SPECIAL BOARD OF ADJUSTMENT NO. 927

Award No. 1
Case No. 1

Parties to Dispute: Brotherhood of Locomotive Engineers and Norfolk and Western Railway Company

Question at Issue: Are the following individuals displaced and/or a dismissed employee as set forth in the New York Docket II Protective Conditions:

L. O. Dawson	J. G. Elia
H. R. Barney	J. T. Gyer
C. L. May	H. K. Scott
G. R. Heydt	T. A. Chapman
L. L. Newberry	M. D. Scott

Findings: The instant claims were filed, on behalf of the above ten (10) Claimants, pursuant to Article XI, II of the New York Docket Protective Provisions. Said provisions had been imposed by the Interstate Commerce Commission (ICC) in connection with its decision to approve the coordination of operations on the Norfolk and Western Railway Company (N&W) and Southern Railway Company (SR) in Finance Docket 29430 (SUB-NO. 1).

The Employee Protective Conditions for protection of employees were those enunciated in the New York Dock Railway - Control-Brooklyn Eastern District, 360 ICC, 60 (1979) (New York Dock Conditions).

Carrier, in anticipation of the Commission's approval of said coordination, entered into Implementing Agreements covering consolidations at certain common points.

Upon receipt of the Commission's approval to consolidate the Norfolk and Western and Southern Railway facilities, operations and services, a decision was made to effect the coordination at the facilities upon which implementing agreements had been entered into, effective June 1, 1982. Consequently, bulletins were issued far enough in advance in order that everyone at said facilities could be in place and assigned on

June 1, 1982. Any employee having insufficient seniority to acquire regular assignment at the consolidated facility but who was in an active status at the facility at the time of consolidation was automatically made a part of the combined facilities extra board on June 1, 1982 pursuant to the said implementing agreements.

New York Dock II conditions contain the following pertinent definitions:

> "Transaction" means any action taken pursuant to authorization of this Commission on which these provisions have been imposed."
>
> "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."
>
> "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 abolishment of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction."

Each of the 10 Claimants, commencing some time after October of 1982, completed and submitted a "Request to be Recognized as a protected employee under NYD II" form. The Carrier, after researching each Claimants' allegation, subsequently advised each [of the men] individually that their request to be recognized as protected employees under the New York Dock was denied in view of the fact that they had been furloughed as a result of the proper regulation of the number of firemen in accordance with the formulas set forth in the National UTU Manning Agreement.

This is the first of five cases placed before this Board wherein each Claimant seeks entitlement to employee protection under varying circumstances, such as, reduction in business, lower level of earnings, or loss of jobs. Claimants allege that the particular circumstances arose as a result of the transaction for which protective provisions had been imposed.

The Board's review of the parties submission reflects the following: All ten Claimants, on June 1, 1982, were not employed in or working at any of the terminals consolidated on June 1, 1982; that they were not in any of said terminals until furloughed subsequent to September of 1982 under Article III of the 1972 UTU Manning Agreement; that they were working on either the Pocahontas division, the Radford Division, or the Scioto Division.

All Claimants were working as firemen and were furloughed as such under the Fireman's Manning Agreement. Although two of the ten Claimants, to wit- Messrs. Heydt and Chapman, had transferred from the Norfolk, Franklin and Danville Ry. on September 8, 1982, the basic argument offered on behalf of all ten Claimants was that Carrier, although it had been a signatory party to the Manning Agreement of 1972, had never imposed or subjected their employees to the conditions of said agreement, until after the June 1, 1982 consolidation. Therefore, any employees thus effected by the Manning Agreement were therefore "Merger effected."

Further, say the Employees, New York Dock II conditions, contemplates certification as a result of the consolidation and it does not provide for a decline in business as a basis for non-certification. Therefore, the request by the ten Claimants for a test period average should have been granted and the question before this Board should be answered in the affirmative.

The Board finds the Question at Issue before it to be in the negative, i.e., that the ten individual Claimants identified in the Question at Issue were neither displaced or dismissed employees as set forth in the New York Dock II Protective Conditions.

The fundamental purpose of most, if not all, employee protective agreements is, or was, to provide protection to employees against adverse effects flowing from the transaction involved and not, as here, from adverse effects arising from other unrelated causes. See the Award of SBA 770 and Award No. 1 of SBA 868 among others.

Status must be established as either a "displaced" or a "dismissed" employee as the result of an effect flowing from the transaction. The adverse result thereof on an employee is spelled out in the definitions of the New York Dock II conditions. Consequently, one must establish a direct causal relationship or nexus between the transaction and the alleged adverse effect. The accepted detriment as to whether an employee qualifies for an allowance under either such definition is, the lost of a regular job, or the loss of earnings due to being involved in a chain of displacements resulting from said transaction.

The record does not support any conclusion that such results were involved in the instant claims. The parties appear to agree that the basic factor causing these Claimants to either be furloughed and/or forced to exercise their seniority from the road to the yard was the July 19, 1972 Manning Agreement being implemented by the Carrier for the first time.

That Carrier prior to June 1 or September 11, 1982 had not implemented the provisions of Article III of Section 5 of the UTU July 19, 1972 National Manning Agreement did not preclude it from placing said provisions into effect. Such action did not require approval of the Interstate Commerce Commission in order to place same into effect.

Therefore, the cases of these individuals and the change in the employment status of these Claimants is outside the protective pale of the employee protective conditions imposed in Finance Docket No. 29430. The Employees failed to establish the causal nexus between the change in the employment status of all of the instant Claimants and the Norfolk-Southern consolidation.

The efforts to identify a tangential effect (i.e., the implementation of the National Manning Agreement) does not qualify any of these Claimants as having been adversely effected by the transaction in Finance Docket No. 29430 (SUB-NO. 1). See Amtrak 23-11. Therein it was held:

> "That the prevailing and almost unanimous weight of arbitral authority is that mere loss or reduction of earnings <u>per se</u> does not render or place an employee in the status of a 'displaced employee.' Neither the Congress of the United States,

> nor the Secretary of Labor or the contracting parties to protective benefit agreements, intended to afford absolute and complete financial protection to any railroad employee who might be in some way tangentially adversely effected by a merger, coordination, or, as in the instant case, by a statutorily authorized discontinuance of railroad passenger service."

Amtrak Board of Arbitration, between Grand Trunk Western Railroad Company and the UTU held:

> "...The determining factor to be considered is end product of the chain of bumps of June 9, 1971. If this criterion has one basis, then we must conclude that Webster was not affected at that time. Hence, when he was furloughed subsequently, it was a result of a change in volume or character of employment brought about by other causes than a transaction as defined by Appendix C-1, Article I, Section 1(a)."

Consequently, the Question at Issue is found in the negative. This Board, in effect, must deny the instant claims and request of the instant Claimants to be recognized as protective employees and find that they are therefore not entitled to the benefits of the New York Dock II conditions.

Award: The Question at Issue is found in the negative. The Claimants in the Question at Issue are not displaced and/or dismissed employees.

C. M. Moore, Employee Member

D. H. Mullen, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued January 30, 1984.