

AWARD NO. 1

Case No. 1

Organization File No.

Carrier File No.

**PUBLIC LAW BOARD NO. 6072 (Procedural)**

PARTIES     ) INTERNATIONAL ASSOCIATION OF MACHINISTS  
              )    AND AEROSPACE WORKERS  
TO            )  
              )  
DISPUTE     ) CONSOLIDATED RAIL CORPORATION

**Background:**

On December 22, 1995, R. J. Corman Railroad Company/Pennsylvania Lines, Inc. (RJCP) filed a verified Notice of Exemption, pursuant to 49 C.F.R. § 1150.32, to acquire and operate approximately 230.4 miles of rail lines of Consolidated Rail Corporation (Conrail), hereinafter referred to as "Carrier." This trackage is known as the "Clearfield Cluster." The Notice of Exemption was filed with the Interstate Commerce Commission, and was docketed as Finance Docket No. 32838. Because RJCP was not a rail carrier, this transaction was governed by Section 10901 of the Interstate Commerce Act, 49 U.S.C. § 10901, which requires the Commission's approval of an acquisition of a rail line by a non-carrier. Although the Act gives the Commission discretion to impose certain protective conditions for employees affected by the transaction, it has rarely done so. On January 23, 1996, the Surface Transportation Board<sup>1</sup> granted the exemption for RJCP to acquire and operate the subject rail lines without imposing labor protective conditions.<sup>2</sup>

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<sup>1</sup>The successor to the Interstate Commerce Commission pursuant to the I.C.C. Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

<sup>2</sup>Finance Docket No. 32838.

In connection with Finance Docket No. 32838, R. J. Corman (Corman) filed a verified notice under 49 C.F.R. § 1180.2(d)(2) to continue control of RJCP, after it acquired control of the Clearfield Cluster and thereafter becomes a carrier. This was docketed with the Commission as Finance Docket No. 32839. Section 11343 of the Interstate Commerce Act, 49 U.S.C. § 11343, requires Commission approval and authorization for transactions involving "the acquisition and control of a carrier by a person that is not a carrier but that controls any number of carriers."<sup>3</sup> This section is applicable because Corman, while itself a non-carrier, controls other railroads in its corporate family. The Surface Transportation Board, on January 23, 1998, granted the Exemption in Finance Docket No. 32839, stating:

This proceeding is related to R.J. Corman Railroad Company/Pennsylvania Lines, Inc. — Acquisition and Operation Exemption — Lines of Consolidated Rail Corporation, Finance Docket No. 32838, wherein RJCP will acquire 230.4 miles of rail lines of Conrail, and to acquire by assignment from Conrail incidental trackage rights over approximately 7.8 miles of railroad owned by the Clearfield and Mahoning Railway Company.

The transaction is exempt from the prior approval requirements of 49 U.S.C. 11343 because: (1) the properties of RJCP will not connect with any other railroad in the R.J. Corman corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect RJCP with any other railroad in the R.J. Corman corporate family; and (3) the transaction does not involve a class I carrier.

As a condition to this exemption, any employees adversely affected by the trackage rights will be protected under New York Doc Ry. — Control — Brooklyn Eastern Dist., [sic] 360 I.C.C. 60 (1979).

Prior to the sale of the Clearfield Cluster, David L. Duke, hereinafter referred to as "Claimant," held a machinist position at Clearfield, Pennsylvania. He was, at all time relevant to this dispute, an employee of Carrier and a member of the International Association of Machinists and

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<sup>3</sup>§ 11343(a)(5).

Aerospace Workers, hereinafter referred to as "the Organization." Claimant's position was abolished effective December 29, 1995, whereupon he exercised his seniority to a machinist position at the Juniata Locomotive Facility in Altoona, Pennsylvania, located approximately sixty miles from Clearfield. Beginning on March 5, 1996, claims were filed seeking monthly displacement allowances for Claimant, contending he was adversely affected by the sale of the Clearfield Cluster. Carrier denied these claims.

By letter dated August 28, 1996, the Organization requested arbitration pursuant to Section 11 of the *New York Dock* Conditions. Carrier has refused to arbitrate these claims, but has agreed to the establishment of a Procedural Public Law Board to resolve the issue presented herein.

**Issues Presented:**

The Organization has stated the issues before this Board as follows:

1. *Is the position of the Organization correct, in that the Carrier (Conrail) does not have the exclusive right to determine what disputes or controversies relative to New York Dock conditions are to be handled in accordance with Article I, Section 11 of the New York Dock conditions, "Arbitration of disputes"?*
2. *Is the position of the Organization correct, in that the Carrier (Conrail) was wrong in denying the employee the right to progress this dispute to Arbitration in accordance with Article I, Section 11 of the New York Dock conditions, "Arbitration of disputes"?*

The Carrier has stated the issues before this Board as follows:

1. *Did the Surface Transportation Board impose New York Dock protective benefits under Finance Docket No. 32838 for the benefit of those Conrail employees adversely affected by the acquisition of Conrail rail lines known as the "Clearfield Cluster" by R. J. Corman Railroad Company/Pennsylvania Lines, Inc.?*

2. *Is Claimant, D. Duke, as an employee of Conrail, considered an "affected employee" subject to the benefits imposed by Finance Docket No. 32839, Continuance in Control Exemption — R. J. Corman Railroad Company/ Pennsylvania Lines, Inc.?*
3. *If the answer to questions 1 and 2 are in the negative, have the employees identified any authority, statutory or otherwise, to request arbitration under section 11 of the New York Dock conditions regarding Claimant D. Duke's request for protective benefits?*

**Relevant Provisions:**

***New York Dock Conditions, Article I***

11. Arbitration of disputes. - (a) *In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except Sections 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.*

*(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.*

*(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.*

*(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.*

(e) In the event of any dispute as to whether or not a particular employees 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.

***Railway Labor Act, Section 3, Second 45 U.S.C. § 153***

*Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.*

*If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the*

*a dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for the enforcement of compliance with awards of the Adjustment Board. (emphasis added)*

**Position of the Organization:**

The Organization argues Section 11(a) of the *New York Dock* conditions clearly mandates the arbitration process when there is a dispute or controversy with respect to the interpretation, application or enforcement of the conditions, and one party may not frustrate the process. It submits that all activities of the Carrier with regard to this dispute have been directed toward stalling the process from reaching a final resolution. After refusing to designate a member of the arbitration board in accordance with Section 11, says the Organization, the Carrier further refused to be a party to the arbitration process. The Organization objects to the Carrier's position that it has the exclusive right to determine what disputes may be handled in accordance with Section 11 of the *New York Dock* conditions. According to the Organization, the Carrier's position is without agreement, statutory or precedential authority.

The Organization asserts this is the first case wherein a Procedural Public Law Board has been established to determine if Carrier may pick and choose which disputes are arbitrable under *New York Dock* conditions. Historically, says the Organization, it is the arbitration process contained in

Section 11(a) that determines which disputes or controversies are relative to the conditions. Noting that the arbitration provisions in Section 4 of the *New York Dock* conditions preclude the creation of a Procedural Board to prevent the employees from stalling transactions, the Organization submits Section 11 should be no different. It insists either party may initiate arbitration under Section 11.

The Organization also asserts the Carrier failed to serve advance notice of its intent to change its operation with the Clearfield Cluster, as required by Section 4 of the *New York Dock* conditions. It further contends the Carrier failed to meet with representatives of such interested employees for the purpose of reaching an agreement with respect to application of the terms and conditions of *New York Dock*. It submits Section 4 prohibits a carrier from changing its operations, services, facilities or equipment until after an agreement is reached or the decision of a referee has been rendered.

The Organization argues the Carrier has evaded making protective payments to the affected or harmed Claimant in violation of the Surface Transportation Board's imposed *New York Dock* conditions. It asks, therefore, that the issues presented by the Organization be answered in the affirmative.

**Position of the Carrier:**

The Carrier avers the transaction covered by Finance Docket No. 32838 was a non-carrier acquisition under Section 10901 of the Interstate Commerce Act, and the Commission exercised its discretion not to impose labor protective conditions for any employees. Because Claimant is not entitled to labor protection as a result of the 10901 transaction, the Carrier concludes the request for arbitration under Section 11 of *New York Dock* is not appropriate.

The Carrier next argues the control transaction covered by Finance Docket No. 32839 does not provide labor protection for employees of non-parties. According to Carrier, this was a transaction covered by Section 11343 of the Interstate Commerce Act, and involved the control of a new carrier by a company that already exercises control over one or more other carriers. While the Carrier acknowledges the Commission did impose employee protective conditions in this transaction, it denies that Conrail was a party to the transaction. It contends the Commission has explained on numerous occasions, with affirmation by the courts, that employees of carriers that are not parties to a transaction are not entitled to labor protective benefits. The Carrier also denies the Organization may somehow link the two transactions to confer labor protective conditions upon Claimant.

The Carrier suggests the Organization's claim would be more properly filed before the Surface Transportation Board as a Petition to Revoke the Exemption. It contends the Neutral herein would exceed the limits of his authority under *New York Dock* if he were to expand the scope of the labor protection that has been imposed by the Commission.

Concluding that Claimant has failed to identify a transaction under which labor protection conditions were imposed, thereby entitling him to any benefits, the Carrier asks that the issues it has presented be answered in the negative.

**Findings:**

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this



Board is duly constituted by order of the National Mediation Board, and that the parties were duly notified of the hearing on this matter.

Distilled to its quintessence, the dispute between the parties arises from the Carrier's refusal to enter into arbitration pursuant to Section 11 of the *New York Dock* conditions on the basis that such conditions have not been imposed upon the Carrier in the transaction upon which the Organization bases its claim. In the first instance, the Carrier argues Finance Docket No. 32838 was an exempt transaction and no conditions were imposed. In the second instance, the Carrier argues the *New York Dock* conditions imposed in Finance Docket No. 32839 are not applicable to it because Conrail was not a party to that proceeding. Therefore, reasons, the Carrier, it cannot be required to submit to arbitration under conditions that are not applicable to it.

The Organization, on the other hand, appears to be stymied. It submits the only way it can get a determination of whether or not the *New York Dock* conditions protect Claimant is by submitting the question to arbitration pursuant to Section 11 of *New York Dock*. It argues Carrier's act of picking and choosing which disputes it will allow to go forward to *New York Dock* arbitration frustrates the adjudicatory process. In an effort to move this case forward, the Organization sought relief through the National Mediation Board, which established this Board pursuant to Section 3, Second of the Railway Labor Act.

At the outset, this Board, on its own initiative, must raise a jurisdictional question. Although the parties have averred to the Board that they have agreed to put this issue to it, such concurrence does not establish the Board's jurisdiction. This is not a private arbitration panel, such as those established through collective bargaining agreements in other industries. Such panels derive their

authority from the agreement establishing them. This Board, on the other hand, is a creation of the Railway Labor Act, and derives its jurisdiction therefrom. The parties, despite their agreement, have no power to expand the statutory jurisdiction of a Public Law Board.

The mere fact that this Board was established by action of the National Mediation Board is not sufficient to confer jurisdiction upon it. The National Mediation Board has on numerous occasions explained that its creation of Public Law Boards is strictly a ministerial function and in doing so it makes no judgment or determination as to the appropriateness of the Board's jurisdiction to the particular dispute. Instead, the National Mediation Board leaves it to the Public Law Board to determine on its own whether it has jurisdiction over a particular matter.

Under Section 3, Second of the Railway Labor Act, a Procedural Public Law Board is created when the partisans are unable to agree upon any of the matters with respect to the establishment and jurisdiction of the merits board. As noted by Jacob Seidenberg in *The Railway Labor Act at Fifty*, the Procedural Board typically will address "such problems as jurisdiction, time limits, place of hearings, exchange of submissions in advance of board session, interpretation of agreements for establishing the board, and the like." (p. 231)

The National Mediation Board's procedures for the establishment of Public Law Boards are set forth in 29 C.F.R. § 1207.1. Subsection (b) addresses the appointment of a neutral to determine matters concerning the establishment and/or jurisdiction of a PL Board. It provides as follows:

(1) When the members of a PL Board constituted in accordance with paragraph (a) of this section, for the purpose of resolving questions concerning the establishment of the Board and/or its jurisdiction, are unable to resolve these matter, then and in that event, either party may ten (10) days thereafter request the Mediation Board to appoint a neutral member to determine these procedural issues.

(2) Upon receipt of this request, the Mediation Board will notify the other party to the PL Board. The Mediation Board will then designate a neutral member to sit with the PL Board and resolve the procedural issues in dispute. When the neutral has determined the procedural issues in dispute, he shall cease to be a member of the PL Board.

It is evident from the statute, the National Mediation Board's regulations and the history that Procedural Public Law Boards are ancillary only to Public Law Boards established pursuant to Section 3, Second of the Railway Labor Act. There is, significantly, no comparable procedure for the Divisions of the National Railroad Adjustment Board under Section 3, First of the Act. In the case before this Board, the parties have not entered into an agreement to establish a Public Law Board, nor is either party seeking to do so. Rather, the Organization is seeking to bring its dispute to arbitration under procedures totally separate and apart from the Railway Labor Act.

Public Law Boards have long recognized that they do not have jurisdiction over disputes arising from agreements that establish their own exclusive arbitration procedures. Public Law Board No. 2925 (BRS v. SP, Richard R. Kasher) for instance, held that a dispute under the Washington Job Protection Agreement cannot be resolved pursuant to the dispute adjudication procedures of the Railway Labor Act, and must be handled pursuant to a Section 12 WJPA Arbitration Committee.

Further, the National Mediation Board has an interest in separating disputes that are referable to Public Law Boards under Section 3, Second, from those arising under agreements or conditions that have their own adjudicatory machinery. The expenses and compensation of neutrals deciding disputes under the Railway Labor Act are paid by the federal government through the National Mediation Board, while the expenses and compensation of neutrals operating under other arbitration provisions are paid by the parties. It would be contrary to the National Mediation Board's budgetary responsibility to allow parties to bring disputes within the aegis of the Railway Labor Act when they

have already agreed, or have been directed by the Interstate Commerce Commission, to have their disputes resolved at their own expense.

The distinction between the two arbitration fora is further evidenced by the avenues of appeal. Under the Railway Labor Act, a party may appeal an award of a Public Law Board to federal district court. A *New York Dock* arbitration award, however, is first appealed to the Surface Transportation Board, and may then be appealed directly to the Court of Appeals. The requirement of appealing to the agency first is an indication that the *New York Dock* arbitration committee serves as an adjunct to the Surface Transportation Board rather than as a private arbitration panel of the parties.

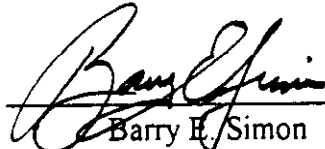
The issues herein, as expressed by the parties, clearly ask this Board to go beyond the statutory limits of its jurisdiction. To address these issues, the Board must consider whether or not *New York Dock* conditions have been imposed upon the Carrier. This is not a matter of contractual interpretation, but, rather, is a question more appropriately presented to the Surface Transportation Board. Alternatively, the Organization asks that it be permitted to present this question to a *New York Dock* arbitration committee over the Carrier's objection. This question goes to the scope of jurisdiction of a *New York Dock* arbitration committee. This, too, would be more appropriately addressed to the Surface Transportation Board. In any case, these are not issues that are ancillary to the creation of a Public Law Board under Section 3, Second of the Railway Labor Act.


Further, if this Board were to rule on these questions, neither party would be able to challenge the Board's award to the Surface Transportation Board as the Railway Labor Act directs appeals to the district court and there would be no way to make the Surface Transportation Board a party to

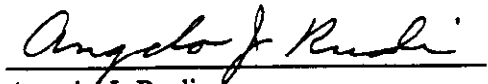
such an appeal. Thus, the Surface Transportation Board would never get an opportunity to clarify its own orders.

For these reasons, the Board concludes that the issues presented by the parties are beyond the jurisdiction of a Procedural Public Law Board established pursuant to Section 3, Second of the Railway Labor Act. The matters herein, therefore, must be dismissed.

AWARD: The matters herein are dismissed.

  
Barry E. Simon  
Chairman and Neutral Member

  
Raymond J. McMullen  
Employee Member

  
Angelo J. Rudi  
Carrier Member

Dated: May 28, 1998  
Arlington Heights, Illinois