Finally dividends on BA&P stock was paid to Anaconda, until the first quarter dividend of 1982 when dividends were paid to ARCO.

According to Mr. Greene, there was no change in the equipment, facilities or personnel of the railroad following the acquisition by ARCO.

The resources of the railroad improved somewhat following the acquisition. Mr. Greene testified that after ARCO's purchase, he made requests to Anaconda for money for certain capital expenditures and those requests were approved. For instance, in 1976, prior to the purchase, BA&P had a capital budget expenditure of under \$200,000. The following year the railroad was able to acquire a new locomotive as well as some other expenditures totalling almost \$700,000. In 1978 there was another increase. In 1980 the railroad bought a new caboose as well as 45 hopper cars and, in 1981 a new axle lathe

for repair and maintenance of railroad equipment. In sum, it was Mr. Greene's testimony that it was as a direct result of the acquisition by ARCO that capital expenditures were made possible for the years 1977 through 1983. This increase in capital expenditure for the BA&P apparently followed the same type of expansion that occurred in other parts of Anaconda immediately following acquisition by ARCO. According to a certified public accountant who testified on behalf of the Carrier at the Cassle hearing, ARCO loaned Anaconda 545 million dollars within the first three years, almost eighty percent of the original purchase price of 688 million.

Other than financial assistance, initially in the form of loans, ARCO apparently took no part in management of Anaconda affairs. The Carrier presented testimony that no ARCO official was involved in day-to-day operations of either Anaconda or the BA&P. Moreover, no ARCO officials were placed in key executive positions at either Anaconda or BA&P. The decisions to make changes - such as contracting out trucking - did not require ARCO approval. It is not even clear from the record whether the major capital investments in the new lime kiln and dryer required ARCO approval; there is no evidence at all that ARCO officials were familiar with the projects either before or after their completion.

B) THE EVIDENCE PRESENTED REGARDING THE INCIDENTS COMMON
TO THE UTU AND THE ORGANIZATIONS HERE-

In the proceeding before this panel, the Organizations argued that several of the incidents heard by the Cassle panel also affected employees of the organizations here. As indicated above, the UTU originally listed these events in a pleading filed early in the Cassle proceedings. That list was ultimately used as the format for introducing evidence at the hearing before neutral Cassle and in the submissions in this proceeding. The list is composed of various types of events which fall into three categories: the original transaction, events which led to reduction in work and events which led to the dismissal of employees.

1) The Original Transaction:

THE MERGER BETWEEN ARCO AND THE ANACONDA COMPANY WITH THE
SUBSEQUENT ACQUISITION OF CONTROL AND OWNERSHIP OF THE
BUTTE, ANACONDA AND PACIFIC RAILWAY - Item (c) before
Cassle.

As indicated in footnote 4, the Carrier initially denied the existence of any "transaction" and, apparently that is why the UTU listed the original transaction as an incident. It is now agreed by both parties that the above described transaction gives rise to jurisdiction under New York Dock but that

ultimate liability exists only if the transaction caused adverse effects. In its presentation before the Cassle panel, UTU submitted approximately 30 separate documents relating to the history of ARCO's acquisitions of Anaconda (e.g., reassurances given to Anaconda and BA&P employees regarding ARCO's sound financial condition; the method in which ARCO and Anaconda sought ICC approval of the acquisition of the BA&P; the written application made to the ICC and the ICC's imposition of labor protective conditions more "generous" than those offered by the Carrier). The exhibits relating to this "cause of action" also contained a 1981 notice from ARCO explaining that the Anaconda Company was being merged into ARCO as an operating division effective January, 1982.

2) Events which led to reductions in the amount of BA&P traffic, resulting in the loss of work for BA&P employees:

GREYROCK TRUCKING FIRM TAKING OVER HAULING OF THE
LIMEROCK - Item (a) before Cassle.

In the proceeding before the Cassle panel, the General Chairman of UTU testified regarding the transportation of limerock from the lime quarry west of Anaconda to the tipples at the smelter. He testified that the BA&P had initially been the sole method of transportation but at some point a trucker named Nick Laslovich began to move some limerock. The UTU introduced documents purporting to show that as of 1976 rail costs were

less than trucking costs. The UTU also placed in the record a 1979 letter to the manager of business and administration of the Anaconda company. That letter read in part:

"You will recall that starting on or about December 1, 1978 the BA&P railroad had anticipated getting back into the limerock movement from Brown's to the East Anaconda Tipple for bulk conveying of material to Smelter Lime Kiln No. 2. With the disastrous fire that occurred November 19, 1978, causing extensive damage and ruin to the conveyor system, this was the end of rail haulage to the Tipple.

"I feel confident that the BA&P, based on a large volume of this traffic, would be in a position to negotiate a competitive rate that would be as attractive or future truck haulage costs for movement of limerock. At times we received 'grapevine feedback' from Smelter officials to the effect that 'BA&P limerock rate is too high.' In each case recently called to my attention, I have been telling these gentlemen that simply because a railroad has published tariff rates on certain commodities, there is nothing to prevent a Carrier from sitting down with shippers and negotiating a more attractive rate based on volume of traffic.

"Finally, it occurs to me that should the railroad recapture limerock traffic at some time in the future, P&L should soar to a rather high profit figure, a year-end dividend in favor of the principal stockholder could be declared."

The Organizations also introduced evidence showing that the Anaconda Company material assisted a company called Greyrock Trucking in securing the work of hauling limerock. Specifically the Organizations submitted an application to the Montana Public Service Commission filed by the Greyrock Trucking Company to secure the work of hauling limerock, filed at about the same time that the ICC approved the acquisition of the BA&P by ARCO. Anaconda supported the Greyrock application. The Organizations note that hauling of limerock

was not work that was lost because of a downturn in the copper industry; the work remained but it was handled by employees other than the BA&P. Limerock was now hauled by employees of the Greyrock Trucking Company. Moreover, the Organizations here claim that, along with the incidents that follow, loss of work in the Operating Department created less need for section work, car repairs and clerical assistance.

BUTTE HILL DIVERTED TO TRUCKS - Item (f) before Cassle.

According to the testimony of the UTU Chairman, the Rocker Yard crew hauled supplies, such as acids and nitrates, to Butte Hill as late as 1976. The BA&P stopped hauling to the Hill completely in 1980. The UTU suggested the work was given to trucks driven by Anaconda employees.

TRUCKS HAULING "PRECIPS" TO THE BUTTE DRYER - Item (g) before Cassle.

Prior to 1980, BA&P road and yard crews were used to haul "precips" from the plant to either the stock bins or the coal pile. ("Precips" have been described as cans of copper as in leaching solutions.) In 1980, the dryer was moved to within the confines of the concentrator complex (apparently not accessible by rail). Thereafter, trucks were used for hauling and all roadwork was eliminated, though some yardwork remained.

THE INCIDENT INVOLVING TRACK NO. 1 AT THE COAL PILE - Item (h) before Cassle.

Historically, BA&P employees had switched the tracks between the coal pile, stock bin and the Smelter, a distance of approximately 1 and 1/2 miles. The UTU claimed that in 1979, Anaconda employees began assuming that work and by 1981, the BA&P had no crews working in this area.

THE DIVERSION OF CHLORINE USED FOR CITY WATER SYSTEM TO TRUCKS - Item (i) before Cassle.

Prior to 1981, BA&P crews were used to take cars of chlorine for the water system from the Rocker Yard into Anaconda and then return the empty cars. After 1981, this work was handled by trucks.

BURNT LIME INCIDENT - Item (j) before Cassle.

Starting in the 1960's, milk of lime was produced in Anaconda and BA&P crews would haul the milk of lime to the Butte concentrator. When a slaker was built in Butte, instead of hauling milk of lime from Anaconda, lime was hauled directly to Butte. By 1982, only trucks hauled lime.

INCIDENTS INVOLVING SWITCHING AND WEIGHING CARS - Item (k)
before Cassle.

In addition to the loss of particular road and yard work mentioned above, the UTU contended at the hearing before the Cassle panel that the switching and weighing was reduced when trucks assumed more of the work that was formerly handled by BA&P.

3) Events which directly led to the dismissal of BA&P employees:

CONSOLIDATION OF ARCO EMPLOYEES - Item (e) before Cassle.

At the Cassle hearing, the UTU submitted documents regarding an across-the-board layoff of Anaconda employees that occurred in January, 1980. A memorandum from the President of the BA&P indicated that about 10 percent of Anaconda's workforce in Montana was to be affected: 200 positions at the Butte Operations, 100 positions at the Anaconda Smelter, 45 positions at the Great Falls Copper Refinery, and 15 positions on the BA&P.

The Organizations here contend that when this manpower reduction was implemented, both operating and non-operating employees were adversely affected. The Organizations claim

that it was at the parent company's direction that BA&P was hit with layoffs, since BA&P's revenues were actually up at this point. While the Organizations' claim that furloughs were made specifically at ARCO's direction, it must be noted for the record that the only name that appears in the documents is "Anaconda"; the name ARCO is not mentioned.

THE MOVEMENT OF THE DRYER AND LIMEKILN TO BUTTE IN
1982 - Item (d) before Cassle.

The UTU claimed that this incident had the most serious impact on UTU. The UTU presented the background in the following manner: In September 1979, an official of the Anaconda Company circulated a memorandum which read, in part:

Recent studies on the utilization of lime in Montana for metallurgical and environmental requirements indicated that major changes in lime production facilities must be made to provide lower operating costs. Related costs impact on lime rock availability, lime kiln operations, receipt, storage and transport of rock and product.

Since the costs are interrelated to operations at Anaconda Reduction Department, the Butte Anaconda & Pacific Railroad and to Butte Operations continuation of study effort to develop budgetary costs on alternatives will be undertaken by Denver engineering.

The attached Scope of Work is provided for your review and modification.

The "scope of work", or proposal, listed four study items: converting and modernizing the Number 2 Kiln at Anaconda, construction of a new lime plant at the limestone quarry site,

construction of a new lime slaking facility at Butte and construction of drying facilities at Butte. Upon receipt of the memorandum, the President of BA&P formed a committee to study each of the option's impact on BA&P operations. The committee promptly reported back that certain of the options would have a serious impact on the railroad's operations.

Until this time, lime kilns had always been in Anaconda. Lime products from the kiln would be transported to the concentrator in Butte in the form of milk of lime. When a new lime kiln was ultimately built in Butte in late 1981, the UTU no longer performed any transportation or weighing of this product. Moreover, the concentrate drying facilities in Butte drastically reduced the need for slurry cars to haul copper slurry from the concentrator to the Smelter back in Anaconda.

"THE ELIMINATION OF REGULAR ASSIGNMENTS AS A RESULT OF OPERATIONAL BULLETINS DATED FEBRUARY 1, 1982 AND FEBRUARY 3, 1982." - Item (n) before Cassle.

The Organizations here note that similar operational notices were sent to employees of the BMWE, which made members of that craft "extra" employees in exactly the same fashion as the UTU notices dated February 1 and February 5, 1982. The notices sent to the BMWE employees will be discussed below; for

purposes of comparison, the notices sent to UTU employees in 1982 are quoted below.

**"TRANSPORTATION DEPARTMENT
NOTICE**

February 1, 1982

All Concerned - Transportation Department:

On account of substantial loss of business to the Butte, Anaconda and Pacific Railway Company, all bulletined good positions and mark up boards within the operating Transportation Department - Anaconda switching district are hereby cancelled at the end of shift, Monday, February 1, 1982.

Any jobs required after this date will be called as needed, on an extra basis.

G. J. Allen
Superintendent of
Transportation"

The second notice read:

**"TRANSPORTATION DEPARTMENT
NOTICE**

February 5, 1982

To All Transportation Department Personnel:

On account of substantial loss of business to the Butte, Anaconda and Pacific Railway Company, Rocker Trademen's markup board and yardmaster bid are hereby cancelled at the end of shift, Monday, February 6, 1982.

Rocker jobs required after February 6, 1982 will be called as needed, on an extra basis.

G. J. Allen
Superintendent of
Transportation"

C) THE EVIDENCE REGARDING THE ISSUES EXCLUSIVE TO THE
ORGANIZATIONS HERE

THE 1980 COPPER STRIKE

In addition to the general reduction of work described above, the organizations here argue that certain specific incidents led to the abolishment of permanent job assignments for employees represented by BMW, BRC, and BRAC. Workers at the Anaconda Company went on strike in July 1980. This was the first strike against Anaconda since ARCO had acquired the company in 1976. The strike lasted until November of 1980. When copper production halted, the BA&P had virtually no business and the carrier announced general force reductions. Employees whose service might be required would work on an "extra" basis. It appears that ten of the eighteen clerks did work during the strike; however, apparently no maintenance or car repair employees worked during this period. When the strike was over, employees were recalled "as needed" to extra positions; regular job assignments were apparently posted five or six months later. Even then it appears that some members of the BMW were never removed from the "extra" classification. Moreover, when the strike ended, only ten of the eighteen clerks jobs were filled. Eight jobs were abolished and the functions merged into the remaining positions. Thus, not only did the employee roster change but the work load changed for those employees who did return after the strike.

According to witnesses for the Organizations who appeared at the hearing in this case, the posting procedure after the strike departed from what was done after previous strikes. It appears that strikes in the copper industry occurred with some regularity over the years and when previous strikes ended, the Organizations claimed, railroad employees were immediately recalled to work to return to their regular job assignments. This did not happen after the 1980 strike and the Organizations claim that any reductions in salary, or displacements, that occurred can be traced to the original transaction, ARCO's acquisition.

THE ELIMINATION OF REGULAR ASSIGNMENTS AS A RESULT OF
OPERATIONAL BULLETINS POSTED IN FEBRUARY 1982

On February 8, 1982 a notice was posted for all employees represented by BMWE. It read as follows

"N.W.&S. DEPARTMENT NOTICE

February 8, 1982

TO ALL M.W.&S. DEPARTMENT EMPLOYEES:

As a result of the reduction in main line rail traffic, section gang 3 will be discontinued indefinitely at the close of the work day February 12, 1982.

Affected personnel may exercise their seniority within remaining gangs as provided in rule 15(a&b).

D.M. Bisch
M.W.&S. Superintendent"

On February 22, 1982, a further notice was posted, terminating all department assignments permanently. That notice read as follows:

"NOTICE

February 22, 1982

TO ALL M.W.&S. DEPARTMENT EMPLOYEES:

With the completion of the copper concentrate handling facility and the utilization of a new milk of lime slaking process at the concentrator in Butte, BA&P rail traffic has diminished considerably and revenues have been drastically reduced. Therefore, a further forced reduction in the M.W.&S. Department is necessary. As a result, all M.W.&S. department bulletin assignments are hereby cancelled at the close of the work day Friday, February 26, 1982.

Employees whose services are required on an extra basis will be contacted.

D.M. Bisch
M.W.&S. Superintendent"

The BMWE points out that this notice, abolishing all department positions, is directly tied to Anaconda's moving the dryer and limekiln to Butte. This event was one of the incidents argued before the Cassle panel. The Organizations claim that the Cassle panel found that this operational incident directly flowed from the control transaction. Therefore, the Organization alleges that all members of the BMWE were eligible for New York dock benefits.

DISCUSSION

At the outset, it must be observed that section 11 (e) of Appendix III places the burden of going forward on the

employee: "it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon." In this case the Organizations have identified thirteen changes in operations that occurred after the transaction and that resulted in the displacement or dismissal of employees. The Organizations claim that in all thirteen cases ARCO's acquisition caused the change which led to the adverse affects. The changes in operations were of various types. For instance, the Organizations have shown that in 1980, after the strike against Anaconda, the carrier changed the way in which employees were recalled to service. The Organizations have identified a number of changes in operations where apparently other Anaconda employees took over work previously performed by the BA&P employees;⁶ in some of these changes, Anaconda truckers began hauling material previously hauled by the Carrier; in at least another situation, the railroad employees claim that Anaconda employees assumed work which had been within the BA&P jurisdiction (i.e., the incident at the coal pile and the loss of switching and weighing work). Other changes gave hauling work to an outside trucking company. This identification clearly satisfies the initial burden of going forward.

According to section 11 (e), once the employee has identified the transaction on which he relies, it "shall then be the railroad's burden to prove that factors other than a transaction affected the employee." In this regard, the

Carrier's witnesses and exhibits were directed toward showing the "business justifications" for each incident raised. For example, with respect to the increased use of the Greyrock Trucking firm, Mr. Greene testified that the tipple fire in 1978 was the primary cause of the loss of rail traffic. He testified that studies had shown that truck rates were cheaper than rail rates to any point on the smelter except the tipple. Once the tipple had been damaged, there was no available destination for rail cars since there were no rail tracks directly to the limekilns. Thus, either a dumping pit would have to have been constructed, or the tipple repaired at a cost in excess of a million dollars. Given this situation, Anaconda opted to rely exclusively on truck transportation of limerock to the kilns. Mr. Greene also described the business decisions which led to a reduction in work on Butte Hill: there had been a general decline in crews on the Hill since the 1960's and more rapid decline when mining operations stopped using acid. Mr. Greene also testified that a business decision was made to buy burnt lime from a source outside Montana at a lower cost and better quality than Anaconda could produce. Since there is no rail service between the supplier and the concentrator at Butte, the lime had to be hauled by truck. Finally, Mr. Greene testified that for a number of years the Anaconda Company had been considering more efficient ways of handling lime products. Historically, the railroad transported milk of lime, which is composed of one part lime to four parts water, to the concentrator in Butte. It was recognized as early as 1974 that

it would be more efficient for the railroad to haul dry lime, with the water added at the site of use. This change in operations required the construction of a silo to store the dry lime and a slaker to change it to milk of lime. According to Mr. Greene, these changes were contemplated prior to ARCO's acquisition but Anaconda Company did not have sufficient capital to make the changes. Similarly, hauling copper slurry was less efficient than hauling dry copper and recommendations were made that a dryer be built. Again, Anaconda was unable to act on the recommendation without the infusion of additional capital.

The Organizations' Submissions are replete with conclusory statements regarding ARCO's responsibility for the adversity that arose after the acquisition. For example, on page 96 of its Post Hearing Submission, the organizations referred to the arguments made before the Cassle panel. The submission states

"the UTU did not argue to the Cassle panel that ARCO could not make changes in its operation if it so desired. The argument merely indicated that if it chose to make these changes, it was committed to extend New York Dock benefits to BA&P employees who were adversely affected thereby.

On page 99 the Organizations argued that "ARCO can do with its other employees whatever it desires, but when it "adversely affects" its railroad employees, it is bound by the promises made to the ICC to supply to those railroad employees New York Dock protection. This same obligation did not apply to other workers in the copper industry who were not railroad employees."

The Carrier has argued that ARCO had no role in the changes. As indicated above, not only did the BA&P continue to function with the same management after ARCO's acquisition, but the parent company, Anaconda, functioned with the same management as well. Decisions of officials in the mining operations at Anaconda had a tremendous impact on BA&P employees. For example, the Carrier presented testimony during the Cassle proceeding that it was officials of Anaconda located in Butte who initially recommended the across-the-board layoff in January 1980. According to the person who was then the manager of open pit operations, no ARCO employee was involved in that decision.

The Organizations point out, quite correctly, that decisions to change operations were made by BA&P's primary customer as well as its owner. Thus, BA&P was essentially captive to the Anaconda company. In some instances management of BA&P attempted to hold on to as much traffic as possible. For instance, in April 1979 the President wrote to the Manager of Business Administration of Anaconda regarding "getting back into the limerock movement from Browns to the East Anaconda Tipple for bulk conveying of material to Smelter Limekiln No. 2." As the BA&P official noted in that letter

"with Anaconda Copper owning the BA&P railroad it appears to me that a workable arrangement that would be satisfactory to all concerned would certainly appear to be both economical and feasible...I feel compelled as manager of the railroad to document this particular business problem with the hope and thought that somewhere, somehow and some day, limerock traffic will return to rail movement where we feel it rightfully belongs."

In any event, the dispute does not turn on whether BA&P was a willing or unwilling participant in Anaconda's changes in operations. In the same way the fact that Anaconda made these changes for "business" or "economic" reasons is not dispositive of the question. What matters is a determination as to whether or not the ICC approval permitted the owner/customer here to make changes that would not otherwise have been possible. That is, were these changes made pursuant to the transaction authorized by the ICC.

In reviewing the precedent under New York Dock, as well as other labor protective conditions, the case that appears to be most analogous is Missouri Pacific Railroad Company and American Train Dispatchers Association, ICC Finance Docket Number 27773, decided in 1981.⁷ The facts of that case are as follows: For many years the Missouri & Pacific Railroad owned the controlling interest in a railroad called Texas & Pacific Railroad Company. In 1974 the Missouri & Pacific and the Texas & Pacific railroads filed an application with the ICC seeking approval for a merger. At that time both railroads had been operating as a unified entity for about 10 years. The ICC granted the merger and imposed New York Dock conditions. In 1981 the now merged carrier sought to consolidate dispatching functions, that were then performed at two locations in Texas, into a single location. The Association representing the potentially affected dispatchers filed for arbitration under New York Dock, identifying the issue as whether the

consolidation of the dispatching functions constituted an action taken pursuant to authorizations for approval of the ICC, thus making applicable the labor protective conditions imposed by the ICC. In other words, the question asked of the arbitration panel was whether the change in operations was an action taken pursuant to a transaction approved by the ICC.

In the Missouri Pacific case, the arbitration panel first found that the Carrier had the ability, prior to the ICC action, to open a new dispatching office. Nevertheless, the Association in that case argued that the consolidation was "pursuant to" ICC authorization because it was in accordance with, or consistent with the ICC's approval of the merger. The arbitration panel rejected that view finding that

"the Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue. Every action initiated subsequent to a merger cannot be considered, ipso facto, to be "pursuant to" the merger. There must be a causal connection. As it relates to the applicability of New York Dock II to a merger, such nexus is implicit in the term "pursuant to."

The arbitration panel then went on to find that the Carrier's decision to centralize its dispatching was a decision made independent of the ICC's merger approval. The Association member of the panel in that case filed a vigorous dissent; and that dissent is also useful here in understanding the causation required for New York Dock benefits. In his dissent the Association member was critical of the panel's reliance on the

Carrier's claim that it intended to consolidate the dispatching facilities prior to the merger. The Association claimed that consolidation could not have taken place until after the ICC's decision authorizing the merger. The Association member noted that separate schedule agreements existed and that

"the only way the carrier could effectively disregard these agreements and implement the consolidation is through the ICC's merger approval... Simply stated, other than the merger action, there is no other vehicle which permits consolidation of facilities operated by different railroads and governed by separate schedule agreements. The cause and effect relationship in these circumstances could hardly be more clear."

Thus, while the Association member disagreed, quite strongly, with the panel's decision, he recognized the need for cause and effect - that is, the consolidation of the dispatching offices would not have been possible but for the ICC's approval of the merger.

Returning to the case before us, is it possible to say that any of the events described by the Organizations were "caused" by ICC's approval of ARCO's acquisition? Framed differently, would any of the events have been possible when the BA&P was owned wholly by Anaconda, as it had been prior to ARCO's acquisition. The Organizations presented no rebuttal evidence whatsoever that Anaconda could not have legally taken any of the actions that were subsequently taken after ARCO's

acquisition. In other words, since Anaconda was both the employer and the customer prior to the acquisition as well as after the acquisition, Anaconda always had the power to change operations so as to shift work to other Anaconda employees, to outside trucking firms, or eliminate the work altogether. ARCO's acquisition did not empower the Anaconda Company with anything it did not have prior to the acquisition. When Anaconda became part of ARCO, ARCO had no greater legal ability to effect change than Anaconda had ten years earlier. ARCO did have greater resources and that is why certain changes were made (e.g., construction of the new kiln and dryer at Butte).

The Organizations presentation has been quite thorough and all inclusive. Nonetheless, despite the extent of the material submitted, we note the absence of any Award or authority (other than the Cassle Award) which would compel the conclusion espoused by the Organizations. That absence confirms our own independent view that no such persuasive authority exists.

We continually return to the rhetorical question of what would have occurred if ARCO had not purchased Anaconda. The record persuades the Undersigned that the employees of BA&P would have been unemployed within a very short period of time. There is nothing to suggest that the transaction, in any manner, caused or hastened the unemployment. In fact, it may

have even extended certain periods of gainful labor before the inevitable demise of the railroad operation.

AWARD

Claims Denied



Joseph A. Sickles
January 1988

1 The New York Dock conditions derive from the first case in which the Interstate Commerce Commission imposed such conditions, New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd subnom. New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979).

2 BMWE, BRAC and BRC will be referred to as the "Organizations," except as necessary to describe claims specific to separate groups of employees. The number of employees represented here by each of the Organizations is as follows:

BMWE: seventy-one employees, seventeen of whom have no monetary claims pending; remaining claims total \$2,807,246.96.

BRC: fourteen employees, one of whom has no monetary claim; remaining claims total \$730,571.89.

BRAC: nineteen employees, one of whom has no monetary claim; remaining claims total \$1,013,021.61.

3 The Organizations suggest that ICC approval was necessary because of the structure of the acquisition. The organization stated in its brief that

"as part of its [acquisition of the Anaconda Company, a Montana corporation, and all of its assets including the BA&P Railroad], ARCO formed a new corporation which was known as the Anaconda Company, a Delaware corporation. Naturally, ARCO owned all of the stock in the new Delaware corporation. If it would not have been for the fact that ARCO voluntarily chose to form this new corporation it might not have been necessary for ARCO and the new Anaconda Company to file an application with the Interstate Commerce Commission (ICC) allowing them control of the BA&P. The application became necessary because of the fact that the old Anaconda Company which owned all outstanding stock of the BA&P had been destroyed.

The arbitrator makes no finding as to whether the form of the acquisition effected the need for ICC approval under 49 U.S.C. Section 11343.

4 The Carrier attempted to avoid arbitration in the UTU case by filing a complaint seeking a declaratory judgment that New York Dock was not applicable. UTU was granted summary judgment (BA&P v. UTU, No. CV-82-71-BU, U.S.D.C. Mont.). The Carrier did not take such action in the matter under

consideration here and this award will make no assessment of the Carrier's position on nonarbitrability.

5 As discussed below, nine of these incidents also form the basis for claims of BMW, BRC and BRAC in this proceeding.

6. These figures are based on the totality of evidence presented by both the Carrier and the Organizations. In some instances it has not been possible to find exactly where specific pieces of work went. For example, when Anaconda began purchasing burnt lime instead of using its own limerock, it is not clear whether the burnt lime was trucked in by the supplier or picked up and delivered by Anaconda truckers.

7 Carrier cited approximately twenty other cases decided by arbitrators under the New York Dock Conditions and the Appendix C-1 conditions. The following cases in particular are helpful in understanding the issues presented here: Missouri Pacific Railroad Company and Brotherhood of Railway Carmen of the United States and Canada, ICC Finance Docket 29455, (Sickles), 1982; Railroad Yardmasters of America and Chesapeake and Ohio Railway Company, OSL III Labor Protective Provisions Dispute, (Van Wart), 1983; Amtrak Appendix C-1, Amtrak Number 23-11, (Seidenberg), 1979; Louisville and Nashville Railroad Company and United Transportation Union, Amtrak Arbitration Committee 7-11, (Roadley), 1973; United Transportation Union and Burlington Northern Railroad Company, Public Law Board Number 3160, (Dolnick), 1982.