ARBITRATION COMMITTEE

In the Matter of the Arbitration Between: WILLIAM T. GRAVELLE. Petitioner or Claimant. and RIO GRANDE INDUSTRIES, INC., SOUTHERN PACIFIC TRANSPORTATION COMPANY and DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY. Respondents or Carriers.	I.C.C. Finance Docket No. 32000 Pursuant to Articles I and IV of the New York Dock Conditions **OPINION AND AWARD**

Hearing Date: July 12, 1994
Hearing Location: San Francisco, California
Date of Award: November 15, 1994

JOHN B. LaROCCO
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OPINION

I. INTRODUCTION

On September 12, 1988, the Interstate Commerce Commission (ICC) approved the application of Rio Grande Industries and the Denver and Rio Grande Western Railroad (DRGW) to acquire and control the Southern Pacific Transportation Company (SP). I.C.C. Finance Docket 32000.

To protect employees affected by the acquisition, the ICC imposed the employee protective conditions set forth in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) (*New York Dock Conditions*) on the DRGW and SP pursuant to the relevant enabling statute. U.S.C. §§ 11343, 11347.

William T. Gravelle, Petitioner or Claimant, seeks a dismissal allowance under Article I, Section 6 of the *New York Dock Conditions*. Claimant, a non-agreement employee, initiated a claim for *New York Dock* benefits pursuant to Article IV of the *New York Dock Conditions* which reads:

> Employees of a railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provisions hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

After the DRGW and SP (Carriers) denied the claim, the parties proceeded to arbitration in accord with Article I, Section 11 of the *New York Dock Conditions*. In lieu of the tripartite Arbitration Committee described in Article I, Section 11(a), the parties stipulated that the undersigned Arbitrator would act as the sole Arbitration Committee Member. At the Arbitrator's request, the parties waived the Article I, Section 11(c) 45 day time limitation for issuing this decision.

The July 12, 1994 arbitration hearing proceeded in accord with Article I, Section 11(e) which provides:

> 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.

Both parties presented extensive testimonial and documentary evidence in support of their respective positions.[1] Following the hearing, the parties filed post-hearing briefs which the Arbitrator received on or about August 22, 1994 and the matter was deemed submitted.

While the basic issue in this case is whether or not Claimant is entitled to *New York Dock* protective benefits, the Carriers raised three separate justifications for denying this claim. First, the Carriers submit that Claimant is not a *New York Dock* protected employee under the auspices of ICC Finance Docket 32000 because the SP hired Claimant after both the filing of Carriers' merger application and the ICC's approval of the control transaction. Second, the Carriers contend that Claimant is not the type of non-agreement employee covered by the *New York Dock Conditions* due to the nature of his job and his personal skills. Third, the Carriers allege t

[1] The parties also filed pre-hearing submissions with the Arbitrator.

Claimant has been unable to show a causal connection between the DRGW-SP merger and his layoff, and thus, he did not satisfy his burden of going forward as specified in Article I, Section 11(e) of the *New York Dock Conditions*. To the contrary, Claimant asserts that he is a protected employee within the meaning of the *New York Dock Conditions* and that he has been placed in a worse position with respect to his compensation due to a merger related transaction.

II. BACKGROUND AND SUMMARY OF THE FACTS

Claimant had two separate stints of employment with the SP. The SP originally hired Claimant in February, 1981.[2] Claimant worked as a Competitive Truck Analyst and then as a Traffic Manager. Claimant testified that he resigned on December 20, 1985 because he was apprehensive about possibly being laid off as a result of an impending merger between the SP and the Atchison, Topeka and Santa Fe Railway Company.[3] From 1985 to 1990, Claimant worked as a Regional Traffic Manager for The Fleming Company, a wholesale grocery concern. The SP rehired Claimant on February 20, 1990. Thereafter, Claimant worked several positions in the SP's Distribution Services Department at San Francisco.

Pursuant to written notice dated September 3, 1993, the SP informed Claimant that his position was being abolished effective September 15, 1993. Claimant was offered a lump sum severance payment of $3,115.38 pursuant to a Non-Agreement Severance Benefit Plan. Claimant

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[2] Claimant extensively testified about his employment history. Prior to working for the SP in 1981, Claimant held vario jobs mostly in the trucking industry. He held positions dealing with transportation rates, traffic management (including LTL operatio and tariffs. Claimant holds a Bachelor's degree in Marketing from California State University, Chico and a Master of Science in Finar from St. Mary's College.

[3] The ICC later rejected the proposed SP and Santa Fe merger.

declined the offer. Claimant elected to pursue the instant claim for *New York Dock* protective benefits instead of accepting the severance pay.[4]

Rio Grande Industries and the DRGW filed their intent to acquire the SP with the ICC on December 31, 1987 and, to reiterate, the ICC approved the application on September 12, 1988. Thus, Claimant did not have an employment relationship with the SP either at the time of the control application or on the date the ICC approved the application.

Immediately after the ICC's approval of the merger, DRGW tariff and contract support work at Denver was consolidated into SP distribution services at San Francisco. All of the relocations, transfers, coordinations and force reductions surrounding this consolidation were completed by early 1989. The Carrier rehired Claimant and assigned him to the Marketing Services Group within the fully consolidated Distribution Services Department on February 20, 1990.

Although there had been about a year full of rumors before the formal announcement, the Carriers notified Claimant and other employees in the Distribution Services Department on June 10, 1992 that their positions and functions would be transferred to Denver, the headquarters of the DRGW. Indeed, on June 12, 1992, the DRGW and SP served the Transportation-Communications International Union (TCU) with a 90 day notice pursuant to Article I, Sectior 4 of the *New York Dock Conditions* notifying the TCU of the Carriers' intent to transfer a numbe of different departments, including Distribution Services, to Denver.[5] Claimant anticipated th

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[4] If Claimant had accepted the lump sum severance pay he would have had to release the Carriers from any anc employment related claims which Claimant may have had against the Carriers including his claim for *New York Dock* benefits.

[5] The Carriers and the TCU subsequently entered into a September 11, 1992 Implementing Agreement covering the tra of agreement-covered employees in Distribution Services.

the Carriers were going to shift his work and/or position from San Francisco to Denver. The Carrier issued a memorandum to employees on March 25, 1993 that Denver was definitely the future location of the department.[6]

At the time, the Carriers anticipated that the relocation would occur in December, 1992 or January, 1993. For a number of reasons not relevant to this case, the Carriers postponed the move. Timothy Murray, Director of Marketing Services, related that the proposed transfer has not been implemented and was still on an indefinite hold as of July, 1994.

Commencing in February, 1990, Claimant held the position of Manager of Strategic Application Development and then Assistant Manager of Strategic Application Development. He handled waybills and contracts. Claimant explained that he identified discrepancies between amounts paid and accounts owed. He decided whether or not to seek collection from shippers or whether the Company owed customers a rebate. To make this decision, he conducted an analysis of rates, freight movements and contract terms. Company policy set maximum limits on Claimant's decision-making authority. Above a sum fixed by the Company (about $40,000), Claimant could only make reparation and rebate recommendations.

Claimant did not supervise any other employees. At the time he left his job, he was earning an annual salary of $54,000.

Director Murray testified that, during the summer of 1993, he and some other officials were directed by top level management to target positions for abolishment.[7] Murray recommended that Claimant's position and four others be abolished. In fact, all five employees

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[6] However, the memorandum did not pinpoint any date for the transfer of work.

[7] Besides Distribution Services, other departments were forced to slate positions for abolishment. The Carriers' executives ordered a system-wide manpower downsizing.

cut in Distribution Services were situated in Marketing Services. Murray decided that Claimant's position could be abolished because reparations and waivers was not a great generator of revenue and new computer software improved billing accuracy leading to fewer reparation and waiver disputes.[8] Both Claimant and Murray testified that, in 1991, the SP introduced Direct Price Administration (DPA), a computer program which permitted field personnel to compose and print their own contracts and tariffs. Murray explained that this technology gradually reduced the overall number of permanent employees in Marketing Services from 34 to 24. DPA caused a noticeable decrease in Claimant's workload. According to Murray, some of the duties previously performed by Claimant were eliminated and some were absorbed into a position held by a more senior employee (Mike Dorgan). Murray stressed that none of the duties of Claimant's position have been transferred to Denver.

Claimant testified that, since his separation from the SP on September 15, 1993, he diligently searched for but has been unable to find satisfactory employment.

III. STATEMENT OF THE ISSUES

Although the parties could not stipulate to the precise issues before the Arbitrator, the parties concur that there are basically three issues to be considered. The first issue is whether Claimant has access to *New York Dock* protective benefits inasmuch as he was an after hired employee, that is, he was employed by the SP subsequent to the ICC's approval of the contro application. If the *New York Dock Conditions* comprehend after hired employees, the next issu is whether Claimant was an employee for purposes of having an entitlement to labor protectiv benefits? If the answer to the second issue is yes, the third issue is whether Claima

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[8] Murray testified that Claimant helped design computer software to automatically process certain rebates. Claimant de this assertion.

demonstrated a causal connection between the abolishment of his position and a DRGW-SP merger related transaction.

IV. THE POSITIONS OF THE PARTIES

A. Claimant's Position

Regarding the ambit of coverage of *New York Dock* protective benefits to DRGW's acquisition of the SP, the ICC contemplated that the protective conditions would cover many unanticipated and unknown applicants. In its approval, the ICC observed that ". . . the protections we mandate are available to adversely affected employees, whether or not applicants anticipated that their positions would be affected." I.C.C. Finance Docket No. 32000. (Control Decision at Page 93.) The ICC thus recognized that there might be many positions abolished and many employees adversely affected long after the merger. Therefore, merely because Claimant was hired after the control application was approved did not mean that he could not be adversely affected due to a merger transaction. Rather than being immune from merger related adversities, Claimant was susceptible to work force changes stemming from merger related transactions just like an employee hired before the ICC approved the merger. The ICC implicitly realized the potential long term ramifications of the merger on employees and so, Claimant should be treated the same as employees hired before the ICC's approval. Unlike the petitioning employees in the cases cited by the Carriers, Claimant was hired just months (as opposed to years or decades) after the ICC approved the acquisition.[9]

More importantly, the ICC never expressly stated that employees hired subsequent to September 12, 1988 would not be afforded *New York Dock* protective benefits. The ICC retain

[9] In addition, Claimant's dismissal came just five years after the ICC approved the merger.

the flexibility and discretion to formulate appropriate employee protection by examining the equities of each particular merger. *Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982). In this case, the equities flow in Claimant's favor. He was obviously affected by a transaction. The Carriers are preparing to transfer marketing functions to Denver. In advance of the transfer, the Carrier has been downsizing and consolidating jobs.

There is a dearth of legislative history and arbitration decisions concerning after hired employees. 49 U.S.C. § 11343 et. seq. does not contain any provision precluding after hired employees from having access to *New York Dock* benefits. Nevertheless, several court cases stress that the ICC is vested with great latitude to extend protective benefits well beyond those persons employed by a railroad at the time the railroad merges. The ICC extended protection to motor carrier employees as well as railroad workers in *Cosby v. Interstate Commerce Commission*, 741 F.2d 1077 (8th Cir. 1984) The ICC has even decided that employees of a foreign railroad can be affected by a merger transaction on another railroad. *Railway Labor Executives' Association v. United States*, 216 F.Supp. 101 (E.D. Va. 1963). If protection can even be extended to non-railroad workers like trucking employees, then the ICC has the concomitant discretion to extend protective benefits to after hired employees. Since the Arbitrato in this case is an extension of the ICC, the Arbitrator is authorized to weigh the equities an construe the ICC's imposition of *New York Dock* benefits to encompass after hired employe affected by a merger related transaction especially since the ICC recognized that there would unanticipated applicants.

Surely, the ICC did not contemplate that, just five years after the acquisition approval. Carriers could engage in a transaction which caused the dismissal of an employee yet

employee would be left unprotected. Equity demands that Claimant be protected under the broad umbrella of the *New York Dock Conditions*.

Claimant concurs with the Carriers that *Newbourne v. Grand Trunk Western Railway Company*, 758 F.2d 193 (6th Cir. 1985) sets forth five factors to determine whether Claimant is an employee for purposes of labor protection. Those factors are salary level; whether the worker is part of a bargaining unit; whether the worker's skills are transferable or unique to railroad work; whether the employee is protected under a salary continuation plan; and lastly, the length of salary continuation.

Although Claimant was not in a bargaining unit, his customer billing duties were primarily clerical. Claimant was responsible for granting reparations and waivers but only according to strict SP policy guidelines. Thus, he lacked the authority to make truly managerial decisions. Claimant had no supervisory authority. His salary was not unusually high. The fact that Claimant has been unable to procure alternate employment in another industry amply demonstrates that Claimant's skills are unique to the railroad industry. Indeed, working with railway reparations and waivers is a narrow function utilizing skills not readily transferable to other industries. Finally, the Carriers offered Claimant an insubstantial, if not a puny, amount of severance pay (about three weeks pay). The employee in *Newbourne* received severance compensation which continued for six months.

Last, Claimant identified pertinent facts manifesting a nexus between the planned transf of Distribution Services to Denver and the reduction in forces in September, 1993. Claim explained that there were many rumors going back as far as 1991 that his position was goin be coordinated into an existing department in Denver. As a matter of fact, in his March 25, 1

announcement, Director Murray definitively stated that the future of Distribution Services was in Denver and not San Francisco.

This planned transfer is not an isolated incident unrelated to the efficiency of operations of the SP and the DRGW. A transaction can include coordinations effected long after the initial merger. *Missouri Pacific/Union Pacific v. Transportation-Communications International Union*, NYD Arb. (LaRocco: 1987). The intended coordination will reap efficient operations for the merged company and, in exchange for these efficiencies, the Carriers must protect adversely affected employees.

Murray admitted that some of Claimant's duties were reassigned to another worker. These duties will eventually go to Denver. The technology to which Murray referred to has not yet been developed.

The move from San Francisco, an SP point, to Denver, a DRGW point, is clearly a merger related transaction. Therefore, Claimant is a dismissed employee within the meaning of *New York Dock*. His prior years of service should be included when computing the length of his protected period. Since Claimant worked a total of almost eight years for the SP, he is entitled to six years of protective benefits.

B. The Carriers' Position

The Carriers initially argue that Claimant was not employed at the time that the ICC approved the control transaction and thus, he is presumptively not entitled to any labor protective benefits which the ICC imposed as a condition of the DRGW's acquisition of the SP. Whether the ICC has the equitable power to tailor protection to encompass after hired employees is

irrelevant because ICC precedents, as well as the ICC's opinion in the instant merger, show that equity forbids the inclusion of after hired workers.

In Finance Docket 32000, the ICC expressly rejected an expansion of benefits to employees of railroads other than the principal merger partners. The ICC's imposition of protective benefits applied only to present employees, that is, those employed on the date specified in the ICC's approval and not future employees. Special Board of Adjustment No. 813, *Brotherhood of Locomotive Employees v. Norfolk and Western Railway*, (Roadley; 1973). Claimant was not an SP employee on September 12, 1988.

The *Cosby* case cited by Claimant does not stand for the proposition that protection is limitless. The Eighth Circuit decided that because the employees worked for the subsidiary of the primary railroad involved in the merger, they were actually employees of the primary railroad for purposes of protection. The decision can hardly be construed to permit the expansion of benefits beyond those imposed by the ICC.

Once the ICC sets the level of benefits, an arbitrator cannot vary the benefit level either by expanding the benefits to encompass others or lowering the scope of benefits to exclude others. Put simply, the Arbitrator cannot deviate from the basic benefit structure fixed by the ICC.

In this case, the ICC specifically found that an expansion of protective benefits ". . . would unduly restrict the carrier's ability to establish efficient economic operations and use its employees productively." (Control Decision at Page 94.) Although Claimant's situation may invoke some sympathy, sympathy is not equatable to equity. Expansion of *New York Dock* benefits to after hired employees would cause the Carrier to incur unacceptable, unnecessary and

perhaps, prohibitive costs which would offset the advantageous aspects of the merger. Accepting Claimant's argument that after hired employees are entitled to protection would have unintended and disastrous consequences in light of the Carriers' precarious financial position. The expansion would constitute a burden that neither the ICC nor the Carriers contemplated at the time the merger approved. At the time of approval, the Carriers calculated its labor protective costs secure in the knowledge that it was only responsible for employees employed on the date of the transaction.

Even if Claimant has access to *New York Dock* protective benefits, he is not eligible for benefits because he is not an "employee" for purposes of labor protection. Applying the *Newbourne* factors, Claimant's salary of $54,000 a year signifies that he occupied a fairly senior position. Next, Claimant performed functions not usually performed by Union employees.[10] *Benham v. Delaware and Hudson Railway*, NYD Arb. (O'Brien, 1986). Claimant examined claims brought against the Carriers and determined the validity of those claims. He made judgments and exercised unfettered discretion concerning the collectability of revenue. He worked without supervision. While Claimant was limited by certain monetary amounts, there was no limit on the aggregate affect of Claimant's individual decisions concerning reparations and waivers. In sum, Claimant exercised independent judgment. Claimant was therefore a traditiona managerial employee outside the definition of employees in the *New York Dock Condition:* Claimant's skills are readily transferable. He has a graduate degree in finance and a undergraduate degree in marketing. These educational credentials qualify him for many no railroad jobs. Also, although Claimant spent two stints of employment with the Carrier of fc

[10] Indeed, Claimant's position was not covered by the scope of the clerical labor agreement.

and three-quarter years and two and a half years, Claimant has spent most of his working life (14 years) outside the railroad industry. At the arbitration hearing, Claimant acknowledged that his job search has been selective and thus, there is insufficient evidence that he holds knowledge and skills unique to the railroad industry. Moreover, Claimant's skills cannot be deemed non-transferable merely because he fails to obtain a position shortly after his layoff. *Adams, et al. v. Delaware and Hudson Railway Company*, NYD Arb. (O'Brien, 1987). Lastly, Claimant was given an opportunity to participate in a severance plan but he declined. Pursuant to *Newbourne*, Claimant is ineligible for *New York Dock* protective benefits.

Immediately after the ICC approved the merger, DRGW marketing functions at Denver were transferred and coordinated into similar SP functions at San Francisco. The absorption of marketing duties by the SP was completed in 1989, which was one year before Claimant rejoined the SP. Any adverse impact on Marketing Services' employees would have occurred prior to 1990. Claimant was employed after the consolidation was completed and he was not laid off until September, 1993. Claimant has not demonstrated any coherent connection between his layoff and the 1988-1989 marketing coordination.

Also, Claimant has not shown any nexus between his layoff and any other merger related transaction because Claimant's job duties were not absorbed into any Denver position. Most of his job duties disappeared but a few remain in San Francisco. The Company announced tha Marketing Services may move to Denver but this proposed relocation has been held u indefinitely.

The mere fact that a position is abolished after a merger does not mean that the abolitic is related to the merger. In this case, Claimant's job was eliminated due to a host of econom

and technical reasons wholly unrelated to the merger. The Carriers were streamlining their Marketing Services functions via DPA which enabled employees in the field to directly receive tariffs, contracts and price information. This technological innovation propelled the consolidation of duties within Marketing Services. Certainly, technology is not an outgrowth of the merger. Indeed, Claimant tacitly admitted that DPA was partially responsible for the reduction in his aggregate duties and therefore led to the abolition of his job. Moreover, Claimant's layoff was part of a system-wide force reduction due to the Carriers' tenuous financial position. Claimant was one of several employees laid off in Marketing Services and one of many employees laid off across the Carriers' system.

Absent a causal nexus between a merger transaction and Claimant's loss of a job, Claimant is not entitled to *New York Dock* protective benefits. *American Train Dispatchers Association v. Missouri Pacific*, NYD § 11 Arb. (Zumas; 1981). Moreover, pursuant to Article I, Section 11(e) of the *New York Dock Conditions*, the Carriers have fulfilled their burden of proving that factors (technology and a system-wide layoff) other than a *New York Dock* transaction precipitated Claimant's layoff.

V. DISCUSSION

The threshold issue before the Arbitrator is whether Claimant, who was hired after the ICC approved the DRGW's acquisition of the SP, may access the *New York Dock* employe protective benefits which were imposed on the Carriers by the ICC as a condition of th acquisition. In its Opinion approving the merger, the ICC was silent concerning the coverage after hired employees. Claimant submits that the ICC's silence should be construed to mean t the ICC contemplated the possibility of including some future hires and when considering

surrounding circumstances, equity supports extending protective benefits to Claimant. The Carriers, however, argue that the ICC's silence inferentially means that the ICC was restricting benefits to employees in the employ of the Carriers on the date the acquisition was approved.

After carefully perusing the legal authorities relied on by each party, the Arbitrator concludes that the *New York Dock* protective conditions imposed on the DRGW-SP merger do not encompass employees hired after September 12, 1988, the date the ICC approved the acquisition.

Since the ICC has consistently ruled (in other cases) against including after hired employees, the ICC's silence in the DRGW-SP acquisition case must be construed in conformity with these prior rulings. In *Great Northern Pacific & Burlington Lines, Inc. Merger Great Northern Railway; In the Matter of Moser and Navin*, [I.C.C. Finance Docket No. 21478 (Sub-No. 11) (1989)], the ICC adjudged that labor protective provisions protect only those workers employed by the railroads at the time the merger is consummated. In declining to include the petitioner therein within the class of employees protected by merger protection benefits, the ICC wrote: "We continue to reject the principle that labor protection should be extended to employees hired after a merger." The ICC further observed that granting protection ". . . to all employees who in some way were affected by the merger, regardless of the date when they were hired, would vitiate the economies that such a merger was intended to secure."

Great Northern Pacific parallels I.C.C. Finance Docket 32000 where the ICC imposed the conditions based on employment figures concerning present employees, that is, persons employe at the time of the merger application and approval. The Carriers persuasively argue that the IC implicitly rejected any expansion of *New York Dock* benefits by not expressly extendi

protective benefits to after hired employees. The ICC's silence regarding after hired employees means that the ICC did not intend to protect after hired workers. Moreover, inclusion of after hired employees would constitute not just a minor broadening of the scope of protection but rather, a significant expansion of benefits. It is difficult to extrapolate such a substantial expansion from the ICC's silence in its opinion granting approval of the instant acquisition.

The U.S. Circuit of Appeals endorses the ICC's rulings regarding the exclusion of after hired employees. In *American Train Dispatchers Association v. Interstate Commerce Commission*, 578 F.2d 412 (D.C. Cir. 1978), the Court looked to the foundation of benefits (the statute) to determine if it was appropriate to include after hired employees. The D.C. Circuit observed:

> "Against this dubious backdrop, petitioner asks us to support a reading of the statutory language that is of potentially breathtaking scope. Protection could extend to employees hired many years after the merger, if they were "affected" by it. Nor does the "affected" requirement provide a satisfactory limiting principle, since consolidations and other economies instituted long after the merger might well be traced back to it in some sense. The principle urged by petitioner, in short, threatens to vitiate in large measure the economies that the merger was designed to achieve. We reject it." Id. at 413-414. [Emphasis added.]

Despite the ICC's consistent rulings, upheld by the D.C. Circuit, that after hired employees do not have access to employee protective benefits, Claimant nevertheless argues that the Arbitrator should balance the equities and vicariously exercise the ICC's discretionary authority to afford Claimant *New York Dock* protection. Claimant's primary equitable consideration is that, from his viewpoint, he was affected by a merger related transaction and the adverse affect arose only five years after the primary acquisition.

The D.C. Circuit in *American Train Dispatchers Association* observed that the ICC retains the discretionary authority to extend protection to post-merger employees under the statute. Id. at 414. [See also *Simmons v. Interstate Commerce Commission*, supra, at 335.] Indeed, the judiciary defers to the ICC so long as it reasonably exercises its discretion. *Soo Line Railroad Company v. United States*, 280 F.Supp. 907 (D.C. Minn. 1968). However, the ICC's capacity to balance the equities does not necessarily vest the Arbitrator with the vicarious authority to exercise the ICC's discretion although the Arbitrator, when deciding labor protection cases, can properly be characterized as the long arm of the Commission. Unlike the ICC which fashions the level of benefits, an Article I, Section 11 arbitration committee is relegated to applying the ICC imposed level of benefits. *Brotherhood Railway Carmen v. CSX Transportation Company*, NYD Arb. (Stallworth; 1988). It is not the province of this Arbitrator to substantially alter or vary the ICC's fixed level of benefits.

Expanding the protective benefits to include post-merger hired employees would substantially and impermissibly increase the level of protective benefits. Id. Therefore, unless the ICC states otherwise, the ICC's imposition of employee conditions protects only present employees, that is, those employed on the date of the approval. Absent an express finding by the ICC to include after hired employees, these employees have no prior rights equities to consider. *Special Board of Adjustment No. 813*, supra. (Roadley, 1973). The cases relied on by Claimant dealt with instances when the ICC expressly exercised its discretion to equitably apply benefits in nontraditional fashions. These cases simply confirm that when the ICC intend to impose employee protective conditions in a manner differently than the ICC has consistentl

applied such conditions in the past, the ICC expressly delineates the differences in the control case.

To reiterate, silence cannot be construed as a deviation from the ICC's consistent past precedents. In spite of the seemingly enormous equitable powers of the ICC, the Arbitrator may neither abridge nor expand the level of benefits. The ICC has exclusive jurisdiction over this question.

Since the Arbitrator finds that Claimant, an after hired employee, does not have access to the *New York Dock Conditions* imposed as a condition of the DRGW's acquisition of the SP, the Arbitrator need not consider whether Claimant is an employee within the meaning of the *New York Dock Conditions* or whether Claimant was affected by a merger related transaction.

AWARD AND ORDER

The claim is denied.

Dated: November 15, 1994

John B. LaRocco
Arbitrator/Sole Committee Member