INTERSTATE COMMERCE COMMISSION

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	)	
	)	Pursuant to Section 11 of the
UNITED TRANSPORTATION UNION,	)	New York Dock Conditions
YARDMASTER DEPARTMENT,	)	
	)	
Organization,	)	ICC Finance Docket No. 28676
	)	(Sub. No. 1)
and	)	
	)	
GRAND TRUNK WESTERN RAILROAD, INC.,	)	
	)	
Carrier	)	

OPINION AND AWARD

Background: On October 21, 1977, the Norfolk and Western ("NW") and the Baltimore and Ohio Railway Company ("B&O") filed a joint application with the Interstate Commerce Commission ("ICC") to control the Detroit, Toledo and Ironton Railroad Company ("DTI"). *Finance Docket* No. 28499 (Sub-No. 1F), *Norfolk and Western Railroad Company and Baltimore and Ohio Railroad Company-Control-Detroit, Toledo and Ironton Railroad Company,* ("Finance Docket No. 28499"). Four months later, the Grand Trunk Railroad Company ("GTW") and the Grand Trunk Corporation ("GTC") filed an application to control not only the DTI, but also the Detroit and Toledo Shore Line Railroad ("DTSL"). *Finance Docket* No. 28676 (Sub-No. 1), *Grand Trunk Railroad-Control-Detroit, Toledo and Ironton Railroad and Detroit and Toledo Shore Line Railroad Company,* ("Finance Docket No. 28676").

The ICC's Administrative Law Judge hearing this matter determined that both applications were consistent with the public interest, but favored the application of the GTW. Upon petition for

administrative review of the initial decision, the ICC opened the record on September 19, 1979, and scheduled oral argument for October 2, 1979.

In anticipation of its acquisition of the DTI and the DTSL, the GTW negotiated protection agreements with most of its employees. One such agreement ("1979 Agreement") was reached with the Railroad Yardmasters of America[1] on September 4, 1979. The agreement reached with the RYA was identical in all respects to agreements reached with all of the other signatory organizations.

The ICC reopened the record on October 26, 1979, on a joint motion from the GTW and the various organization to receive the protection agreements.

The ICC approved the acquisition by the GTW of the DTI and the DTSL, through the purchase of outstanding stock, in *Finance Docket* No. 28676 (Sub-No. 1), *Grand Trunk Western Railroad-Control-Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company*, served December 3, 1979 ("*Final Decision*"). The ICC found that the protection agreement reached between the GTW and the various organizations had met the minimum requirements of §11347 of the Interstate Commerce Act, and adopted it in its *Final Decision*. The ICC wrote:

> GTW shall be required to provide employees not now covered and to the extent contemplated under 49 U.S.C. 11347 with the basic protection as particularly described in the contract entered into between GTW and the Railway Employees' Department, AFL-CIO, *et al.*

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[1]The Railroad Yardmasters of America ("RYA") subsequently became a part of the United Transportation Union ("UTU") and is now known as the United Transportation Union - Yardmaster Department. That event is not significant to this case. For the sake of simplicity, the term "Union," when used in this Award, shall refer to the RYA both before and after becoming a part of the UTU.

On June 24, 1980, the GTW acquired the stock of the DTI from its previous owner, Pennco. GTW was already a half owner of the DTSL, and acquired the remaining stock of that carrier from it co-owner, the NW, on April 13, 1981. On October 1, 1981, the operation of the DTSL was merged into the GTW's operation, and a similar merger with the DTI was accomplished on December 31, 1983.

At the time of the acquisitions, yardmaster employees on the GTW and the DTSL were represented by the RYA, but were unrepresented on the DTI. On January 8, 1985, the National Mediation Board, following a representation election in which yardmasters on all three former properties participated, certified the RYA as the exclusive representative of the class and craft of yardmasters on the entire merged system. Since that date, the parties have applied the GTW Yardmasters Agreement on the former GTW and the DTI,[2] but have applied the DTSL Yardmasters Agreement on that property.

On May 7, 1993, the parties hereto participated in a Section 11 Arbitration Board with Referee John C. Fletcher serving as Neutral Member of the Board ("the Fletcher Board"). That Board accepted the Union's statement of issue, which read as follows:

> Did the UTU-Yardmasters (former Railroad Yardmasters of America) have a single working agreement for the yardmasters they represented on the Grand Trunk Western (GTW) and the Detroit, Toledo and Ironton (DTI) on June 24, 1980, in

[2]Although the terms of the same agreement are applicable on both properties, the parties have treated the two railroads as if they were separate carriers, *e.g.*, there has been no intermingling of the work force between the two railroads and separate seniority rosters are maintained.

accordance with the ICC Finance Docket No. 28676 (Sub-No. 1) provisions and the September 4, 1979 Agreement?

In its Award, issued on May 24, 1993, the Fletcher Board answered this question in the affirmative. As a consequence of reaching this conclusion, the Board found that the 1979 Agreement was applicable to GTW yardmasters effective with the acquisition of the DTI on June 24, 1980. The parties were subsequently unable to resolve certain disputes concerning the application of the 1979 Agreement with respect to GTW yardmasters. Accordingly, they established this Board of Arbitration. The Carrier named Richard J. O'Brien, Assistant Director Labor Relations, as its Member of the Board. The Union named Donald R. Carver, Assistant to the President, as its Member of the Board. They mutually selected Barry E. Simon to serve as Chairman and Neutral Member. Pre-hearing briefs were furnished the Chairman by both parties on December 3, 1994. The Board met in the offices of the Carrier's attorneys in Washington, D.C. on December 7, 1994. At that hearing, the parties' pre-hearing briefs were reviewed and both sides were given full opportunity to present argument and evidence in support of their positions. In addition to the Board Members, appearances were made by Lloyd E. Miller, General Chairman, and William G. Mahoney, Esq. (Highsaw, Mahoney & Friedman), for the Union, and by Mark Rose, Manager Labor Relations, and Jo DeRoche, Esq. (Weiner, Brodsky, Sidman & Kider), for the Carrier.

Issues Presented: The Union states the issues as the following claims:

1) Claim of GTW Yardmaster G. A. Wohlfeil for loss of Yardmaster position and monthly compensation provided in the September 4, 1979 Agreement.

2) Claim of GTW Yardmaster J. Vandendries for loss of Yardmaster position and monthly compensation provided in the September 4, 1979 Agreement.

3) Claim of GTW Yardmaster L. E. Miller for loss of monthly compensation provided in the September 4, 1979 Agreement.

Position of the Union: As a prelude to its argument before this Board, the Union asserts the Board should not give credence to the Carrier's attempt to overturn the Award of the Fletcher Board. It first argues the Award is good law, and then insists this is not the appropriate forum to challenge such an Award. Such jurisdiction, insists the Union, is reserved to the Interstate Commerce Commission. The Union further notes the Carrier has not taken any action before the ICC designed to overturn the Award.

The Union insists the ICC made only one imposition of protection, namely, the 1979 Agreement. It denies that the ICC also imposed *New York Dock* Conditions at the same time. It asserts that affected employees would have whatever protection the ICC imposed (the 1979 Agreement) until there was a single working agreement pursuant to Section 11 of the 1979 Agreement. At that point, they still are covered by the 1979 Agreement. The Union argues there is no way employees could be covered by only the *New York Dock* Conditions because they were never imposed by the ICC.

According to the Union, Claimants are protected by both the attrition and compensation provisions of the 1979 Agreement, as imposed by the ICC. Although the Carrier has denied that any order, decision or agreement "can be read to freeze the number of yardmaster jobs [it] must

maintain," the Union insists the ICC has already found to the contrary. The Union quotes from the ICC's November 30, 1979, decision as follows:

> The agreement provides attrition protection. That is, no reduction in force of employment shall occur other than principally by death, retirement, discharge for cause, or resignation. . . .
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> * * *
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> . . . The protection afforded regarding job security could not have been achieved except as an outgrowth of the proposed consolidation. . . .

The Union further states that Claimants are adversely affected and protected employees, and have been qualified as such. In this regard, the Union cites Sections 2(a), 2(b) and 3 of the 1979 Agreement, which read as follows:

> Section 2. (a) All "protected employees" of GTW, DT&I and DTSL shall be certified as adversely affected.
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> (b) All employees in the active employment of GTW, DT&I or DTSL on the date of acquisition of DT&I by GTW shall be "protected employees."
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> Section 3. The protective period for a "protected employee" shall be from the date he is certified as adversely affected until he qualifies for early retiree major medical benefits provided under Group Policy GA-46000,[1] except as otherwise provided in Article I, Section 5(c) and 6(d) of New York Dock.

In arguing that the Carrier is prohibited by the 1979 Agreement from reducing forces except through attrition, the Union compares the Agreement to an agreement between the Norfolk & Western and the various labor organization members of the Railway Labor Executives' Association

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[1]Group Policy GA-46000 is qualified for by attaining age sixty-one (61) if retirement application is made to the Railroad Retirement Board.

(RLEA) when it was granted control of the Nickel Plate, Wabash and ACY Railroads in 1962. The Union quotes the ICC as follows:

> The Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate, and Wabash, as well as persons employed on the Sandusky line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules, and agreements of Nickel Plate, Wabash, as well as those having application on the Sandusky line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms, Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease, and purchase, all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue.[4]
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> * * *
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> Employees. - Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of Railway Labor Executives' Association, for the protection of employees of Norfolk & Western and A.C.Y. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules, and agreements of A.C.Y., basically requires that job eliminations as a result of the proposed acquisition of control be accomplished only through normal attrition.
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> It was stipulated and agreed that any report and order approving the proposed acquisition of control may consider this agreement as being made pursuant to and in conformity with section 5(2)(f) of the Interstate Commerce Act for the protection of covered employees.
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> In view of this agreement, no conditions need be imposed under any authority granted herein for the protection of those employees covered by such agreement.[5]

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[4] *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. at 89.

[5] *Id.* at 106.

The Union rejects the Carrier's position that job protection may be satisfied by providing the job's equivalent in wages. The Union insists the ICC has already defined the attrition protection afforded by the 1979 Agreement as requiring "no reduction in force of employment shall occur." Additionally, the Union cites an Award of an Arbitration Board on which Dana E. Eischen served as Chairman and Neutral Member.[6] Although the Board found that the claimant therein had been dismissed for just cause, the Union notes the following finding of the Board:

> Carrier is correct in pointing out that no "single working agreement" has been negotiated between Carrier and Claimant or other similarly situated managerial employees. But this does not bar the effectiveness of the 1979 Attrition Agreement because the alternative condition subsequent specified in Section 11 obviously has occurred, i.e., the date of acquisition of DT&I by GTW was June 24, 1980. Since we accept as a given in the state of this record that the ICC-imposed conditions apply to Claimant, we must find that the ICC order of November 30, 1979 imposed not only New York Dock but also the attrition benefits specified in the GTW/RED Agreement of September 4, 1979.

The Union further notes it elected coverage under Section 8(b) of the 1979 Agreement for addressing any decline in business. According to the Union, this provision prohibits the Carrier from reducing the number of protected yardmaster employees due to a decline in business and is consistent with "attrition protection." The Union explains that Section 8(b) permits the Carrier only to reduce the employees' monthly guaranteed compensation.

The Union acknowledges that the 1979 Agreement does not stand by itself. Rather, the Union agrees it incorporates certain elements of the *New York Dock* Conditions. Looking at Section 3 of

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[6] *In the Matter of the Arbitration Between Grant E. Hoover and Grand Trunk Western Railroad Company*, decided December 13, 1985. The claimant therein was a managerial employee not covered by a collective bargaining agreement.

the 1979 Agreement, the Union asserts Sections 5(c) and 6(d) of Article I of the *New York Dock* Conditions apply because they are specifically referenced. Similarly, the Union refers to the Note to Section 8, which cites Article I, Section 5(a)(2nd paragraph) and Section 6(a) of the *New York Dock* Conditions. The Union urges this Board to follow the principle of *expressio unius est exclusio alterius* and find that provisions of *New York Dock* Sections 5 and 6 not specifically referenced in the 1979 Agreement are not a part thereof.

The Union finds it significant that the parties did not include *New York Dock* Section 5(a)(1st paragraph) in that it requires a protected employee to exercise seniority to a secondary craft to protect his guarantee. Not including this provision, according to the Union, is consistent with the concept that the 1979 Agreement is an attrition agreement.

With respect to the three individual claims, the Union states that G. A. Wohlfeil, the first Claimant, held a regular yardmaster position prior to June 24, 1980. That position was subsequently abolished and Claimant Wohlfeil exercised his seniority to a switchman position. The second Claimant, J. A. Vandendries, also held a regular yardmaster position prior to June 24, 1980. As the result of the abolishment of his position, he exercised his seniority in the clerical craft. He subsequently was appointed to a non-agreement Trainmaster position. The third Claimant, L. E. Miller, has remained employed as a yardmaster, although his monthly earnings have been diminished since June 24, 1980. The claims on behalf of the first two Claimants seek their return to their yardmaster positions. All three claims seek lost earnings.

Position of the Carrier: The Carrier first argues that the Award of the Fletcher Board is patently erroneous. According to the Carrier, the Board relied upon a single sentence, which it acknowledges was "inartfully drafted," and created a situation that is markedly different from what was understood to be the agreement with thirteen other unions. The Carrier, therefore, asks this Board to overturn the Award of the Fletcher Board.

The Carrier recognizes that appeal could have been taken to the ICC, however, it doubted that the errors it cites would meet the Commission's standards for accepting the Award on appeal or for reversing the Board's decision.[7] Carrier reached this conclusion because the alleged errors involved an agreement between only a single carrier and a single union. Furthermore, Carrier felt the impact of the Award was limited because all yardmasters with a seniority date prior to June 24, 1980 had continued to be employed by the Carrier in some capacity or had retired.

Asserting that the yardmasters still do not have a single working agreement for the merged system, Carrier insists the only applicable protection is the basic *New York Dock* Conditions. Carrier further notes this requires the Union to prove a *causal nexus* between any alleged adverse effect and the transaction. In overturning the Award of the Fletcher Board, the Carrier would have this Board find that the 1979 Agreement was not applicable to yardmasters.

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[7]The process of reviewing such decisions and the standards of review were first developed by the Interstate Commerce Commission in *Chicago & North Western Transportation Company - Abandonment*, 3 I.C.C. 2d 729, 736 (1987) ("*Lace Curtain*"), aff'd sub nom. *International Brotherhood of Electrical Workers* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988).

In the alternative, and assuming the 1979 Agreement is applicable, the Carrier proposes that the Board address the following questions:

> Issue 1: Whether the protection applicable to Grand Trunk Yardmasters under the 1979 Agreement is *New York Dock*, as modified by the express terms of the 1979 Agreement?
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> Issue 2: Whether the calculation of test period earnings under Section 5(a) of *New York Dock* was modified by the 1979 Agreement?
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> Issue 3: Whether the 1979 Agreement amended the Carrier's rights under the collective bargaining agreement to reduce forces and abolish jobs?
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> Issue 4: Whether the 1979 Agreement changed the responsibility of protected employees to exercise their seniority with the carrier and otherwise mitigate their damages?
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> Issue 5: Does Section 6 of *New York Dock* apply to Grand Trunk Yardmasters, and has the Carrier's right to offset other earnings against a protection claim, as provided in Section 6, been modified by the 1979 Agreement?

Carrier proposes that the first issue be answered in the affirmative, the next three be answered in the negative and the last be answered that "Section 6 applies and has not been modified by the 1979 Agreement.

The Carrier submits that the 1979 Agreement is, by its own terms, *New York Dock* Conditions, as modified by Sections 2 through 10 of the Agreement. The Carrier primarily bases this position on the terms of Section 1, which reads as follows:

> Section 1. The terms and conditions imposed in New York Dock Railway - Control - Brooklyn Eastern District, 354 I.C.C. 399, as modified by the Commission's Decision served in that proceeding on February 23, 1979, ("New York Dock") shall be applied for the protection of the interests of employees of GTW, Detroit, Toledo & Ironton Railroad Company (DT&I) and the Detroit and Toledo

Shore Line Railroad Company (DTSL), except as those terms are modified herein. Copy of New York Dock attached hereto and made a part hereof.

Carrier also cites the ICC's *Final Decision* as stating, at page 532, "[w]e find that the agreement satisfies the minimum requirements of section 11347 and we therefore adopt the agreement as providing the appropriate measure of protection for employees in this case." Further, the Carrier quotes the ICC as saying the 1979 Agreement "not only incorporates the terms set out in New York Dock but includes various other employee benefits."[8] Accordingly, Carrier argues the first issue must be answered in the affirmative.

With respect to Carrier's second issue, Carrier avers that Sections 5(a) and 6(a) of *New York Dock* provide the method for computing monthly guarantees, whether they are in the form of displacement allowances or dismissal allowances. It denies that either formula limits the calculations to the earnings within a particular craft. Carrier disputes the Union's assertion that test period figures provided to GTW yardmasters with a seniority date of June 24, 1980, or earlier, should include only income earned as yardmasters. Carrier cites several arbitral decisions in support of its position that the agreement protects compensation rather than the rate of pay, and must include all earnings made during the test period.

As to its third issue, Carrier argues it has not forfeited its right to reduce forces and abolish jobs. Although the Union has characterized the 1979 Agreement as an attrition agreement, Carrier notes there is no reference in either the Agreement or *New York Dock* to attrition protection. Carrier

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[8] at page 531.

says the Union's position is based solely upon the ICC's use of the term "attrition protection" to support its conclusion that employees are guaranteed yardmaster jobs for life. Nevertheless, Carrier adopts the definition of "attrition protection" from *In the matter of the Valuation Proceedings under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973*, 531 F.Supp. 1191 (1981), wherein the court defined it as a guarantee of "employment or its equivalent in wages and fringe benefits until the employee dies, retires, resigns, becomes disabled, or refuses to accept a bona fide job opening."[9] The 1979 Agreement, according to the Carrier, has the effect of continuing protection until the protected employees qualify for GA-46000, rather than for only six years as provided in *New York Dock*. Carrier compares the 1979 Agreement to the agreement establishing the Burlington Northern, and cites both the ICC's decision approving the merger,[10] and a later decision regarding the proper application of the conditions.[11]

Carrier further asserts it is privileged to reduce the forces, complying only with the procedures set forth in the schedule rules. It denies it must engage in negotiating an implementing agreement pursuant to *New York Dock* Section 4, which requires, *inter alia*, a ninety day notice.

Carrier next asserts its fourth issue must be answered in the negative. It insists that yardmasters who have been promoted to such a position from another craft and retain seniority in the

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[9]at 1263, n. 136.

[10]*Great Northern Pac. - Merger - Great Northern Ry.*, 331 I.C.C. 228 (1967), aff'd sub nom. *United States* v. *I.C.C.*, 296 F.Supp. 853 (D.D.C. 1968), aff'd, 396 U.S. 491 (1970).

[11]*Great Northern Pacific & Burlington Lines, Inc. - Merger - Great Northern Railway - In the Matter of William A. Rilling*, Finance Docket No. 21478 (Sub-No. 13), 8 I.C.C.2d 229, served December 11, 1991 ("*Great Northern*").

other craft have both a right and a responsibility to exercise such seniority when they have been displaced from the yardmaster craft. The Carrier states that the ICC imposed protective conditions without regard to craft or class lines. None of the agreements negotiated with the various unions contains any restrictions upon employees exercising their seniority, according to the Carrier. Carrier cites several Awards, including one involving yardmasters on the C&O/SCL, holding that the duty to exercise seniority is not limited to a single craft. Carrier also cites an ICC decision[12] vacating an Award under the Norfolk and Western Merger Agreement, which Carrier states includes "attrition" protection. In its decision, the ICC wrote:

> Central to the [Washington Job Protection Agreement], as outlined in section 6(a) of that agreement, is that employees are not placed in a "worse position" so as to trigger the receipt of compensatory benefits when they can exercise seniority rights to take positions producing equal or greater compensation elsewhere in the consolidated system. That requirement embodies the fundamental bargain in WJPA and all subsequent Commission-developed labor conditions that employees exercise existing contractual rights (seniority) to take available work elsewhere in exchange for economic protections that would be afforded should they ultimately be displaced. See e.g., New York Dock, 360 I.C.C. at 86 (Article I, section 5(a)).
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> * * *
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> By its own words, section 1(b) of the Merger Agreement simply added to the WJPA benefits adopted in section 1(a) by guaranteeing working-life economic protection, specifying that no employee could be placed in a "worse position" regarding compensation and working conditions "at any time during [this] employment." Nowhere does section 1(b) expressly withdraw the WJPA precondition that seniority must be exercised to secure those benefits.

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[12] *Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company - Merger, Etc. (Arbitration Review)*, Finance Docket No. 21510 (Sub-No. 4), (not printed), served July 27, 1993 ("*NW Merger*").

Finally, with regard to its fifth issue, the Carrier asserts that a dismissed employee may be required to furnish proof of any other earnings to be used by the Carrier as an offset against the total amount of a dismissal allowance. In this respect, the Carrier cites Section 6(c) of *New York Dock*, which reads as follows:

> 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, and benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based.

With regard to the specific claims, Carrier asks this Board to invoke the doctrine of laches. It notes that the first claim filed by the Union was made in 1986 on behalf of Yardmaster Byle. This claim, says the Carrier, was dismissed by Referee Peterson on July 26, 1989, on the basis of laches because of a nineteen month delay between the date of the alleged adverse effect and the filing of the claim. Relying upon that Award, Carrier insists that claims for periods as far back as 1980 are also barred. Carrier insists that a thirteen year delay in progressing claims to arbitration is unreasonable and detrimental to the Carrier. Carrier further asserts that neither it nor the Union has access to the necessary data to make the necessary calculations for guarantee payments for claims prior to the Award of the Fletcher Board.

In Claim No. 1 on behalf of G. A. Wohlfeil, Carrier states his position as the BOC Yardmaster at Detroit was abolished in December 1992. Carrier asks that any portion of his claim pre-dating the Award of the Fletcher Board be denied on the basis of laches. Subsequent thereto, Carrier asks that Claimant Wohlfeil's guarantee be reduced by the full amount of his other earnings. Carrier makes the

same argument in Claim No. 2 on behalf of J. Vandendries, except it avers he earned in excess of his guarantee while employed as a trainmaster. The Carrier reinforces its laches argument in Claim No. 3 on behalf of L. E. Miller by noting his guarantee was based upon considerable overtime worked during the test period. Subsequently, Carrier had not documented the overtime opportunities he might have foregone, resulting in his earning less than his guarantee, although he worked every straight time shift.

Discussion: At the outset, we must address the Carrier's attempt to overturn or modify the decision of the Fletcher Board. As both parties are aware, the procedure for review of an arbitration decision concerning ICC imposed protective conditions is to the ICC.[13] The Commission has primary jurisdiction over such matters, with further appeal being to the U.S. Court of Appeals. The presumption that the ICC might not choose to review an appeal does not give the Carrier license to seek review of the Award of the Fletcher Board by this Board. As far as this Board is concerned, the issues presented and decided by the Fletcher Board are *res judicata*.

Even if we were to review the Award of the Fletcher Board, we would be required to give it full recognition unless we were convinced it is patently erroneous. Not only do we not reach this conclusion, we find that we must concur with the findings of the Fletcher Board. The Carrier argues that the Fletcher Board relied upon a strict construction of "inartfully drafted" language rather than what it characterizes as the clear intent of the parties. In labor contract negotiation, the most

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[13] *Chicago and North Western Transportation Company - Abandonment, supra.*

effective way to manifest the "clear intent" of the parties is to reduce it to written language in the agreement. If the language can be interpreted without resort to external sources, the Arbitrator is compelled to do so.

> Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear meaning. . . . Thus, the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved.[14]

The main issue before the Fletcher Board was whether or not the 1979 Agreement was applicable to GTW yardmasters. The critical provision of the Agreement stated it would be "effective upon the date of acquisition or the date upon which the labor organization and GTW come to agreement on a single working agreement for all employees they represent on the GTW and DT&I, whichever is later." When GTW drafted this Agreement to be used with all of the organizations representing its employees, there is no doubt it desired to have a single working agreement cover all the employees of a particular class or craft on both properties. Carrier conditioned coverage under the Agreement upon obtaining such a concession from the organizations.

In the case of the yardmasters, however, the Fletcher Board found that the condition had been satisfied on the date of the acquisition because the GTW yardmasters were the only ones represented by the Union. The DTI yardmasters were officials, not represented by any organization. Presumably, Carrier had intended that the Agreement would be effective upon the Union securing the right to represent the DTI yardmasters and then placing them within the coverage of the GTW working

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[14]Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition (BNA 1985) pp. 349-50.

agreement. This intent, however, was not expressed in the 1979 Agreement, or any other correspondence. It is evident Carrier overlooked the unique situation with the yardmasters when it proffered an identical agreement to all of the organizations. Carrier was aware, however, that the DTI yardmasters were not represented. Consequently, it cannot claim it entered into the Agreement based upon a mistake in fact. Had the Fletcher Board read the 1979 Agreement to mean that a single working agreement must be in place for all GTW and DTI yardmasters, the Board would have been engaged in redrafting the Agreement, which is beyond its jurisdiction. The language Carrier used was explicit. The fact that it is now dissatisfied with the result is not a basis to overturn the earlier Award.

Finding that the 1979 Agreement applies, we now turn to the question of the relationship between that Agreement and the *New York Dock* Conditions. We reject the Union's idea that only specified provisions of *New York Dock* are applicable. Section 1 of the 1979 Agreement is clear in that it provides that all of *New York Dock* applies, unless the Agreement has modified any portion of those Conditions. An abridged reading of Section 1 shows that "The terms and conditions imposed in *New York Dock* . . . shall be applied . . . , except as those terms are modified herein." The 1979 Agreement was not written to stand alone. Rather, the parties agreed to adopt *New York Dock*, plus certain enhancements. Thus, we conclude that all of the *New York Dock* Conditions are applicable unless the 1979 Agreement provides otherwise. The Carrier's first issue is, therefore, answered in the affirmative.

To determine the applicability of any of the *New York Dock* provisions, we must look to the 1979 Agreement to see if there are any modifications therein. With regard to the calculation of test

period earnings, which are covered by *New York Dock* Section 5(a)(second paragraph) for displacement allowances and Section 6(a) for dismissal allowances, our review of the 1979 Agreement shows first that Section 8 recognizes that these provisions shall be used for computing monthly guarantees, except when guarantees are to be reduced as a result of a decline in business as determined by Section 8(b). Secondly, we find that Section 9 of the 1979 Agreement is the only other provision that modifies *New York Dock* in this regard. Section 9 establishes a method of determining a monthly guarantee for union officials. We conclude, therefore, that test period earnings are to be calculated in the manner established by *New York Dock*, as interpreted by various Arbitration Boards. In particular, test period earnings are to take into consideration all earnings paid by the Carrier during the test period, without regard to the class or craft for which those earnings were paid. An Arbitration Committee, chaired by Referee Fletcher, in an Award involving a dispute between the International Brotherhood of Electrical Workers and CSX Transportation, Inc., held:

> Even if this argument were accepted in total as presented, which it is not, [Test Period Averages] would still have to be developed in accordance with the procedures provided in the Conditions, which the parties did not modify. This procedure requires examination of the earnings and hours in the preceding 12 months and taking the "total compensation" received and divide this number by the "total time paid for." This formula does not provide an exclusion of earnings received in higher rated service and it does not provide for an exclusion of earnings received in lower classes of service. The formula is arbitrary - providing for no exceptions of any type, and while some may argue that it is not equitable to protect a demoted Supervisor at his higher rate others may argue that a recently promoted Journeyman Mechanic is not treated equitably when lower rated helper or apprentice service would be counted. But, regardless of which perspective of equity and fairness is considered, the formula is there, and that is what must be followed, unless the parties saw fit to alter its language. A situation not present here.

In our view, this is a correct interpretation of *New York Dock*. To the extent that Claimants performed service in crafts or classes other than yardmaster during their test periods, such compensation and time shall be factored into their monthly guarantees. The answer to the Carrier's second issue is that with the exception of the computation of monthly guarantees for union officials, Section 5(a) of *New York Dock* has not been modified.

Carrier's third issue goes to the question of what is meant by an attrition agreement. As noted by the Carrier, that term does not appear in the 1979 Agreement, but is found in the ICC's *Final Decision*. Although the ICC is not charged with the interpretation of a protective agreement once it has been adopted, the Commission is responsible for evaluating such agreements to determine if they meet the minimum standards of protection established by the Interstate Commerce Act. In this regard, the ICC is well-suited to its task, and its statements must be given great deference. The real question is what the ICC meant when it characterized the 1979 Agreement as an attrition agreement. We find most significant the ICC's decision in *Great Northern Pacific & Burlington Lines, Inc. - Merger - Great Northern Railway - In the Matter of William A. Rilling*,[15] wherein it wrote:

> The Northern Lines conditions specifically set forth the methods by which Northern Lines job protection rights may be terminated – death, retirement, discharge for cause, or resignation. Mr. Rilling's situation constitutes a "resignation" within the express terms of the Northern Lines conditions. We therefore find that the Agreement does not vary the terms of, but rather comports with, the labor protective conditions imposed here.
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> Moreover, we point out that Mr. Rilling's argument may be construed as a contention that BN discharged him without cause and that such action is not

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[15] *supra*

> permitted by the express terms of the conditions. However, it is clear from practice under attrition-type conditions (including the Landis case) that the railroad is permitted to discharge without cause, as long as the employee is compensated at the appropriate level for the rest of his or her working life or agrees to a lump sum, as here. To say, as Mr. Rilling arguably contends, that no discharge without cause is possible is to say that the merger conditions amounted to a "job freeze" in which employers would have to retain employees even though no work was available. The courts have consistently held that a job freeze was not contemplated by Congress or the Commission when the imposition of labor protective conditions was established as a requirement for a merger's approval. See, *RLEA* v. *United States*, 339 U.S. 142, 153 (1950).
>
> We conclude that Mr. Rilling's release agreement does not vary the terms of the merger protective conditions and therefore is valid. We find that the release agreement constitutes a "resignation" within the express terms of the Northern Lines conditions. We also find, as independent ground, that even under attrition-type conditions such as those imposed here, the railroad may discharge an employee without cause so long as it compensates the employee at the appropriate level for the rest of his or her working life or reaches an agreement, as here, for a lump-sum payment.

From our reading of the above decision, it is clear to this Board that the ICC does not consider an attrition agreement to be one that prohibits Carrier from reducing the number of jobs it has in any class or craft. The ICC drew a distinction between the two, calling the latter a "job freeze," a term the ICC has not used in connection with this merger. We find, as did the ICC in the above decision, that under an attrition agreement the Carrier is obligated to provide a specified level of compensation to a protected employee until he or she leaves the work force through normal attrition, *i.e.*, as a result of death, retirement, discharge for cause or resignation. When the ICC stated that "no reduction in force of employment shall occur other than principally by" normal attrition, we conclude it meant that the number of protected employees, rather than the number of jobs or positions, shall

not be reduced. We find nothing in the 1979 Agreement that would place any further restriction upon the Carrier. The Union's reference to its election of Section 8(b) of the Agreement is not persuasive. That provision merely directs how the Carrier may reduce its protection liability in the event of a decline in business. The Union rejected Section 8(a), which would permit the Carrier to reduce the number of employees subject to protection, and accepted the provision that allows a proportionate reduction in all protected yardmasters' guarantees. Section 8(a) cannot be read to be the only mechanism the Carrier had to reduce jobs. The Carrier's third issue, therefore, is answered in the negative.

Carrier's fourth issue concerns the interrelationship between the 1979 Agreement and *New York Dock*. Under *New York Dock* it is well established that a protected employee is obligated to accept work within a subordinate craft when he or she is unable to exercise seniority to a position in the primary craft. The employee's failure to do so permits the Carrier to charge the earnings of the subordinate position against any guarantee payments to which the employee would be entitled. This is the intent of Article I, Section 5(b) of *New York Dock*, which reads as follows:

> 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.

To properly interpret the above provision, we must also consider Section 5(a), which establishes the eligibility requirements for a displacement allowance. That provision reads, in pertinent part, as follows:

> 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.

Under this provision, it has been established by several Arbitration Boards that the "normal exercise of . . . seniority rights under existing agreements" includes the exercise of seniority to a subordinate craft. One such Award is Award No. 2 of the Arbitration Board between the International Brotherhood of Electrical Workers and Burlington Northern Railroad Company, with John B. LaRocco serving as Neutral Member and Chair. The dispute therein involved an electrician apprentice who also held seniority as a laborer under another agreement. The Board held:

> To resolve this dispute, we must interpret the term "seniority" as used in the above passages. The Organization argues that because the Agreement covers only electrical workers, seniority refers solely to Claimant's electrician apprentice seniority. On the other hand, the Carrier gives a more expansive definition to seniority contending that it refers to Claimant's laborer seniority as well as his electrician apprentice seniority.
>
> Article I, Section 1(e) states that Claimant is a dismissed employee if ". . . he is unable to secure another position by the exercise of his seniority rights." We must interpret the Agreement according to the plain meaning of the language negotiated by the parties. First, the words "another position" do not expressly restrict the exercise of seniority to a position within the electricians' craft. Second, the possessive

adjective "his" before seniority rights strongly suggests that we should look to Claimant's personal seniority rights and status.

A perusal of Section 6 supports the conclusion that Claimant was obligated to exercise his laborer's seniority. Except for a single reference, seniority is not expressly limited to seniority within a particular craft. . . . In the Arbitration Award between the RYA and C&O/SCL (Lieberman, 1981) which interpreted the same New York Dock protective conditions found in the instant Agreement, the Arbitrator observed that the:

> ". . . language indicates that an employee must exercise his seniority rights under 'existing agreements, rules and practices to obtain a position. . .' That language does not restrict the exercise to a particular agreement and specifically also includes practices which in this instance clearly indicate return to the original craft." (Emphasis Added.) RYA and C&O/SCL Arbitration Award (Lieberman, 1981) at page 5.

Our reading of the *New York Dock* Conditions leads to no different a conclusion. Under *New York Dock*, a yardmaster holding seniority in another craft, such as in train service or as a clerk, must exercise such seniority when he can no longer hold a position as a yardmaster. Should he fail to do so, his guarantee may be reduced by what he would have earned had he exercised such seniority.

The only remaining question is whether the 1979 Agreement modified *New York Dock* in this regard. We have already rejected the Union's argument that the first paragraph of Section 5(a) and Section 5(b) do not apply because they are not specifically mentioned in the 1979 Agreement. We find no provision in the 1979 Agreement that either modifies or voids these paragraphs.

Accordingly, we find that Claimants' guarantees may be reduced each month by the amount they would have earned in other crafts if they failed to exercise seniority to such crafts. The Carrier's fourth issue, therefore, is answered in the negative.

For the same reasons, we find that Carrier's fifth issue must be answered that *New York Dock* Section 6 is applicable and that the 1979 Agreement has not modified the Carrier's right to offset other earnings against a protection claim.

We now turn to the Carrier's position that the claims should be barred, in whole or in part, under the doctrine of laches. For its part, the Union refers to the following statement contained in the Carrier's submission before the Fletcher Board:

> In this case, the Carrier is not arguing laches, because of a desire to put the issue to rest and, hopefully, dispose of the claims that have been made by yardmasters. Rather than arbitrate each protection claim, the parties agreed to submit the general issue to arbitration. Following an award, those claims will be disposed of in accordance with its findings. This Board would serve its purpose by clearly stating that Section 11 conditions 1979 Agreement benefits on negotiation of a single working agreement for employees of a craft/class, and that no such agreement exists for yardmasters; therefore, yardmasters are entitled only to basic New York Dock protection.

We interpret Carrier's statement to be a waiver of the defense of laches as to all claims then pending. We do not read it to be an unconditional waiver. Thus, we find that the defense was preserved with respect to claims that had not yet been filed. Each of these claims must be evaluated to determine if the claim reaches back so far that it is unduly burdensome upon the Carrier. The fact that the parties were not certain that the 1979 Agreement was applicable to yardmasters until the Fletcher Board issued its Award on May 24, 1993, is not relevant to our consideration of whether laches will be applied. Claimants' rights arose when they were adversely affected, not when the Award was rendered.

Looking first at Claim No. 1 on behalf of G. A. Wohlfeil, we find that the first claim filed on his behalf was on October 15, 1993, and covered a period from December 1992 through September 1993. Although this claim was filed subsequent to the Award of the Fletcher Board, it covers only six months prior to the Award. Additionally, we do not find that the Carrier had raised laches as a defense to this claim during the handling of the dispute on the property. Accordingly, we find that the claim is not barred.

Claim No. 2 on behalf of J. Vandendries was first filed on November 10, 1993, and covers the period from June 1986 through October 1993. In its denial on the second level, Carrier raised a laches defense. The Union asserts, however, that this was merely a refiling of a claim that was first presented in 1986. This Board, however, has not been furnished with copies of the 1986 claim and is, therefore, unable to make such a determination. We must, therefore, treat them as separate claims. With respect to the claim as it was presented to the Board, we find that the portion of the claim covering any period prior to December 1992 (the same date on which Claim No. 1 begins) is barred by the doctrine of laches. The balance of the claim is timely. We make no ruling with respect to whatever claim the Union might have filed earlier. There shall, however, be no duplication of claims.

Claim No. 3 on behalf of L. E. Miller was filed on October 15, 1993, and covers the period from September 1986 through September 1989. In its first denial of the claim on November 22, 1993, the Carrier raised a laches defense. The Union asserts laches is not applicable because the employees had not been furnished with computations of their test period earnings until August 1993, after the Fletcher Board issued its Award. Without such information, the Union says it could not file

proper claims. The facts in Case No. 2, however, belie this position. Obviously, claims were filed before the Fletcher Board met, although they may not have had the specificity that is now possible with having the test period earnings. Nevertheless, certain employees protected their rights by filing claims. The burden then fell to the Carrier to compile the necessary information. The fact that Carrier may have waited to do so until it found that its position regarding the application of the 1979 Agreement was erroneous did not alter the employees' rights or obligations. Claimant Miller, however, filed no claim and we find, accordingly, that the claim presented herein is barred under the doctrine of laches.

At the suggestion of the parties, the Board has not undertaken to compute the exact amounts to which Claimants are entitled under those claims not found to be barred by laches. The parties have assured the Board that the general interpretations herein shall be sufficient to permit them to reach agreement as to Claimants' entitlements, if any. The Board, however, will retain jurisdiction over these claims should the parties, after reasonable attempt, be unable to reach resolution.

Award: Claims 1 and 2 are sustained to the extent they are consistent with the findings herein. Claim 3 is dismissed.

Richard J. O'Brien
Carrier Member

Barry E. Simon
Chairman and Neutral Member

Donald R. Carver
Employee Member

Dated: March 14, 1995
Arlington Heights, Illinois

EB

SERVICE DATE
FEB 26 1996

SURFACE TRANSPORTATION BOARD

DECISION

RECEIVED
FEB 28 1996
LEGAL

Finance Docket No. 28676 (Sub-No. 2)

GRAND TRUNK WESTERN RAILROAD COMPANY--MERGER--
DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY--ARBITRATION REVIEW

Decided: February 12, 1996

On April 3, 1995, the United Transportation Union (UTU or the Union) petitioned the former Interstate Commerce Commission (ICC or Commission) to review and set aside an arbitration award issued March 14, 1995, interpreting a labor protective agreement (the Agreement). GTW filed a reply on April 24, 1995. The Surface Transportation Board (Board) has been given jurisdiction over this matter.[1] In considering the petition, we will apply the Lace Curtain review standards.[2] Based on our review, we affirm the arbitral decision.

BACKGROUND

The terms of the Agreement were imposed in Grand Trunk Western Railroad--Control--Detroit, Toledo and Ironton Railroad Company, et al., 360 I.C.C. 498 (1979) (the 1979 Decision).[3] The Agreement was one of the conditions imposed on the Commission's approval of the acquisition by the Grand Trunk Western Railroad Company (GTW) of the Detroit, Toledo and Ironton Railroad Company (DTI) and the Detroit and Toledo Shore Line Railroad (DTSL).

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the ICC and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the Act, and citations are to former sections of the statute, unless otherwise indicated.

[2] Chicago and North W. Transp. Co.--Abandonment, 3 I.C.C.2d 729, 735 (1987), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Review of arbitral decisions has been limited "to recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Generally, the agency will not reverse an arbitrator's decision unless the decision fails to draw its essence from the conditions imposed, the arbitrator's action was outside the scope of authority granted by those conditions, or there is egregious error. Lace Curtain, 3 I.C.C.2d at 735. We do not review arbitrators' decisions on issues of causation, calculation of benefits, or resolution of other factual questions. Lace Curtain, 3 I.C.C.2d at 736.

[3] The decision was embraced in Norfolk & W. Ry. Co.--Control--Detroit, T. & I. R. Co., 360 I.C.C. 498 (1979).

In anticipation of the acquisition, GTW negotiated protective agreements with most of its employees, including the Agreement with the Railroad Yardmasters of America (RYA),[4] signed September 4, 1979. The Agreement was identical in all respects to those reached with all of the other labor organizations. The Commission found in the 1979 Decision that the various protective agreements met the minimum requirements of 49 U.S.C. 11347, which requires that we impose conditions on merger transactions to protect the interests of affected employees.

The arbitration award that UTU seeks to overturn was issued by an arbitral board convened pursuant to Section 11 of New York Dock[5] with Barry Simon as the neutral member.[6] UTU filed claims on behalf of three GTW "yardmasters," a craft of rail employees. The first claim was filed by G.A. Wohlfeil, who held a yardmaster position until June 24, 1980. When his position was abolished, he exercised his seniority to take a lower-paying position as a switchman. The second was filed by J.A. Vandendries, a yardmaster whose position was also abolished on June 24, 1980. He exercised his seniority to become a clerk, and subsequently, was appointed a trainmaster. The third claimant, L.E. Miller, kept a yardmaster position, with a reduced salary.

The arbitral board sustained Wohlfeil's and Vandendries' claims in part and to the extent that they were timely, but dismissed Miller's. In so ruling, it held that the claimants were required to exercise their seniority to take positions in subordinate crafts to protect their rights under the Agreement. It thus permitted the carrier to charge the earnings of the subordinate position against the payments to which the employees would otherwise have been entitled. (Wohlfeil and Vandendries had argued that they were entitled to be paid yardmaster salaries, without any deduction for the salaries they were paid as a switchman and clerk respectively.) The arbitral board also held that the carrier could reduce the number of jobs on the railroad, even though the Agreement is an "attrition agreement." Finally, the arbitral board held that the laches defense barred any recovery of damages accruing before December 1992.

The Union argues that the three yardmasters were not required to exercise their seniority to take positions in other crafts. It also argues that the railroad was prohibited from eliminating Wohlfeil's and Vandendries' yardmaster positions until they voluntarily left, retired or died. Finally, the Union maintains that the laches defense is not available.

In reply, the carrier argues that UTU's appeal should be dismissed because it involves no recurring or otherwise significant issues of general importance in the interpretation of labor conditions, and thus does not fall within the scope of those warranting our review. Alternatively, GTW argues that the

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[4] RYA subsequently became a part of the United Transportation Union and is now known as the United Transportation Union - Yardmaster Department. For simplicity, the term "Union" shall refer to RYA both before and after becoming a part of UTU.

[5] New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

[6] Both the labor and rail parties selected one board member each. Those two members agreed to select Barry Simon as the Chairman and neutral member.

appeal must be denied because the arbitral board properly construed the Agreement.

DISCUSSION AND CONCLUSIONS

Lace Curtain Review. We will accept review because this appeal raises a significant issue of how provisions of an implementing agreement are to be interpreted in light of the New York Dock conditions on which the Agreement is based. This issue transcends questions of causation, calculation of benefits, or resolution of other factual questions.

The Agreement and New York Dock. The heart of the disagreement between the railroad and the Union concerns the effect of the Agreement on the provisions of New York Dock. The railroad argues that New York Dock applies unless it is specifically modified by the Agreement, while the Union argues that the Agreement displaces New York Dock entirely.

The arbitral board correctly agreed with the carrier. It explained that "Section I of the 1979 Agreement is clear in that it provides that all of New York Dock applies, unless the Agreement has modified any portion of those Conditions." It noted that "[a]n abridged reading of Section 1 shows that '[t]he terms and conditions imposed in New York Dock . . . shall be applied . . ., except as those terms are modified herein.'"

The Union notes that the Agreement references certain provisions of New York Dock [Section 5(a)(second paragraph) and Section 5(c), for example], but not others [such as Section 5(a)]. Because the Agreement referenced only those specific provisions, the Union argues that no other provisions were intended to be included. But, as the arbitral board noted, Section 1 of the Agreement expressly applies the provisions of New York Dock except as they are specifically modified. Under Article I, Section 5(b) of New York Dock, an employee must accept work within a subordinate craft if the employee is displaced from his or her primary craft. Thus, Wohlfeil's and Vandendries' guarantees should be reduced each month by the amount they earned as a switchman and clerk, respectively.

We also find the arbitral board's interpretation of the term "attrition agreement" to be correct. It determined that an "attrition agreement" does not prohibit a carrier from reducing the number of jobs in any class or craft. The UTU had argued that the carrier could only eliminate jobs through attrition, i.e., when the incumbent retired, died or left the railroad of his own violation. As the arbitral board noted, however, the ICC's decision in Great Northern Pacific & Burlington Lines, Inc.--Merger--Great Northern Railway--In the Matter of William A. Rilling, 8 I.C.C.2d 229, 238 (1991)[7] explained that:

> to [accept labor's position] that no discharge without cause is possible is to say that the merger conditions amounted to a "job freeze" in which employers would have to retain employees even though no work was available. The courts have consistently held that a job freeze was not contemplated by Congress or the Commission when the imposition of labor protective conditions was established as a requirement for a merger's

[7] Aff'd Rilling v. Burlington N. R.R. Co., 31 F.3d 856 (9th Cir. 1994).

approval. See RLEA v. United States, 339 U.S. 142, 153 (1950).

The arbitral board correctly found that, although the Agreement (like the attrition conditions in Great Northern) extended the duration of labor protection beyond the 6-year maximum of New York Dock, it did not create a job freeze. Accord, Norfolk and Western R. Co. v. Nemitz, 404 U.S. 37, 42 (1971) (Nemitz) (purpose of labor protective conditions is to provide compensation, not freeze jobs). The Agreement contained no language restricting the carrier's right to eliminate jobs, but merely provided for compensation when that occurred.

Laches. The carrier successfully argued before the arbitral board that the claims of Vandendries and Miller should be disallowed, at least in part, because they had allegedly delayed too long (almost 7 years) in presenting their claims. The Unions had argued that the carrier waived that defense in a prior arbitration involving claims by other yardmasters[8] arising out of the GTW acquisition of the DTI and DTSL. But the arbitral board reasonably interpreted the carrier's waiver in that earlier case only to apply to claims pending at the time of that prior arbitration, which the claims at issue here were not.

The Unions argue that because neither the Agreement nor New York Dock makes specific provision for a laches defense, the railroad may not use it. It claims that resort to laches would somehow contravene Nemitz, Reiter v. Cooper, 507 U.S. 258 (1993), and the Constitution. We disagree.

Nemitz is not on point. There, the Supreme Court invalidated an implementing agreement between labor and the carrier that reduced the level of labor protection that had previously been imposed by the ICC for a particular merger transaction. The court ruled that the agreement undermined the right of an individual employee, Nemitz, to the minimum level of protection provided for in the statute.

In this case, there has been no implementing agreement that has compromised statutorily guaranteed labor protection rights of individual employees. Rather, an arbitral panel has merely exercised its delegated authority to determine whether particular claims under the existing agreement are so stale that they should be barred. The arbitral panel is charged with determining whether particular claims are valid, a task that can be made more difficult or impossible by delays of the magnitude encountered here. As the carrier notes, it may not be possible under the circumstances to calculate appropriate offsets such as voluntary absences and to determine whether the claimant exercised his seniority rights to the fullest extent possible. In the absence of any particular statutory deadlines for filing, or of any agency rule concerning the subject, we think that it is appropriate for the arbitral board to make determinations concerning timeliness, as necessary to protect the integrity of the arbitral process.

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[8] United Transportation Union (Yardmasters) and Grand Trunk Western Railroad Company Arbitration Pursuant to Section 11, New York Dock Protective Provisions imposed by the Interstate Commerce Commission in Finance Docket No. 28676 (Sub-No. 1), John C. Fletcher, Chairman and Neutral Member, May 24, 1993 (Fletcher Board and Fletcher Award). There GTW said: "the Carrier is not arguing laches, because of a desire to put the issue to rest and hopefully, dispose of the claims that have been made by the yardmasters." Quoted in Simon Award, at 25.

The Union's constitutional argument rests on an analogy between this case and Reiter, where the Supreme Court held that shippers could not avoid paying the rates published in ICC tariffs by invoking common law claims and defenses, including estoppel. The Union argues that, similarly, the carrier may not escape its obligations under section 11347 here by invoking the common law defense of laches.

Reiter does not stand for the broad proposition claimed. Reiter and related cases deal with the strict obligation to pay the filed tariff rate under the "filed rate" doctrine. Those cases do not purport to preclude the use of equitable principles in all ICC cases or in related arbitral decisions. No court, agency or arbitral precedent supports the broad interpretation of Reiter claimed by UTU here. The carrier cites ICC and arbitral precedents to establish that not only may claims be barred by laches, but also that shorter time periods than the ones at issue here have been found sufficient to bar claims. In Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad -- Merger (Arbitration Review), 5 I.C.C.2d 234 (1989) (Norfolk and Western), the agency held that "[a] delay of 11 months in appealing the award would warrant dismissal based on laches." Id., at 237.[9]

Moreover, there are numerous precedents affirming the use by federal agencies of equitable principles. United States v. Northern Pac. Ry., 288 U.S. 490, 494 (1933) (laches, emphasizing the importance of timeliness to orderly administrative procedure); National Insulation Transp. Comm. v. ICC, 683 F.2d 533, 540-541 (D.C. Cir. 1982) (ICC has broad equitable discretion in fashioning rate refund remedies); Southern Ry. v. United States, 412 F. Supp. 1122, 1151 (D.D.C. 1976) (agency should look to equity of restitution in determining whether to award refund for unlawful rate); Moss v. CAB, 521 F.2d 298, 308-309 (D.C. Cir. 1975) (same). We conclude that the fact that the laches defense is not specifically enumerated in the Act or the Agreement does not preclude GTW from invoking it here.

Application of laches to these facts was reasonable. The three claims at issue were filed in 1993. Wohlfeil's claim involved an injury that arose only 6 months before the claim was filed, and the arbitral board held that this claim was timely. But the basis for the other two claims arose in 1986, more than 7 years before the two yardmasters filed their claims. It is not persuasive to say, as the Union argued, that the claimants had not unreasonably delayed in asserting their rights because they were not certain of their rights until the Fletcher Board found on May 24, 1993, that the Agreement applied to the yardmasters.[10] As the arbitral board noted, some yardmasters did protect their rights by promptly filing claims under the Agreement. It held that it was incumbent on Vandendries and Miller to do likewise. We do not find this conclusion to be egregious error under the Lace Curtain standards and we uphold the Board.

In sum, we find the arbitral board's decision to be a correct application of the law to the facts of this case and that

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[9] Although the Union claims that laches has not been recognized as a defense in arbitrations under the Railway Labor Act, it has provided no citations in support of that contention.

[10] GTW asked the arbitral board to set aside the decision of the Fletcher Board. It correctly declined to do so, noting that review of arbitral decisions is properly reserved to this agency.

its decision does not draw its essence from the conditions imposed. The arbitral board has not exceeded its authority; nor has it committed egregious error. Thus, we are affirming the arbitral decision and denying the appeal.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. We affirm the arbitral decision and deny UTU'S appeal.

2. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary