In The Matter of Arbitration Between NORFOLK AND WESTERN RAILWAY COMPANY and ILLINOIS TERMINAL RAILROAD COMPANY vs. BROTHERHOOD OF LOCOMOTIVE ENGINEERS and UNITED TRANSPORTATION UNION	Finance Docket 29455

OPINION AND AWARD

Background

This is an arbitration proceeding pursuant to the provisions of the New York Dock Labor Protective Conditions (under Article I, Section 4), imposed by the Interstate Commerce Commission in Finance Docket Number 29455.

Hearing was held at St. Louis, Missouri on November 11, 1981, at which time oral argument was heard and exhibits offered and made part of the record.

In addition to the submissions presented at the hearing, the parties agreed to file post-hearing submissions and reply submissions. The post-hearing submissions of Carriers and UTU were received on November 25, 1981. Because of an incorrect mailing address, the post-hearing submission of BLE was not received until December 2, 1981.

Carriers were represented by R. D. Kidwell, System Director Labor Relations and M. M. Lucente, Esq. The UTU was represented by Vice Presidents C. L. Caldwell and H. G. Kenyon, and W. G. Mahoney, Esq. The BLE was represented by Vice President E. E. Blakeslee.

Statement of the Case

On June 22, 1981, the Interstate Commerce Commission (ICC) authorized the acquisition of the Illinois Terminal Railroad Company (IT) by the Norfolk & Western Railway Company (N & W). The acquisition authorization was conditioned upon the N & W's agreement to accept the provisions of the New York Dock II (New York Dock Railway-Control - Brooklyn Eastern District, 360 I. C. C. 60 (1979).

Article I, Section 4 of the New York Dock Conditions require that subsequent to Carriers' serving a 90 day notice of the intended transaction, the parties endeavor to negotiate an implementing agreement under which the employees will work after the implementation of the consolidation.

On July 29, 1981, Carriers' served the required notice on the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) of their intent to "unify, coordinate and/or consolidate their respective operations" on or after November 1, 1981. After serving the requisite notice, the parties met on several occasions in an effort to reach agreement under which the employees would work upon implementation of the consolidation. The parties were unable to reach agreement, and Carriers then advised the Organizations that all proposals made (except

Carriers' original proposal) were withdrawn; and that Carriers were invoking arbitration pursuant to Article I, Section 4 of the New York Dock Conditions.

The pertinent portions of the July 29, 1981 Notice by Carriers read:

> "As a result of the Carriers' excercise of the above-described authority, it is intended to unify, coordinate and/or consolidate facilities used and operations and services presently performed separately by Illinois Terminal Railroad Company and Norfolk & Western Railway Company.
>
> It is intended that all train and engine service employees represented by the Brotherhood of Locomotive Engineers or the United Transportation Union will, on the effective date of the unification, coordination and/or consolidation, be integrated into an appropriate single seniority roster and that such employees will be employees of NW and will be available to perform service on a coordinated basis subject to currently applicable NW (former Wabash) agreements."

Carrier's initial Implementing Agreement dated August 31, 1981, was a proposal involving BLE only, and excluded UTU. That Agreement read in pertinent part:

> "Article I
> Section 1
> (a) Except as provided as in (b) below, the names and seniority dates of the active IT engineers (all who are working as engineer or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) will be dovetailed with the active NW engineers (all who are working as engineer, fireman or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) on St. Louis Terminal. Thereafter, the inactive (not working or do not stand to work as engineer, fireman or hostler) IT engineers names will be dovetailed with the inactive NW engineers on St. Louis Terminal and the combined inactive group will then be placed on the bottom of the previously dovetailed active group of engineers. This will constitute the new NW consolidated St. Louis Terminal Roster.

(b) IT engineers electing not to have their names and seniority dates dovetailed into the St. Louis Terminal Roster will advise the Carrier within ten (10) days of the effective date of this Agreement of the NW's Decatur Division road or yard roster, excluding roster of Forrest District and Hannible-Quincy Yards, on which they elect to have their names and seniority dates dovetailed, and their names will be removed from said St. Louis Terminal Roster.

Article II - Schedule Agreement

Upon implementation of this Agreement, all engineers in the consolidated seniority districts will be subject to the applicable Schedule Agreement in effect on the former Wabash, except as specifically provided herein.

* * * *

Article XIV

This Agreement, while bearing the signature of the United Transportation Union General Chairman who formerly represented engineers on the former Illnois Terminal Railroad Company is hereafter recognized as an agreement between Norfolk and Western Railway Company and Brotherhood of Locomotive Engineers only."

In summary, Carriers' proposed Implementing Agreement would:

(1) Dovetail the seniority of employees on a two-tiered basis (active with active, inactive with inactive)

(2) Place the IT employees under the N & W (Wabash) schedule agreement, and

(3) Transfer the representation of the IT employees from UTU to BLE. 1 /

1 / Carriers reject the third contention, asserting that the Board is not being asked to alter representation rights. Carriers state: "The Illinois Terminal engineers represented by UTU constitute a minority of the employees of the craft of engineers in the post-consolidation NW system. As such, UTU must apply for certifica to represent engineers of the consolidated NW system, regardless of which agreements remain in effect."

Issues To Be Resolved

The parties are in agreement that there are two essential issues to be resolved in this dispute:

1. Does this Board have the authority under New York Dock Conditions to change the provisions of existing collective bargaining agreements, i.e. the authority to terminate the IT - UTU agreement and remove the IT engineers from UTU's jurisdiction.

2. Is the Carriers' proposal to dovetail seniority rosters (active with active and furloughed with furloughed) a fair and equitable method of combining the N & W - IT work of locomotive engineers.

Position of the Carriers

Carriers argue that the consolidation proposal, particularly the provision for the placement of all employees under one N & W schedule agreement, is the only proposal that will effectively achieve the purpose and intent of the ICC order. Otherwise, Carriers argue, N & W will have to live indefinitely with two separate and distinct work forces -- "One still operating under N & W rosters and rules and one still dependent on IT's rosters and rules even though IT and its operations have disappeared."

Carriers argue that the arbitrator's authority under Section 4 of the New York Dock Conditions includes the power to change the provisions of existing collective bargaining agreements. Carriers assert that the arbitrator's authority is consistent with the principal enunciated by the ICC in Southern Railway - Control-Central of Georgia, 331 ICC 165: "That the very purpose of the first and landmark set of merger protection conditions - the Washington Job Protection Agreement (WJPA) - was to provide a basis for 'superseding' existing agreements in order 'to avoid... the pro-

hibitions against transfering work from one railroad to another contained in collective bargaining agreements ... ' While Carriers agree that the ICC in Southern Railway-Control that agreements were not automatically cancelled by a merger order, they argue that the ICC "prescribed Sections 4 and 5 of the Washington Job Protection Agreement as conditions of the merger in order to provide a mechanism by which agreements could be changed, " and that Sections 4 and 5 (which formed the basis for Section 4 of the New York Dock Conditions) "required Carriers and labor organizations to negotiate over 'each plan of coordination which results in the rearrangement of forces' "and that in the event that the parties failed to agree, both Section 5 of the Washington Job Protection Agreement and Section 4 of New York Dock, a 'superseding process' through arbitration."

Carriers refer to the New York Dock decision 2/ (Which expressly refers to the consolidation of seniority rosters as a change that is subject to its procedures), and quotes the Commission's statement that "any future related action taken pursuant to an approval (i.e., consolidation of rosters as a result of the control) will require full and literal compliance with the conditions," and urge that "where seniority rosters and work are consolidated, it necessarily follows that rules must be consolidated and made uniform as well. Otherwise, the absurd situation of employees working at the same time on the same crew under a different set of work rules would result."

2/ New York Dock Railway-Control-Brooklyn E.D.T. 360 ICC 60 (1979)

(Underscoring provided.)

Carriers reject the Organizations' contention that Section 2 of the New York Dock Conditions does not allow changes in agreements through the arbitration process. Section 2 reads:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privleges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

Carriers argue that the arbitration process set forth in Section 4 is an integral part of the collective bargaining process that results eventually in an agreement voluntarily negotiated between the parties or an agreement prescribed by arbitration. Even though arbitration might be required, this does not change the character of the ultimate product, namely, a collective bargaining agreement; thus meeting the requirements of Section 2 of the New York Dock Conditions with respect to the procedures for changing existing collective bargaining agreements. In support of their argument, Carriers rely on the Seidenberg Award involving the Yardmasters, Conrail and the Detroit Terminal Company.

Finally, Carriers argue that the consolidation of seniority rosters and the placement of the N & W and IT work forces under the N & W Wabash agreements are necessary to carry out the transaction authorized by the ICC. Without a consolidation of seniority rosters and a unification of schedule agreements, Carriers contend they could not accomplish the central features of the application

approved by the ICC. Carrier states: "IT positions will not become NW positions and IT's operations will not be fully consolidated with NW's operations. Instead, an inconsistent and obstructive aspect of IT's former operations will survive and impede the consolidation. NW will be forced to manage the physically consolidated NW-IT properties with an unconsolidated NW-IT work force."

With respect to the question of the method of consolidating the seniority rosters, Carriers contend that the dovetailing as proposed is the most fair and equitable method of putting the rosters together. Carriers assert:

> "It would tend to keep the same employees working subsequent to consolidation that are working today. Furthermore, those presently active engineers who possibly would be furloughed subsequent to consolidation through a reduction in assignments would be the first group returned to active status by atrition of senior engineers or an increase in total number of assignments."

Carriers reject the "equity proposals" as being too difficult to administer and creating confusion and ill will among the involved employees.

Position of the Organizations

Both the UTU and BLE argue that an arbitrator does not have the authority to terminate the IT-UTU Agreement and place the IT engineers under the N & W-BLE (Wabash) Agreement. The Organizations argue that the arbitrator's jurisdiction under Article I, Section 4 of the New York Dock Conditions is limited to determining the implementing agreement provisions having direct application to the basic employee protections arising from the immediate transaction and to the selection and assignments of employees affected by the transaction. Unless such jurisdiction is specifically and

unequivocally given, an arbitrator may not write an collective bargaining agreement for the parties.

The Organizations argue that the arbitrators authority in this case, arising from Article I, Section 4 of the New York Dock Conditions, is limited. Section 4 requires "each railroad contemplating a transaction which is subject to [the New York Dock] conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces " to give advance written notice thereof to the employees and their bargaining agents which notice must "contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." Before Carriers can consummate the transaction, the parties are required to negotiate an "agreement with respect to the application of the terms and conditions of this appendix", (Appendix III to the Commission's Order in New York Dock) and further providing "for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case." Thus, if the parties cannot agree upon the employee protections contained in Appendix III or the basis for the selection of work forces, the dispute may be submitted to arbitration for adjustment. The limited nature of an arbitrator's authority is further confirmed by Section 2 of the New York Dock conditions. In Section 2, the Commission preserves and continues the application of existing collective bargaining agreements when it states:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of

pension rights and benefits) of the railroads employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining or applicable statutes." (Underscoring added)

When Section 4 is read in conjunction with Section 2, the Organizations argue, "the limitation on an arbitrator's authority is placed beyond serious argument."

The Organizations argue further that, in addition to the preservation of existing agreements found under the provisions of Section 2 of the New York Dock Conditions, Sections 2, Seventh and 6 of the Railway Labor Act prohibit the Carriers from abolishing bargaining agreements; and that a collective bargaining agreement subject to the provisions of the Railway Labor Act cannot be revised except through the procedures of a Section 6 Notice and the other mandatory provisions of the Railway Labor Act. Since the Organizations have not agreed to any changes in the working agreements of the employees they represent or to make such changes an issue in this dispute, it is contended that this arbitrator is not authorized to adopt the Carriers proposal that the UTU-represented employees be placed under the Wabash schedule agreement; rather, they contend, this arbitrator is limited to imposing an Implementing Agreement that provides the basic protections and a "fair and equitable method for the selection of forces to perform the work involved."

The Organizations further argue that neither judicial decisions, ICC decisions, nor arbitration decisions support the Carriers' argument that the Interstate Commerce Act gives the ICC the authority to supersede collective bargaining agreements and change represen-

tation of railroad employees by its approval of a railroad acquisition. The Organizations further argue that even if the ICC had such authority as claimed by Carriers, it did not exercise such authority in this case.

With respect to the question of the method of consolidating the seniority rosters, the Organizations take different positions.

The BLE is opposed to dovetailing rosters on the basis proposed by Carriers contending that such method is inequitable and would do violence to the basic concept of seniority. The BLE urges that the seniority rosters for the craft of locomotive engineers on the combined Carrier be consolidated by dovetailing the rosters for locomotive engineers on the N & W and the IT on the basis of entry into the craft of fireman and engine service without penalizing senior employees presently furloughed by the recession. The BLE opposes the effort by Carriers to consolidate the engineers' rosters by promotion dates after seperating the engineers into so-called active and inactive categories. The Carriers' proposal, BLE contends, creates runarounds of senior engineers by junior engineers, and penalizes senior employees on furlough and those persons who may be on sick leave or in an inactive status through no choice of their own; and is further inequitable because it does not take into consideration the employee's length of service with his orginal employer, thereby failing to consider his work contribution, disregards the different hiring and promotion patterns and practices on the two Carriers, and serves to benefit the employee working for an inefficient Carrier that has not already made economies in operation as compared with efforts to economize on the other Carrier. The BLE further oppose the UTU proposal (suggesting that the

N & W and IT rosters be combined on the basis of a work equity principal) asserting that the UTU proposal "suffers from much of the same criticism of the Carriers' proposal" in that it "overlooks the foundational premise of seniority integration to first look to the employees length of service with his original employer," and to the prior seniority rights of employees to service on their former seniority district or territory. Additionally, the BLE argues, that there is little if any data upon which to adequately consider and apply an equity formula in this case. The BLE suggests that any figures obtainable are "tainted" and cannot serve as the basis for integrating seniority rosters in a fair and equitable manner. The exclusive engine hour formula proposed by UTU could benefit the IT engineers and penalize N & W engineers because they were employees of a more efficient Carrier; and that an equity formula such as that proposed by UTU fails to take into account various factors including number of employees, hours worked, earnings, mileage, car count and tons carried. Since there is little uniformity of these factors between the two Carriers, the formula suggested by the UTU must be "disregarded as impracticable and inequitable, and other considerations must be used in combining the rosters."

The UTU takes the position that its "work equity" proposal is the most equitable because it recognizes the increase in work and job opportunities for all employees contributed to the combined operation by IT employees. Since IT employees are comparatively junior, the straight dovetailing by seniority date method would result in the IT work being performed by N & W employees. The UTU further argues that placing all presently furloughed

N & W and IT employees in a separate furlough roster would eliminate all future job opportunities for those employees even though some of them may be senior to employees on the active roster.

The UTU urges that the integration of rosters be made on the basis of the existing 1972 St. Louis Terminal Agreement; and that the difficulties in working out the terms of that Agreement as allegedly experienced by the N & W could be obviated by renegotiating the terms of that Agreement. Otherwise, the UTU argues, "to sanction implementation of such a [dovetailing] plan would not only violate the provisions of the Railway Labor Act and NYD but could in no sense be considered the 'fair and equitable arrangement to protect the interests of the railroad employees affected'".

Findings and Conclusions

Issue No. 1

After careful examination of the relevant statutory provisions and their legislative history, judicial and arbitral decisions, and the ICC imposed Conditions, this Arbitrator is compelled to conclude that he has no authority to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

The ICC, in its decision of June 22, 1981, stated:

> "Our approval of NW's acquisition of IT must, nonetheless be conditioned on NW's agreement to provide 'a fair arrangement at least as protective of the interests of employees who are affected by the transaction' as the labor protective provisions imposed in control proceedings prior to February 5, 1976. 49USC § 11347. In New York Dock RY.-Control-Brooklyn Eastern Dist. 360 ICC 60 (1979) (New York Dock

Aff'd Sub. Nom. New York Dock RY. v. United States, 609 F. 2D 83 (Second Cir. 1979), we described the minimum protection to be afforded employees under that statute in the absence of a voluntarily negotiated agreement...."

Article I, Section 4 of the New York Dock conditions (Appendix III) provides in pertinent part:

> "Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) written notice of such intended transaction... such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.
>
> Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this Appendix, and these negotiations shall commence immediately thereafter and continue for at least thrity (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4. ..." (Underscoring added)

Section 2 of Appendix III provides:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future

collective bargaining agreements or applicable statutes." (Underscoring added)

Title 49 USC §11347 of the Revised Interstate Commerce Act (a recodification of Section 5 (2)(f) applicable at the time the New York Dock matter was pending before the ICC), provides:

> "When a rail carrier is involved in a transaction for which approval is sought under Sections 11344 and 11345 or Section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this Section before February 5, 1976, and the terms established under Section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)."

Prior to February 5, 1976, the Commission developed a series of standard employee protective conditions imposed by the ICC in approving a transaction involving one or more railroads under Section 5 (2) of the Interstate Commerce Act.3 / All of these job protection agreements were patterned after the Washington Job Protection Agreement of 1936 (WJPA.) Section 4 of the WJPA requires that employees be given 90 days' notice of a coordination, and that such notice "shall contain a full and adequate statement of the proposed changes to be effected by such

3 / The principal sets of conditions imposed by the ICC under former Section 5(2)(f) in Stock Control cases were the "New Orleans Conditions" and the "Southern - Central of Georgia Conditions"

conditions, including an estimate of the number of employees of each class affected by the intended changes." Section 5 of WJPA states:

> "Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on basis accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

The New York Dock Conditions are derived from the Washington Job Protection Agreement, the New Orleans Conditions, and Appendix C - 1. 4 / In formulating the New York Dock conditions, the ICC selected the most favorable of the provisions contained in these conditions. The New York Dock conditions included a provision not contained in the WJPA, and that was Section 2, quoted above.

Carriers argue that this Arbitrator has the authority and the duty to prescribe N & W's proposal, and that this Arbitrator's power is not constrained in his authority to prescribe the terms of any "rearrangement of forces." Since the Commissions authority is exclusive and plenary under the provisions of Section 11341 of the Interstate Commerce Act, the Arbitrator's authority is derived from, and is an extension of, such exclusive and plenary authority . Carriers argue that the Commission's order authorizing the purchase

4 / Protective provisions promulgated by the Secretary of Labor under the Rail Passenger Service Act of 1970.

and consolidation of IT by N & W and requiring arbitration of disputes involving the "rearrangement of forces" supersedes any other agreements or laws, including the Railway Labor Act. 5 /

Central to the position of the Carriers is the question of whether the negotiation and arbitration provisions of employee protection conditions in consolidation cases provide a mechanism that supersedes Railway Labor Act requirements and permits an Arbitrator to transfer work and employees despite any such prohibitions contained in collective bargaining agreements pursuant to the Railway Labor Act.

This Arbitrator is of the opinion that the question must be answered in the negative.

An Arbitrator's authority under Article I, Section 4 of New York Dock, where the parties are unable to reach agreement, is limited to the determination of employee protections contained in Appendix III, and to provide a basis for the selection of work forces of the employees involved. Article I, Section 4 does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute, modify or terminate agreement negotiated pursuant to the provisions of the Railway Labor Act. Carrier's contention that the arbitration process

5 / Sections 2 Seventh, and 6 of the Railway Labor Act prohibit a Carrier from unilaterally abolishing or revising a bargaining agreement.

(provided in Section 4) is an integral part of the collective bargaining process, and as such, an agreement may be changed (as provided in Section 2) either by negotiation by the parties or by an arbitration award is, in this Arbitrator's view, based on the erroneous premise that the ICC mandated involuntary "interest arbitration" in contravention of the provisions of the Railway Labor Act. No persuasive authority has been presented that supports or warrants such a far-reaching result.

Contrary to the contention of Carriers, the ICC in Southern Railway Company-Control-Central of Georgia Railway Company (Finance Docket No. 21400, 331 ICC 151) does not, in the opinion of this Arbitrator, support the position of Carriers.

A reading of the ICC decision in Central of Georgia warrants the finding that the ICC, notwithstanding its plenary and exclusive jurisdiction in these matters, recognizes the need to preserve the rights of employees under their collective bargaining agreements; and that those rights may not be abrogated by arbitral fiat.

At page 169, the Commission states:

> "[T]he rights of railroad employees under their collective bargaining agreements, under the Washington Agreement and under the protective conditions imposed upon the Carriers under Section 5 (2)(f) are independent, seperate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees."

The Commission goes on to state, at page 170:

> "Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, Section 5 (11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved***'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed Section 5 transactions have been successfully consummated in full compliance with such terms.
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> * * *
>
> The designated 'exclusive and plenary power' of the Commission in Section 5 (11) cannot be so broadly construed as to brush aside all laws - be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law." (Underscoring added)

In further support of this Arbitrator's holding that Carriers are in error when they contend that the ICC's exclusive and plenary authorization of the purchase and acquisition of IT by N & W supersedes any other agreements or the Railway Labor Act, and, by extension, that "an arbitrator has the authority, under the necessary, 'superseding' authority of Section 4 of New York Dock, to alter collective bargaining agreements in order to achieve an effective consolidation," Referee Bernstein in American Railway Supervisors Association et al vs. Southern Railway System (Docket No. 141) stated the following relative to the WJPA (from which New York Dock conditions are derived) and the Railway Labor Act:

> "Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that

they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5 (11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws - there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements - assuredly a fundamental and important change - was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time. Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them.

* * *

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of is applicability.

> Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractural arrangement as harmonious with the ICC power to imposed employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated."

The Arbitrator has reviewed the awards cited and relied upon by Carriers and, with all due respect for their authors, disagrees with their conclusions.

None of the awards contains any rationale or analysis that would form any justifiable basis for the result reached. These awards are not only not instructive but cannot be considered to have any precedential value. See: Conrail & Detroit Terminal Company & RYA (August 13, 1981); Chesapeake & Ohio Railway & BLE/UTU (May 12, 1980); and New York Dock Railway & Brooklyn Eastern District Terminal & BLE (December 15, 1980.)

The Aribtrator has also reviewed the judicial decisions cited by Carriers, and has found them to be either irrelevant or unpersuasive as to the matters involved in this dispute. None of the cases cited deals directly with the nature and extent of an Arbitrator's authority to alter or invalidate negotiated bargaining agreements under the circumstances presented.

Issue No. 2

With respect to the question of the method of consolidating the seniority rosters for the craft of locomotive engineers on the combined Carrier, the Arbitrator finds that dovetailing is fair, equitable and workable; and should be consolidated on the basis of the date of entry into the craft of firemen and engine service without penalizing any employees presently furloughed.

Initially, Carriers proposed to dovetail by seniority date the active engineers of each road, and thereafter dovetailing the furloughed engineers below the roster of active engineers. Carriers rejected the BLE contention that dovetailing be effected on the basis of entry dates as firemen or engine service, and also rejected BLE's further contention that Carriers' two-tiered (active and inactive rosters) created a situation where senior employees were penalized through no fault of their own.

At the hearing, there were indications by the Carriers' representatives that the BLE proposal was acceptable. In their post-hearing submission, Carrier expressly agreed, stating:

> "The Brotherhood of Locomotive Engineers (BLE) appears to accept the Carriers' proposal to dovetail NW and IT seniority rosters, provided that entry of service dates rather than seniority dates are used and that limitations are placed upon the ability of former IT engineers to work in certain areas. In addition, BLE accepts some unification of schedule agreements. At the November 11 hearing, the Carriers stated that they had no objection to the BLE suggestion that dovetailing should be on the basis of entry dates and should not differentiate between active and inactive employees. This remains the position of the Carriers."

The Arbitrator is satisfied, considering all of the circumstances, that the "work equity" proposal of the UTU is not as equitable over-all as the method proposed by BLE and agreed to by the Carriers.

* * *

Based on the foregoing, the Arbitrator renders the following:

AWARD

1. The Arbitrator is not empowered, without specific authority and mutual agreement by the parties, to substitute, modify or abrogate a collective bargaining agreement (or any provisions thereof.) There is, therefore, no jurisdiction to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

2. The parties are directed and ordered to consolidate the seniority rosters for the craft of locomotive engineers on the combined Carrier on the basis of date of entry into the craft of firemen and engine service without differentiating between active and furloughed employees; and the parties should execute any agreement necessary to carry out the direction and order of this paragraph of the Award.

Nicholas H. Zumas

NICHOLAS H. ZUMAS, ARBITRATOR

Date: February 1, 1982