SPECIAL BOARD OF ARBITRATION
PURSUANT TO SECTION 11, NEW YORK DOCK CONDITIONS AGREEMENT
BETWEEN
NORFOLK AND WESTERN RAILWAY COMPANY
AND
BROTHERHOOD OF RAILWAY CARMEN - DIVISION T.C.U.

Carrier Representative: G.C. Edwards
Assistant Director Protective Benefits
Norfolk Southern Corporation

Organization Representative: Robert P. Wojtowicz
General Vice President
Brotherhood of Railway Carmen
Division T.C.U.

Date of Hearing: Friday, August 12, 1991

PARTIES TO DISPUTE:

Brotherhood Railway Carmen -- Division of TCU

and

Norfolk and Western Railway Company.

STATEMENT OF CLAIM:

It is the claim of the Brotherhood:

1. That the Norfolk and Western Railway Company violated the Implementing Agreement dated May 7, 1982, wherein the Interstate Commerce Commission (I.C.C.) imposes the employee protective conditions set forth in New York Dock - RY - Control - Brooklyn or Eastern District 360 ICC 60 (1979) (New York Dock Conditions) in Finance Docket No. 29430, when nineteen (19) Carmen working at Portsmouth, Ohio Train Yards and Shops were furloughed and deprived of employment, including compensation on July 23 and July 25, 1989.

2. That the Norfolk and Western Railway Company be ordered to comply with test period for each of the named employees in Attachment "A" and B28 thru B51 of 139, Exhibit B139 of 139, as per the May 7, 1982 Implementing Agreement and the protective provisions as set forth in New York Dock II Conditions for the named Claimants, supra, account of being furloughed and/or deprived of employment and compensation on July 23 and 25, 1989 and subsequently.

BACKGROUND:

The Carrier in this dispute, the Norfolk and Western Railway Company (hereinafter called the Carrier) began coordinating operations with the Southern Railway Company under approval of the Interstate Commerce Commission dated March 25, 1982. As part of this "coordination," the I.C.C. imposed the New York Dock protective conditions upon the Carrier, in an implementing agreement dated May 7, 1982. The basic coordination of operations was implemented on June 1, 1982.

The Carrier notes that the coordination involves essentially "end-to-end" railroads, which do not have many common points of operation. The Implementing Agreement provided for the coordination of operations at the ten (10) common points, and provided a method for coordinating other operations as the need arose.

In July, 1989, the Carrier ceased performing certain functions at the Portsmouth, Ohio yard, including classifying cars, coupling air hoses, flat switching, and performing several other functions. On July 23, 1989, the Carrier abolished seven (7) carmen positions at the yard; on July 25, the Carrier abolished ten (10) more carmen positions at this location. The Parties do not dispute the fact that the abolishment of the positions was due to the Carrier's change in operations at the Portsmouth location.

Five of the carmen involved were protected under the New York Dock conditions due to an earlier transaction. Three of these employees decided to resign from service and accept a lump sum

payment. The other two allegedly failed to respond to notices of transfer, and therefore forfeited the New York Dock protection arising from the earlier transaction, according to the Carrier.

On August 9, 1989, the Organization filed claims for all seventeen (17) employees whose positions were abolished at Portsmouth. The claim contended that the affected employees were entitled to New York Dock protection because the work they had formerly performed at Portsmouth was being transferred to other points on the Southern Railway and Norfolk and Western Railway.

The Carrier denied the claims, stating that the Organization had failed to specify the pertinent facts of the transaction which allegedly affected the employees. The Parties were unable to settle the dispute on the property and it proceeded to this forum for resolution. It is within this factual context that the instant dispute arises.

THE ORGANIZATION'S POSITION

The Organization contends that it has specified the pertinent facts of the transaction which caused the furlough of the seventeen (17) carmen at Portsmouth. The Organization contends that there is no dispute that the only reason that the employees were furloughed is that the Carrier ceased performing almost all carmen work at Portsmouth in July, 1989. The Organization further contends that much of the work was moved to points on the Southern Railway system.

The Organization asserts that prior to the Carrier's action in July, 1989 about twenty (20) or more trains were processed each day in the Portsmouth, Ohio West Yard. Now the Organization contends that much of that work has been moved to the Southern Railway system.

As an example, the Organization points to Train 128, which leaves Linwood, North Carolina, on the Southern system, and which used to be processed at Portsmouth. It is now serviced at Bellevue, Ohio. The Organization asserts that had there been no consolidation of the two railroads, Train 128 would, in all probability, still be processed at Portsmouth.

The Organization also contends that the Carrier has attempted to evade applying New York Dock protections by arguing that the Norfolk and Western Company and the Southern Railroad are simply two separate railroads held by one holding company. The Organization asserts, however, that had a holding company not been formed to hold both railroads in 1982, there would have been no transferring of the work in question out of Portsmouth.

The Organization also argues that there was no decline in work which justified the action. According to the Organization, the data shows that there were approximately the same number of cars worked through the Portsmouth location from January to July, 1989. There was no sharp drop in the number of cars until the change was put into effect, according to the Union.

The Organization contends that the furloughs of the claimants in this case were due to the coordination between the two

railroads. Consequently, the Organization urges that the claimants are all entitled to New York Dock protection.

THE CARRIER'S POSITION:

The Carrier contends that the claimants are not entitled to New York Dock protection, and therefore, this claim should be denied. According to the Carrier, the Organization has failed to meets its burden of proof, under Section 11(E) of the New York Dock II Conditions. In support of this position, the Carrier urges that the Organization has failed to show that there was a transaction which directly caused the elimination of the employees' positions. According to the Carrier, the mere fact that there was a reduction in force does not within itself constitute a transaction under the provisions of Section 4.

In essence, the Carrier contends that the Organization has not established that there is a "transaction" in this case, as that term is used in New York Dock Conditions cases. There must be a causal nexus between a transaction and the adverse effect on the claimants in order to trigger New York Dock protection, according to the Carrier.

According to the Carrier, the Organization bears the initial burden of proving that such a transaction occurred, and that there is a causal nexus between the transaction and the adverse effect on the claimants.

According to the Carrier, the change in operations at Portsmouth, Ohio was an internal change not made pursuant to any

authorization of the Interstate Commerce Commission. The Carrier alleges that it conducted an internal study which indicated that some of the blocking (classification of traffic by destination) that was being done at Portsmouth was causing certain traffic to be delayed. The Carrier asserts that prior to July, 1989 trains were blocked at Portsmouth to avoid further congestion at train yards in Decatur and Chicago, Illinois; Bellevue, Ohio and Roanoke, Virginia. However, according to the Carrier, new yards were opened at Roanoke, permitting the classifying of westbound traffic at that point. In addition, the Carrier contends that there was further utilization of the Bellevue location, permitting the classifying of eastbound trains at that point. The Carrier asserts that it was therefore able to make blocking and schedule changes at all four of these cities which reduced the demand on the Portsmouth facility.

The Carrier asserts that there has been no transfer of work from the Norfolk and Western to the Norfolk Southern Railroad as a result of these operational changes. Each of the four terminals which picked up some of the work formerly performed by carmen at Portsmouth is on the Norfolk and Western line, the Carrier asserts. The Carrier cites several other cases decided under New York Dock protective agreements which hold that there is no right to protection unless there is a joint action by separate railroads.

The Carrier also takes issue with the Organization's allegations concerning specific trains. For example, the Carrier asserts that Train No. 128, which does originate at a point on the old Southern Railroad, is blocked at locations on the Norfolk and

Western line under very old agreements between railroads to perform such services for each other. All the other trains mentioned by the Organization are intra-road trains on the Norfolk and Western lines, according to the Carrier.

Because the Organization has not proven that there is a transaction which caused the problems here, the Carrier urges that the claim should be denied.

OPINION:

This is a case involving the furlough of seventeen (17) carmen at the Portsmouth, Ohio terminal. The employees are covered by the provisions of a New York Dock protective agreement, as a result of a coordination between the Norfolk and Western Railway Company, and the Southern Railway Company, now known as the Norfolk Southern Railway Company.

Apparently, the coordination between the two railroads was not an outright merger. The two railroads are held by a common holding company, but have coordinated many of their functions at the ten or eleven locations they shared in common prior to the coordination.

The Organization contends that the carmen in question were furloughed as a result of a "transaction" which occurred as part of the overall coordination between the two railroads. There is no dispute between the Parties that the employees were furloughed as a result of the transfer of certain blocking and inspecting work out of the Portsmouth, Ohio yards. The only dispute is whether the

transfer of that work triggered the protections of the New York Dock agreement.

The New York Dock conditions provide certain benefits for employees who are "displaced, " i.e. placed in a worse position with respect to his compensation or work rules, or "dismissed," i.e. loses his job, as a result of a transaction. A transaction is defined rather nebulously as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed."

The gravamen of this dispute is whether the action taken by the Carrier constitutes a "transaction" for purpose of the New York Dock Agreement. If it does constitute such a transaction, then the claimants are entitled to protection; if not, then no such protection is due.

The Carrier relies on Section 11(e) of the New York Dock provisions, which sets out the burden of proof in disputes over whether an employee was in fact affected by a transaction. That section states that it shall be the employee's obligation to identify the transaction and specify the pertinent facts of the transaction relied upon. Once the Organization has met this initial burden, the burden then shifts to the Carrier to show that factors other than the transaction affected the employee.

The Carrier asserts that the Organization has not met its threshold burden in this case. In particular, the Carrier argues that the reduction of forces which affected the employees at Portsmouth in July, 1989 was simply a change in internal operations

of the Norfolk and Western Railroad and had nothing to do with the coordination between it and the Southern Railway Company.

The Carrier argues that the change came about because it determined that the blocking operation at Portsmouth was delaying too many trains. The Carrier asserts that it conducted a study which demonstrated this fact, and the Organization has not suggested that this is not true.

The Carrier further asserts that all of the work which was transferred from Portsmouth went to other terminals on the Norfolk and Western line, and not to terminals on the Southern Railway line. This evidence is the linchpin of this case. The Carrier asserts that all of the disputed carman work was absorbed by the following four terminals: Bellevue, Ohio; Decatur and Chicago, Illinois and Roanoke, Virginia. The Carrier further asserts that all of these terminals are Norfolk and Western Railway Company terminals.

This issue was raised on the property and the Organization has not presented evidence to dispute this assertion. Therefore, the Organization has not sufficiently supported its contention that work was transferred to the Southern Railway Company, as opposed to being transferred internally on the Norfolk and Western line.

The Organization has raised this issue in regard to one train in particular, No. 128. According to the Carrier, this is the only train of the ones mentioned by the Organization which is not

totally "intra-road."[1] It originates in Linwood, North Carolina, and terminates in Bellevue, Ohio, running through Portsmouth. Linwood is on the Southern Railway line.

The Carrier argues that it is not uncommon for trains of one railway system to be run through another system's terminals. There are agreements between railroads which extend as far back as 1892 regarding switching, inspecting and blocking by other railroads, the Carrier asserts. This route had been in existence long before the force reduction in issue, and the route was not changed after the change in operations at Portsmouth. The train simply does not stop in Portsmouth anymore, for the work formerly performed by the claimants at that location.

The Board notes that there is no evidence that any of the work of the carmen which was formerly performed on Train 128 at Portsmouth has now been transferred to a terminal on the Southern Railway line. Although the train originates on the Southern Railway line, it has always originated there, and there is no proof that because it is no longer being blocked in Portsmouth this change had anything to do with the coordination.

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[1]. It is not entirely clear whether the Carrier means here that all of the destinations on the route are within the Norfolk and Western system, or whether the routes are totally run on that system's tracks. The Organization suggested, in the handling of this case, that some of the trains in question were being run on the Southern system's tracks. However, there was no evidence to support this assertion. Furthermore, as discussed in the body of this opinion, the work which is at issue in this case was performed at terminals, so it is not very relevant whether the trains were run on other tracks.

The Organization asserts that, but for the coordination, this work would not have been transferred out of Portsmouth. But the Organization has not demonstrated what aspect of the coordination allegedly caused this change. This is especially important because there is no evidence that the work was transferred to another point on the Southern Railway system.

The Organization also has urged that there was no decline in cars serviced at Portsmouth from January through July, 1989. After that date, of course, the reduction in force is very apparent, with a marked decrease in cars serviced in August, 1989.

The Organization's argument would be relevant if the Carrier had argued that the change in operations was due to a decline of business at the Portsmouth terminal. But the Carrier has not alleged this as a reason for the change. Rather, the Carrier has alleged only that blocking at the Portsmouth terminal was causing a delay in the movement of the trains.

Whether or not the Carrier has adequately supported this argument is not dispositive of this case. As stated earlier, the Organization has the initial burden to show that the furloughs were caused by a transaction related to the coordination between the two railroads. The Organization has not been able to meet this threshold burden in this case.

One of the cases cited by the Carrier is particularly relevant to the issue in this case. In a case very similar to the one at hand, decided under a New York Dock agreement, the arbitration board stated,

> The pivotal question in the instant dispute is whether the Claimants were adversely affected by a causal nexus between the ICC approved acquisition of the B&M by GTI and reductions in the work force on MeC/PT which caused the Claimants to be furloughed, or whether causes unrelated to the authorized acquisition, i.e., a decline in business, or operation of run-through trains with run-through power, precipitated the work force reductions.
> ....
> As concerns the further contention of the BRC that operation of run-through trains with run-through power be viewed as an operational change brought about by the consolidation of operations, this Arbitration Committee finds no rational support for such an argument.
>
> Clearly, as demonstrated by the record before us, the B&M and MeC/PT had the right to implement this operational change without any required authorization by the ICC and had, in fact, a similar operation in effect in past years. Furthermore, we think it apparent that such type operation must be recognized on the fact of the record as a common industrial practice.
> ...
> Certainly more is required in an authorized consolidation or coordination than the reestablishment of an operating right for a change to be a transaction as that term is defined in the New York Dock Conditions.
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> (Arbitration Award, BRC and MC, Peterson, Ref., October 21, 1985).

The Carrier has offered another opinion which is also particularly relevant. In that case decided under the Washington Job Protection Agreement the Arbitration Committee held,

> After reviewing the record, the Committee concludes that the change in location of classifying cars was not a joint action (by separate railroads and, thus, not a coordination within the meaning of Section 2(a). Rather, the Carrier unilaterally made an operational change whereby switching work previously performed at Collier Yard was diverted to other Carrier yards south of Petersburg and previously coordinated facilities north of Collier Yard. There is insufficient evidence showing that this intraline change of the location for classifying cars was planned and implemented by both the Carrier and the RF&P. Simply put, if a diversion of traffic is not a product of joint action, the change is not a coordination.
> (Docket No. 191, Section 13 Disputes Committee, WJPA, BRC vs. CSX, LaRocco, Ref., December 31, 1987).

As in the two cases cited above, the facts in this case indicate that the change in operations here was an internal change, not related to the coordination. Therefore, as in the two cases cited above, the instant claim must be denied.

AWARD

The Arbitration Committee determines that no award favorable to the claimants shall be rendered.

10/2/91

Lamont E. Stallworth, Neutral Member

Carrier Member

Organization Member

Adopted this 14th day of October, 1991 at Norfolk, Virginia.