'n the Matter of Arbitration Between

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA - BRAC

and

THE BALTIMORE AND OHIO RAILROAD COMPANY

OPINION

and

AWARD

ISSUES

1. That the Carrier violated the provisions as set forth in the New York Dock Conditions (Finance Docket No. 28905) and Implementing Agreement dated June 15, 1981, relative to consolidation and coordination between the Baltimore and Ohio Railroad, Cone Yard, and the Louisville-Nashville Yard at East St. Louis, Illinois, wherein both B&O employees and employees transferred from the L&N Railroad, as a result of such consolidation and coordination, were adversely affected, entitled to Protective Benefits as per the provisions of the New York Dock Conditions, and not so afforded.

2. That all Carmen herein are entitled to Protective Benefits as per the New York Dock Conditions (Finance Docket No. 28905) and that the Carrier be ordered to so adhere. Claimants are as follows: William Barks, Andrew Ziverts, Jack Lawrence, C. P. D'Amato, Darryl Young, Melvin Eggleston, J. F. Baker, Jr., and D. Mann - B&O Carmen; and D. E. Norman, P. M. Franklin, and A. L. Richardson, former L&N Carmen transferred to the Baltimore and Ohio Railroad as a result of the above referred to consolidation and coordination.

BACKGROUND

Under the terms of the Interstate Commerce Commission Finance Docket No. 28905, the Baltimore and Ohio Railroad Company and the Louisville and Nashville Railroad Company served notice on March 23, 1981, of their intent to consolidate and coordinate work performed in two separate yards at East St. Louis, Illinois with protections prescribed by the New York Dock Conditions. The notices filed with the General Chairman of the Organization and the one posted for all concerned employees read as follows:

THE BALTIMORE AND OHIO RAILROAD COMPANY
LOUISVILLE AND NASHVILLE RAILROAD COMPANY

March 23, 1981

File: 167-2.74 SC
243-CSX

Mr. H. H. Gahr, General Chairman
Brotherhood Railway Carmen of the
United States and Canada
4007 Lima-Sandusky Road
Sandusky, Ohio 44870

Mr. E. E. Burnside, General Chairman
Brotherhood Railway Carmen of the
United States and Canada
305 West Broadway
Louisville, Kentucky 40202

Gentlemen:

This constitutes notice pursuant to the provisions of Article 1, Section 4(a) of the New York Dock Conditions imposed in Finance Docket No. 28905 (Sub No. 1) and related proceedings of the intent of The Baltimore and Ohio Railroad Company (B&O) and Louisville and Nashville Railroad Company (L&N) to consolidate and coordinate work now performed by Carmen for B&O at Cone Yard and for L&N at East St. Louis Yard, East St. Louis, Illinois, as more fully explained in the attached notice which is being posted on bulletin boards convenient to interested employees.

Article 1, Section 4(a) of the New York Dock Conditions provides that within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place and date shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the Conditions and these negotiations shall commence immediately thereafter. Accordingly, it is requested that conference for this purpose be held in the L&N Labor Relations Office, Room 301, 908 West Broadway, Louisville, Kentucky, beginning at 9:30 a.m. on April 3, 1981.

Please advise if the time, date and location are satisfactory.

Very truly yours,

T. N. Keller, Manager Labor Relations
The Baltimore and Ohio Railroad Co.

John M. Sale, Dir. of Labor Relations
Louisville & Nashville RR Co.

THE BALTIMORE AND OHIO RAILROAD COMPANY
LOUISVILLE AND NASHVILLE RAILROAD COMPANY

NOTICE

March 23, 1981

TO ALL CONCERNED IN THE CARMEN CRAFT EMPLOYEES:

This constitutes notice pursuant to the provisions of Article 1, Section 4(a) of the New York Dock Conditions imposed in Finance Docket No. 28905 (Sub. No. 1) and related proceedings of the intent of The Baltimore and Ohio Railroad Company (B&O) and the Louisville & Nashville Railroad Company (L&N) to consolidate and coordinate work now performed by Carmen for B&O at Cone Yard and for L&N at East St. Louis Yard, East St. Louis, Illinois.

On or after July 1, 1981, Carman work previously performed separately under the B&O Agreement at Cone Yard and under the L&N Agreement at East St. Louis Yard, East St. Louis, Illinois, will be consolidated and thereafter performed on a coordinated basis under the B&O Agreement. The present and proposed forces are as follows:

	Present		
Position	Cone	E. St. Louis	Cone Yard
Carmen	25	11	34

Negotiations with employee representatives for the purpose of reaching an agreement to implement the above changes and protect the interests of the employees involved in the above-mentioned changes will commence as soon as possible.

T. N. Keller, Manager Labor Relations
The Baltimore and Ohio Railroad Co.

John M. Sale, Dir. of Labor Relations
Louisville and Nashville Railroad Co.

When the coordination became effective July 1, 1981, eleven (11) of the employees became entitled to displacement allowances under Article I, Section 5 of New York Dock. Correspondence to that effect was sent to General Chairman Gahr on August 18, 1981, and September 9, 1981. The letter sent on the latter date outlines final disposition of this matter and is cited here for the record.

September 9, 1982

File: 167-2.74 SC

Mr. H. H. Gahr, General Chairman
Brotherhood Railway Carmen of the
United States and Canada
4007 Lima-Sandusky Road
Sandusky, Ohio 44870

Dear Sir:

This has further reference to our letter of August 18, 1981, wherein you were furnished the test period average hours and compensation for the employees involved in the consolidation and coordination of work at Cone Yard and the L&N Yard at East St. Louis, Illinois, which was effective July 1, 1981.

Subsequent to the effective date of the coordination and computation of the test period averages, the December 11, 1981 National Agreement granted wage increases retroactive to April 1, 1981. Accordingly, we have shown below test period averages for the employees involved adjusted to include retroactive wage increases for the months of April, May, and June, 1981, and the wage increase effective July 1, 1981. In addition, the effect of subsequent general wage increases on the test period averages is also reflected below:

			Test Period Averages			
		Hours	Compensation			
Name	ID. No.		7-1-81	10-1-81	1-1-82	7-1-82
W. J. Erlich	1522638	205	2349.44	2414.39	2486.14	2598.14
R. E. Chastain	1522643	180	2012.63	2068.15	2131.15	2227.93
D. P. Virga	1522637	210	2356.24	2421.26	2494.76	2607.93
W. J. Balint	1522646	188	2103.30	2161.32	2227.12	2328.24
J. P. Gibson	1522642	176	1958.14	2012.13	2073.73	2104.61
C. E. Davis	1522639	181	2050.82	2107.46	2170.81	2268.97
R. H. Pierce	1522640	175	1925.13	1978.16	2039.41	2132.53
W. J. Mitchell	1522645	197	2243.27	2305.25	2374.20	2481.38
D. E. Norman	1522644	183	2018.20	2073.81	2137.86	2235.39
P. M. Franklin	1522641	161	1743.83	1791.80	1848.15	1932.98
A. L. Richardson	1523151	127	1394.88	1433.30	1477.75	1545.26

You will note that of the employees listed above, A. L. Richardson, was not listed in our August 18, 1981 letter inasmuch as Richardson had not reported for duty at that time. Richardson had less than 6 years service on the effective date of the coordination and his protective period will end June 30, 1985.

Arrangements are being made to allow any adjustments due as a result of the revised test period average compensation.

Very truly yours,

T. N. Keller

Three (3) of the Claimants to the instant dispute are among the eleven (11) cited in this September 9, 1981 letter who became entitled to displacement allowances on July 1, 1981. These employees are D. E. Norman, P. M. Franklin and A. L. Richardson.

On April 7, 1982, a claim was filed by the Organization under signature of General Chairman Gahr for protective benefits for Carmen William Barks, Andrew Ziverts and Jack Lawrence, all of East St. Louis, on the grounds that the Carrier had been in violation of various Articles of the September 25, 1964 Agreement, as amended, when train 98, formerly made up at East St. Louis, was discontinued and then allegedly made up at the terminal yards at Madison, Illinois. That claim, in pertinent part, stated the following:

> This claim is submitted to your office for handling as provided under the provisions of the Agreement of September 25, 1964, as amended, Article 1-Employe Protection, and Article-11-Sub-contracting (effective January 12, 1976), such claim on behalf Carmen, William Barks, Andrew Ziverts, and Jack Lawrence, East St. Louis, Illinois.
>
> On or about the date of December 15, 1981, train 98, which was previously made up at East St. Louis, was discontinued, and is now being made up at the terminal yards at Madison, Illinois, A & S Railroad, and run over the high lines on

the TRRA tracks, to enter Baltimore and Ohio main line at Willows in East St. Louis. We contend this constitutes SUB-CONTRACTING OF WORK in direct violation of the September 25, 1964 Agreement, Article 11, as amended.

Since this work was arbitrarily discontinued at Cone Yard, E. St. Louis, three Carmen: William Barks, Andrew Ziverts, and Jack Lawrence, have been subjected to furlough, and we contend they are entitled to protective benefits as per the provisions of Article 1-Employe Protection, of the September 25, 1964 Agreement, account their work being contracted out to a foreign railroad.

The organization's claim for these three (3) employees, also named as Claimants to the instant case, was progressed to SBA 570. On March 17, 1986, that Board sustained the claim on the grounds that the ". . . Carrier (had) presented no evidence on the property in support of its position to the invalidity of all, or any portion, of the Organization's claim . . ." (SBA 570, Award No. 659). On June 13, 1986, the Carrier informed the Organization of its intention to implement Award 659 in the following manner.

June 13, 1986

File: 2-SFG-86-112 (Case #852)

Mr. H. H. Gahr, General Chairman
Brotherhood Railway Carmen of the
United States and Canada
4007 Lima-Sandusky Road
Sandusky, Ohio 44870

Dear Sir:

This refers to your letter of March 25, 1986, concerning Award No. 659 of the Special Board of Adjustment No. 570, in favor of Carmen Claimants William Barks, Andrew Ziverts, and Jack Lawrence, East St. Louis, Illinois. We have determined the test period averages of these employees and the protective period which is as follows:

Name	I.D. NUMBER	TEST PERIOD AVERAGE	PROTECTION END
W. Barks	1521595	174 hours $1,892.51	8-2-82
A. Ziverts	1521535	172 hours $1,878.73	2-2-83
J. Lawrence	1720529	181 hours $2,041.08	2-2-87

Arrangements are being made to allow adjustments due these employees.

Very truly yours,

W. C. Comisky
Senior Manager - Labor Relations

After additional force reductions by the Carrier in July and August of 1982, the Organization initiated another claim on September 29, 1982, under the protective provisions of the New York Dock Conditions and the Implementing Agreement which was dated June 15, 1981. That claim, which is the one before this arbitrator, states the following:

September 29, 1982

Mr. T. N. Keller, Manager Labor Relations
Baltimore and Ohio Railroad Company
Labor Relations Department (110)
100 North Charles Street
Baltimore, Maryland 21201

Dear Sir:

This is a claim in relation to the consolidation and coordination between the B&O at Cone Yard and the L&N Yard at East St. Louis, Illinois, which was effective July 1, 1981. This movement was under the provisions of Article I-Section 5 of the New York Dock Conditions, which entailed eleven (11) L&N employees being dovetailed into the B&O Carmens' Roster, at Cone Yard, East St. Louis, Illinois. The individuals names are as follows:

W. J. Erlich
D. P. Virga
J. P. Gibson
R. H. Pierce
D. E. Norman
A. L. Richardson
R. E. Chastain
W. J. Balint
C. E. Davis
W. J. Mitchell
P. M. Franklin

There are many extenuating circumstances involved in this coordination, and the Organization, in their attempt to secure the entitled protection for the employees involved, will in detail explain our version of what transpired, leading up to and continuing beyond the coordination.

First of all, it is our position, the B&O and the L&N were well aware of their intentions to coordinate the facilities at Cone Yard on the B&O and L&N Yard, at East St. Louis, Illinios, long before the actual coordination which was effective July 1, 1981. In their planning, the Carriers made the decision they would reroute traffic that was once performed in the B&O Yard by B&O Car Inspectors at East St. Louis, to the Terminal Yards at Madison, Illinois, on the A&S Railroad, and run over high lines on the TRRA tracks and again swing onto the B&O mainline, at Willows, East St. Louis, Illinois. This deflecting of the work, caused Carmen Claimants William Barks, Andrew Ziverts, and Jack Lawrence, who stood on the common B&O Carmens' Roster to lose their positions by being furloughed. It is our belief, this drying up process was an "in anticipating condition;" one of which was created willfully and knowingly, to reduce the amount of Carmen employees from the B&O Roster. There is a claim filed for Claimants William Barks, Andrew Ziverts, and Jack Lawrence on the B&O Roster, under date of April 7, 1982, requesting protection benefits beginning with December 16, 1981, which is to be considered a part of this claim for reference, and continuing under the provisions of the September 25, 1964 Agreement. It is further our position, these employees were monetarily injured, arising out of the consolidation and coordination of July 1, 1981, between the L&N and the B&O Railroads. We are convinced, these three (3) Claimants should also be a part of the protection allowed under the provisions of the New York Dock Agreement, for it becomes quite evident as to what has now transpired, that they have little or no chance of returning to their former employment. This is in view of the fact, the coordination between the L&N and the B&O caused the knifing into the B&O Roster of eleven (11) former L&N employees, of which the 1982 Carmens' Roster at Cone Yard, East St. Louis, Illinois, shows former L&N employees as follows:

No. and Name		No. and Name	
31	Erlich, W. J.	40	Chastain, R. E.
30	Virga, D. P.	28	Balint, W. J.
34	Gibson, J. P.	39	Davis, C. E.
37	Pierce, R. H.	38	Mitchell, W. J.

Carmen Tentative

No. and Name	
4	Norman, D. E.
5	Franklin, P. M.
1	Richardson, A. L.

After the furlough of W. Barks, A. Ziverts, and J. Lawrence, the coordination between Cone Yard on the B&O and the L&N Yard at East St. Louis, was effective July 1, 1981; all of these L&N individuals were offered eleven (11) jobs on the B&O under the provisions of the New York Dock Agreement. All eleven (11) former L&N employees accepted these positions and became B&O employees, knifing into the B&O Carmens' Roster, as formerly mentioned. The

After the furlough of W. Barks, A. Ziverts, and J. Lawrence, the coordination between Cone Yard on the B&O and the L&N Yard at East St. Louis, was effective July 1, 1981; all of these L&N individuals were offered eleven (11) jobs on the B&O under the provisions of the New York Dock Agreement. All eleven (11) former L&N employees accepted these positions and became B&O employees, knifing into the B&O Carmens' Roster, as formerly mentioned. The Carrier, in their attempt to deflate the inflated B&O Carmens' Roster on July 20, 1982, without warning, furloughed Carmen Claimants A. L. Richardson, D. E. Norman, and P. M. Franklin. These were all former L&N employees and are entitled to test period averages as follows:

D. E. Norman	2235.39
P. M. Franklin	1932.98
A. L. Richardson	1545.26

Additionally, two (2) B&O employees were furloughed, being C. P. D'Amato, and Darryl Younge. Their test period averages have not been established; however, they should also be entitled, under the provisions of the New York Dock Agreement.

The Carrier, in their attempt to further reduce the Roster, on July 29, 1982, furloughed Melvin Eggleston, J. F. Baker, Jr., and D. Mann. These Carmen Claimants are also protected employees under the provisions of the New York Dock Agreement and should be allowed test period averages for the period equal to their seniority.

For easy reference, we are submitting a copy of the B&O 1981 Roster at Cone, Illinois, as an attachment. We are also submitting a January 1, 1981 Carmens' Roster from East St. Louis, on the L&N Railroad.

It is the position of the Organization, this consolidation and coordination brought about unrepairable damage and monetary losses to all the Claimants contained in this claim. Therefore, it is our position, these Claimants that are being deprived that are protected under the provisions of the New York Dock Agreement, be made whole for all their monetary losses, in addition to any and all benefits thus provided and demanded in the "Decision" by the Interstate Commerce Commision, Finance Docket No. 28905, which allows the provisions of the New York Dock Conditions and also the Implementing Agreement dated June 15, 1981.

It is our hope, you will implant what has previously been agreed to by the Interstate Commerce Commission and the B&O and L&N Railroads, and also by the B&O and L&N Railroads and the Brotherhood Railway Carmen of the United States & Canada.

A Prompt response will be appreciated.

Yours truly,

HAROLD H. GAHR, GENERAL CHAIRMAN

PROCEDURAL QUESTIONS

As a preliminary point, the Carrier argues that the instant claim should be dismissed under the doctrine of laches since the matter laid dormant from July 5, 1983, the date of the last correspondence by the Organization to the Carrier on this matter, until telephone calls were made to the Carrier either by the General Chairman or the Vice President of the Organization on August 19, 1985, and on January 2, May 13, and finally on December 19, 1986.

The arbitrator must note that arbitral forums in the railroad industry have not been consistent in their rulings on laches' objections made by one party or the other (see Third Division 2576, 6996, 13239, 2925, 65041, and 14016 for example). Nevertheless, under normal circumstances the dormancy of more than two (2) years would be sufficient, under this doctrine, to estop a claim form further consideration (see Third Division 25484; SBA 570 Awards 287, 288, 448 inter alia).

A review of the record shows, however, that neither side was realistically less expeditious than the other in handling the claim. The record also shows that the claim was ". . . . discussed at length" in conference, as the Organization puts it in its letter of July 5, 1983 to the Carrier, without resolution, in addition to further handling on property by means of at least four (4) more phone calls between the parties at later dates. The record as a whole does not warrant the conclusion that the Organization be equitably estopped, on procedural grounds alone, in its demand for an orderly resolution of the dispute. Such resolution will be provided on merits, therefore, by the arbitrator.

A second procedural point raised by the Carrier deals with the validity of the claim of all eleven (11) Claimants named in the Statement of Claim to the instant case. The Carrier argues that Claimants Norman, Franklin, and Richardson ". . . were all placed under New York Dock protection effective with the July 1, 1981 coordination, and could not be considered proper Claimants herein." As noted in the Carrier's September 9, 1982 correspondence to the Organization, cited in the foregoing, such in fact is the case, and these employees are, therefore, estopped from further protections relative to the instant claim.

Whether proposed Claimants Lawrence, Barks, and Ziverts are properly Claimants to the instant case will be discussed below by the arbitrator under the title of Findings.

APPLICABLE PROVISIONS

Implementing Agreement of June 15, 1981

Article 5(c):

Employees transferring to Cone Yard will be assigned positions in accordance with the bulletins advertising positions; thereafter, changes in the coordinated operation in the filling of vacancies, abolishing or creating positions, and reduction or restoration of force will be governed by application of the B&O Scheduled Agreement.

Article 5(d):

L&N Carmen who are awarded or assigned positions in the coordinated Cone Yard E. St. Louis operation will become B&O employees subject to the rules of the Agreement between The Baltimore and Ohio Railroad Company and Brotherhood Railway Carmen of the United States and Canada.

Labor Protective (New York Dock) Conditions to be Imposed in Railroad Transactions Pursuant to 49 U.S.C. 11343 et seq. (Finance Docket No. 28905)

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.

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient

to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation, the parties shall negotiate in the following manner.

. . . .

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period; but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period, he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) 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.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of Section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

11. Arbitration of disputes. -

. . . .

(e) 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.

POSITION OF THE ORGANIZATION

It is the position of the Organization that the Carrier ". . . anticipated" the ". . . drying up process" of positions prior to the consolidation and coordination between the B&O at Cone Yard and the L&N at the East St. Louis Yard, which became effective on July 1, 1981. It is the further position of the Organization that all of the eight (8) Claimants were furloughed on various dates after July 1, 1981 as a direct result of that transaction. It is the specific contention of the Organizaiton, as noted in the full statement of claim cited earlier, that ". . . in their planning the Carriers made the decision they would reroute traffic that was performed in the B&O Yard by B&O Inspectors at East St. Louis to the Terminal Yards, at Madison, Illinois on the A&S Railroad and run over high lines on the TRRA tracks, and again swing onto the B&O mainline at Willows, East St. Louis, Illinois."

POSITION OF THE CARRIER

It is the position of the Carrier, on the other hand, that it had no way of anticipating, prior to March 23, 1981 when the consolidation and coordination notice was served on the Organization and the employees, the conditions which ultimately led to the furlough of the Claimants in February, July, and August of 1982. These conditions represented factors ". . . other than a transaction" as stipulated by New York Dock Conditions at 11(e) and are sufficient grounds for denial of the instant claim, according to the Carrier. These factors specifically included a ". . . national economic recession and resultant decline in business beginning late in 1981 and continuing through 1982" when the Claimants were furloughed.

FINDINGS

New York Dock Conditions at 11(e) clearly state that it shall be the railroad's burden to prove that factors other than a transaction affected an employee or employees involved in a dispute such as the instant one. The same provision also states that it shall be such employee(s)' ". . . obligation" to identify the transaction and ". . . specify the pertinent facts . . . relied upon."

The Organization takes a double tack with respect to the furlough of three (3) of the Claimants to this case, and that matter must be disposed of first of all by the arbitrator in order to determine the status of those employees to this case. These Claimants are Carmen Barks, Ziverts, and Lawrence. When the Organization filed for protection under New York Dock for these employees, it did so on the grounds that their loss of work was the direct result of a transaction as so defined under New York Dock Conditions at 1(a). When the Organization filed a claim under the September 25, 1964 Agreement (as amended) before SBA 570 for these Claimants, it did so on the same facts but on grounds that train CI-98's ". . . now being made up at Madison, Illinois" instead of East St. Louis constituted "sub-contracting" of work in violation of the Agreement at bar. No arbitral forum ever determined if the Organization was substantively correct or not when it filed for protective benefits for these three (3) employees under the 1964 Agreement since resolution of that dispute was not made on merits. There was no inconsistency on the part of the Organization for having sought satisfaction for these employees, relative to its reading of the same events, but for different reasons. It was simply filing claims, under the 1964 Agreement on the one hand, and under New York Dock on the other, on grounds specified in one and the other, respectively. Such may be looked at, more or less analogically correctly, as two sides of the same coin. But the fact is that

these employees were given satisfaction by the SBA 570 Award referenced earlier, irrespective of the basis of that Award, and they are estopped from further relief herein, such would represent unjustifiable damages. Ruling on merits in this case, therefore, shall apply only to Claimants D'Amato, Young, Eggleston, Baker, and Mann.

On merits the Organization's argument is that the Carrier had a ". . . predetermined plan" prior to the coordination of drying up work at East St. Louis, and of "deflating" the new B&O roster. Such was caused, according to the Organization's letter to the Carrier on May 7, 1987, by the Carrier's ". . . rerouting, sub-contracting, changing operations, discontinuance, technological changes, and a host of other conditions." Despite all these reasons listed by the Organization, however, the one single cause which ". . . alone eliminated the work performed by the Baltimore and Ohio Car Inspectors" according to this same correspondence by the Organization to the Carrier, was the fact that trains were ". . . rerouted to the terminal yards at Madison, Illinois, on the A&S railroad . . . on the TRRA tracks and not rerouted over the mainline until they reached Willows, at East St. Louis . . . ." Did such happen, and was it the direct result of the July 1, 1981 transaction, or was it the result of other "factors?" According to the Carrier, train CI 98 was not rerouted, but ". . . was actually changed to a run-through train to eliminate duplicate work" because of a decline in business in late 1981 and continuing through 1982. The Carrier presents statistics in its January 8, 1987 letter to the Organization for carloads transported on the total system from 1979 through 1982 and for monthly averages of cars interchanged from July of 1981, the date of the coordination, through July of 1982. These averages are then compared with the number of CI 98 cars in question, also on average monthly basis. It is clear from this data that the drop in carloads from 1981 through 1982, the total average cars

interchanged during that period from July of 1981 onward, and the drop in CI 98 cars handled during the same period, is quite consistent. Such was also reflective of the general state of the economy during that time. An evitable result of a decrease in system-wide car loadings over time would have been a decline in employment at the Carrier. It is basically the argument of the Organization that while loadings and total cars interchanged in the total system could have decreased during the timeframe in question, such should not have occurred at East St. Louis. Substantial evidence of record does not support such conclusion. Substantial evidence has been defined as such ". . . relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). Given the record before him the arbitrator must conclude that the elimination of the work in question was the result of a lack of work rather than the direct effect of the transaction which occurred on July 1, 1981.

DECISION

The claim is denied in accordance with the Findings.

Edward L. Suntrup, Chairman

H. D. Swann, Carrier Member

R. P. Wojcowicz, Employee Member

Date: August 13, 1987

Baltimore, Maryland