Arbitration pursuant to Article I - Section 4 of the employee protective conditions developed in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) as provided in ICC Finance Docket No. 29690 dated December 8, 1981.

PARTIES	Southern Railway Company	)	
		)	
TO	and	)	DECISION
		)	
DISPUTE	Brotherhood of Railroad Signalmen	)	

QUESTIONS AT ISSUE:

(1) Does the proposed agreement provide an appropriate basis for the selection and rearrangement of forces made necessary by the transaction described in ICC Finance Docket No. 29690?

(2) If the answer to Question 1 is in the negative, then what would be the appropriate basis for the selection and rearrangement of forces?

BACKGROUND:

The Kentucky and Indiana Terminal Railroad Company (K&IT) was a common carrier which provided terminal railroad services in the Louisville, Kentucky - New Albany, Indiana area. For many years K&IT was owned jointly and equally by the Southern Railway Company (Southern), the Baltimore and Ohio Railroad Company (B&O) and the Louisville and Nashville Railroad Company (L&N).

Due to changes in ownership and operations of B&O and L&N which Southern believed put it at a competitive disadvantage, Southern took several steps to obtain sole ownership and control of the K&IT. On June 15, 1981, Southern consummated agreements with the other owners of K&IT effectuating this goal, and on July 16, 1981, Southern and K&IT filed a joint application with the Interstate Commerce Commission (ICC or Commission) seeking authority for Southern to purchase and operate K&IT

properties. In a decision rendered December 8, served December 11 and effective December 21, 1981, Southern Railway Co.-Purchase-Kentucky & Indiana Terminal Railway Co., Finance Docket No. 29690, the Commission granted the application subject to the conditions for protection of employees set forth in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). known as the New York Dock II conditions. Southern consummated the purchase,and K&IT ceased operation as a railroad effective January 1, 1982.

In anticipation of its application to purchase and operate K&IT properties, Southern proposed to coordinate certain K&IT employee forces with those of the Southern. In this connection on March 31, 1981, Southern and K&IT served a notice dated April 6, 1981, on the employees of Southern and K&IT represented by the Brotherhood of Railroad Signalmen (Organization) of Southern's intent ". . . to coordinate the signal facilities, operations and services of the K&IT with those of the Southern effective July 6, 1981." The notice also stated that such coordination would result in the rearrangement of signal forces whereby ". . . all work of signal forces on the K&IT shall be consolidated with that of signal forces on Southern and performed pursuant to Southern contracts." The notice further stated that the coordination was made in anticipation of ICC approval of Southern's acquisition of K&IT assets and the imposition of New York Dock employee protective conditions by the ICC. Finally the notice stated that it was ". . . served pursuant to Section 4 of the Washington Job Protection Agreement of May 1936 and pursuant to Section 4 of the New York Dock protective conditions."

The Organization represents employees engaged in signal and communications work on the K&IT. It also represents employees engaged in signal work on the Southern. Another labor organization, the International Brotherhood of Electrical Workers (IBEW), represents the employees performing communications work on the Southern. The April 6, 1981, notice covered only signal work and not communications work which was the subject of a separate notice dated March 2, 1982, served upon the Organization and the IBEW. Accordingly neither the communications work on Southern or K&IT or the employees performing it are involved in this case. At the time of the April 6 notice there were five signal employees on K&IT and 218 signal employees on Southern.

The Organization met with the Southern & K&IT on April 14, August 27 and October 19, 1981, to discuss the Carrier's notice. The parties negotiated with respect to an agreement to implement the coordination. The Carrier advanced a proposal for agreement which the Organization rejected. While the Organization presented no proposals of its own, it did indicate a willingness to negotiate. However, no agreement resulted from these negotiations,and on October 21, 1981, the Carrier invoked the arbitration provisions of Article I, Section 4 of the New York Dock conditions to resolve the impasse.

The parties did not select a neutral referee as provided in Article I, Section 4, and as further provided the Carrier applied to the National Mediation Board for appointment of a referee. That agency appointed the undersigned on December 8, 1981, and as provided in Article I, Section 4(a)(1) of the New York Dock conditions a hearing

was scheduled for December 28, 1981. However, the hearing was postponed several times by agreement of the parties.

The Organization challenged the authority of the National Mediation Board to appoint a referee and the authority of the referee to render a decision on the ground that the ICC had not issued a decision authorizing Southern's purchase of the K&IT and prescribing the New York Dock conditions. However, the Commission's decision of December 8, 1981, effective December 21, 1981, approving the acquisition, imposed the New York Dock conditions as anticipated by the Carrier. Although the Organization, together with several other labor unions, moved to stay the Commission's decision, the Commission denied the motion. On December 18, 1981, the Organization and several other unions petitioned the Commission for a Cease and Desist Order against the Southern and K&IT from any further activity based on or arising from the Carrier's April 6, 1981, notice, including the arbitration proceedings before the referee. In a Decision served March 3, 1982, the Commission denied the petition. The Organizations appealed the Commission's ruling to the United States Court of Appeals for the District of Columbia and moved for a stay of the arbitration proceedings, pending the Court's review of the Commission's ruling. On April 9, 1982, the Court denied the motion for a stay of the arbitration proceedings. The matter is pending before the Court.

By agreement of the parties the hearing was held May 19, 1982. At the hearing the parties filed briefs. Subsequently, the parties filed reply and rebuttal briefs the last of which was dated June 29, 1982.

FINDINGS:

This case presents two jurisdictional questions which must be resolved before resolution of the issues set forth above.

Authority of Neutral to
Render a Decision Pursuant
to Article I, Section 4

At the outset the Organization alleges a jurisdictional impediment to any decision by the neutral in this proceeding.

The Organization continues to assert that this neutral lacks jurisdiction to render a determination pursuant to Article I, Section 4 of the New York Dock conditions because this arbitration and all relevant events preceding it are based upon the Carrier's defective notice of April 6, 1981. The Organization urges that because the notice was served prior to the time the Commission granted Southern the authority to purchase the K&IT and imposed the New York Dock conditions as a condition of that authority, the notice and all that has flown from it are void.

However, the Organization made this argument to the Commission in its petition for a Cease and Desist Order, and the Commission specifically rejected the argument ruling that the arbitration procedures of Article I, Section 4 of the New York Dock conditions could be invoked or initiated prior to the time the Commission granted authority for a transaction and in anticipation of the imposition of protective conditions. Thus the Commission, which prescribed or imposed the New York Dock conditions in the instant case, has spoken authoritatively as to when the arbitration procedures of the conditions may be invoked. This neutral believes he is compelled to follow the Commission's ruling. The fact that the Commission's

ruling is on appeal does not warrant a contrary conclusion. In fact, the Court of Appeals refused to stay these arbitration proceedings pending its decision on the Commission's ruling.

Authority of Neutral Under Article I, Section 4 to Apply Organization's Agreement With Southern to Former K&IT Employees

There is a second jurisdictional issue which must be resolved before all else. Indeed, this issue has become central to these proceedings. The parties have devoted the substantial majority of their exhaustively thorough briefs to this issue.

The Carrier's proposed agreement for the coordination contains a provision that all agreements between the Organization and K&IT be cancelled and the Organization's agreement with Southern be made applicable to all employees and work coordinated under the agreement. The Organization refused to agree to this provision during negotiations and instead proposed formulation of a single agreement covering K&IT and Southern signal department employees.

The Carrier seeks a determination in this proceeding that the Southern agreement with the Organization governs the work of former K&IT signal employees who are now employees of Southern and working on former K&IT property now owned and operated by Southern. The Organization contends that to grant the Carrier's request would terminate or modify the existing K&IT agreement with the Organization which is beyond the neutral's jurisdiction under Article I, Section 4.

The Carrier denies that it seeks termination or modification of the K&IT agreement with the Organization which the Organization

emphasizes is beyond the neutral's authority under Article I, Section 4. The Carrier argues, however, that the application of the Organization's agreement with Southern as urged under the circumstances in this case is within the neutral's jurisdiction.

The Carrier cites the decisions of two neutrals in Article I, Section 4 proceedings who awarded the Carriers in those proceedings the relief requested by the Carrier here. The Carrier also contends that ICC decisions recognize that a neutral has such authority under Article I, Section 4. In Durango and Silverton Narrow Gage Railroad - Acquisition and Operation, Finance Docket 29096, the Commission recognized that the function of the neutral is to resolve any and all matters left unsettled by direct negotiations. Then, the Carrier places substantial reliance upon Brotherhood of Locomotive Engineers v. Louisville and Nashville Railroad Co. and Missouri Pacific Railroad Co., Finance Docket No. 29733, which the Carrier contends stands for the proposition that the Commission recognizes the transfer of employees from one employer, agreement and seniority list to another employer, agreement and seniority list as a normal, ordinary impact of a terminal coordination between Carriers.

The Carrier argues that the Organization seeks portability of labor agreements for employees who move from one carrier to another pursuant to a coordination within the scope of Article I, Section 4. The Carrier contends this concept is contrary to the practice in the railroad industry. The Carrier points to Article III, of the New York Dock conditions which predicates employee protection for terminal company employees upon such employees applying for employment with each owning and using carrier, which would subject the employees to the labor agreements of those carriers.

The Carrier contends that what the Organization seeks would establish a de facto craft or class of K&IT signal employees within the craft or class of Southern signal employees. The Carrier contends that this contravenes established rulings of the National Mediation Board that under the Railway Labor Act a craft or class is carrier wide and may not be split.

The Carrier also cites what it considers to be a number of practical considerations in the instant case militating in favor of its position. At present there are only two active former employees of the K&IT doing signal work. Both Southern and K&IT signal employees do identical work. The K&IT and Southern contracts with the Organization are substantially the same. Several other labor organizations in negotiations pursuant to Article I, Section 4 have agreed to the application of the Southern contract to the former K&IT employees in their crafts and classes.

In support of its position the Organization relies upon three arbitration decisions under Article I, Section 4 arising from the acquisition of the Illinois Terminal (IT) by the Norfolk and Western (N&W). The Organization urges that each case in this "trilogy" involved the issue of whether the neutrals possessed jurisdiction to grant the same kind of relief requested by the Carrier in the instant case, and all three ruled that they lacked such jurisdiction.

The Organization also relies upon a decision under Article III of Appendix C-2, of the Amtrak labor protective conditions. According to the Organization, the neutral reached the same conclusion as the three

arbitrators in the trilogy regarding his authority under language substantially the same as that of Article I, Section 4 of the New York Dock conditions. Noting that the New York Dock conditions were based upon the Washington Job Protection Agreement of 1936 and discussing the historical development of employee protective conditions in the interim, the Organization maintains that there are no decisions or awards holding that a neutral has the authority urged upon him by the Carrier in this case. Citing examples, the Organization urges that when protective arrangements permit what the Carrier requests here, those arrangements, whether by agreement or by statute, specifically so provide.

The Organization argues that the neutral's authority under Article I, Section 4 is limited to applying the basic protective conditions to employees and to devising an agreement or arrangement for selection of forces from all employees affected by the transaction. The Organization contends that the Carrier's request in this case is but a single example of a general attempt by the railroad industry to secure termination of labor contracts and representation certifications through Article I, Section 4 of the New York Dock conditions. The Organization contends that for the neutral to effectuate this plan would violate Section 2, Seventh of the Railway Labor Act, 45 U.S.C. §152, Seventh, which specifically protects rates of pay, rules and working conditions embodied in agreements from change except pursuant to the provision of Section 6 of the Act, 45 U.S.C. §156. What the Carrier seeks by the neutral's ruling here is an expansion of interest arbitration beyond that provided for in the Railway Labor Act.

Both the Carrier and the Organization rely upon Article I, Section 2 of the New York Dock condition which provides:

> 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 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.

The Organization contends that Section 2 crystallizes the neutral's lack of jurisdiction to grant the relief requested by the Carrier because it specifically protects the Organization's agreement with the K&IT.

However, the Carrier takes a substantially different view of Section 2. The Carrier contends that Section 2 should be read in conjunction with Section 4 which vests a neutral acting thereunder with the authority and the duty to apply all the terms and conditions of the New York Dock conditions, including Section 2, to affected employees. In applying Section 2 the neutral has the authority to determine that a particular agreement is in fact applicable to affected employees. Such a determination, the Carrier contends, is not a matter exclusively subject to arbitration under Article I, Section 11 but appropriately is a matter for arbitration under Section 4.

Noting that Section 2 appears to have originated in Appendix C-1 of the Amtrak labor protective conditions, the Carrier contends that the purpose of Section 2 was to protect employees remaining with various carriers when the passenger service operations of those carriers were taken over by Amtrak. Accordingly, the Carrier urges, Section 2

has limited application to consolidations or acquisitions. Reciting a number of possible interpretations of Section 2, the Carrier urges that only the interpretation the Carrier places on it is consonant with reason and practicality. The Carrier specifically asserts that when Section 2 and Section 4 are read together, Section 4 provides a method for changing an agreement subject to Section 2 by future collective bargaining agreements, i.e. the negotiations provided for in Section 4.

In their reply and rebuttal briefs the Carrier and the Organization each attempt to distinguish the authorities relied upon by the other.

The Carrier attacks the IT trilogy as involving different facts and issues than those of the instant case. Furthermore, the Carrier notes, the ICC issued its Durango decision after the IT cases were argued. The Carrier faults the IT decisions for relying heavily upon Section 2 without acknowledging the history and purpose of that Section. Arbitrators Zumas and Sickles, by declining to determine in their respective decisions the applicability of agreements,actually geographically extended other agreements which was beyond their authority.

The Organization notes that neither of the arbitration awards relied upon by the Carrier as actually having granted the relief it requests in this case contains any rationale for such action. Nor in the Organization's opinion do the ICC cases relied upon by the Carrier sufficiently address the issue in this case so as to be authoritative pronouncements of the Commission's views on the issue.

This neutral's analysis of the arbitration decisions and awards, ICC decisions and court cases relied upon by both parties, which has proven to be a time consuming task leads him to conclude that the IT trilogy speaks most directly, thoroughly and rationally to the issue under consideration. By contrast the decisions of the two neutrals in Article I, Section 4 proceedings relied upon by the Carrier contain no rationale explaining their ultimate determinations which appear to run contrary to the trilogy. While the Commission's decision in Brotherhood of Locomotive Engineers v. Louisville and Nashville Railroad Co. and Missouri Pacific Railroad Co. was rendered after argument of the IT trilogy cases, this neutral's reading of that decision together with the Commission's Durango decision does not reveal an authoritative statement by the ICC with respect to the issue. The language of the decisions is quite general and will not support the inference urged by the Carrier.

The IT trilogy clearly holds that a neutral under Article I, Section 4 lacks the jurisdiction or authority to grant the relief requested by the Carrier in this case. Those decisions addressed and rejected a number of the arguments advanced by the Carrier here. The most appealing of the Carrier's arguments in this case, e.g., that labor agreements are not portable and that the particular circumstances of this case warrant the relief requested by the Carrier, actually are attempts to persuade the neutral that he should grant the relief requested. But, they have little impact upon the question of jurisdiction.

The Carrier's efforts to distinguish the IT trilogy from the instant case, while thorough and vigorous, also are not persuasive.

The Carrier's argument that it seeks application of the Southern agreement but not modification or termination of the K&IT agreement, the action sought by the Carriers in the IT trilogy, ignores the fact that such would be the practical result of application of the Southern agreement. It is a semantical distinction without a meaningful difference. Furthermore, the Carrier's argument contradicts the evidentiary record. The Carrier's proposed agreement for the coordination specifically states that ". . . all agreements between K&IT and the Brotherhood of Railroad Signalmen. . . shall be cancelled. . . ."

The Carrier's criticism that the decisions in the IT trilogy incorrectly relied upon Article I, Section 2 is not well founded. While the Carrier makes an appealing argument based upon the origin and history of Section 2, the Carrier proves too much. Implicit in the Carrier's argument that negotiations pursuant to Section 4 may alter the terms of existing collective bargaining agreements is the proposition that when such negotiations fail the compulsory arbitration procedures of Section 4 may be invoked by a party. This neutral believes that such a result would constitute compulsory interest arbitration of schedule agreements which is contrary to the general scheme of labor relations in the railroad industry.

The Carrier argues that an issue common to the instant case and the IT trilogy but not addressed by the latter decisions is that the Organization's position would result in a de facto class or craft of K&IT signal employees within the craft or class of Southern signal employees. The Carrier urges that this argument must be addressed in

the instant case. This neutral believes the argument raises a matter within the exclusive jurisdiction of the National Mediation Board. Thus, even if the Carrier's claim is correct, the IT trilogy holds that there is no jurisdiction to grant the relief requested by the Carrier. Lack of jurisdiction means lack of the power to act, even in the face of anomalous results.

For the same reason the Carrier's criticism of the practical effect of the Zumas and Sickles IT decisions is unwarranted. While it is true that by declining to apply agreements as urged by the Carriers in those cases the neutrals allowed the geographical extension of other agreements, this was the inevitable result of their failure to exercise jurisdiction based on their finding that no jurisdiction existed.

In summary this neutral finds the IT trilogy applicable to the issue in this case and highly persuasive. No clear, superior, contrary authority has been cited. Accordingly, this neutral concludes no jurisdiction exists to apply the Southern agreement with the Organization as requested by Carrier.

Appropriate Basis for Selection
and Rearrangement of Forces

There remain for resolution the questions at issue stated at the outset of this decision.

Article I, Section 4 provides in pertinent part:

> 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.

It is the authority and duty of a neutral acting under Article I, Section 4 to render a decision as to all issues which the parties might have discussed during negotiations pursuant to a 90-day notice and over which the neutral has jurisdiction.

However, as determined above, such jurisdiction does not extend to determining that the Southern agreement with the Organization will apply to former K&IT employees or that the K&IT agreement will be cancelled. The Carrier's proposed agreement contains this provision. Although the provision would not be improper if voluntarily agreed to by the parties, in the absence of such agreement a neutral has no jurisdiction to impose it in a Section 4 proceeding. Accordingly, to the extent the Carrier's proposal contains this provision it does not constitute an appropriate basis for the selection and rearrangement of forces which may be implemented in this proceeding.

Absent the provision dealt with in the preceding paragraph the Carrier's proposed agreement contains the following principal elements regarding the coordination of forces:

> All signal work on K&IT would be consolidated with that of Southern and its affiliates.
>
> The K&IT seniority roster for signal employees would be merged (dovetailed) into the Southern Lines West seniority rosters.
>
> Former K&IT signal employees would have preferential rights to positions bulletined to work on the K&IT property; however, employees assigned to such positions could be used elsewhere when the needs of the service required.

The Organization responds that in view of the fact there were no genuine negotiations pursuant to the April 6, 1981, notice the dispute

should be remanded to the parties for negotiations with this neutral retaining jurisdiction. The record clearly establishes that once the jurisdictional issues addressed earlier in this decision were raised during the negotiations, little substantive progress followed. Furthermore, at the hearing the Carrier indicated it might be receptive to further negotiations once the jurisdictional issues were resolved.

However, the Carrier has not indicated since the hearing that it agrees with the Organization. Although the Organization stated its position in reply and rebuttal briefs, the Carrier made no response. Rather the Carrier has consistently urged that the neutral implement its proposed agreement as the basis for the coordination.

The neutral doubts that he has jurisdiction to do as the Organization urges. The neutral's function is to decide all issues left unresolved by negotiations. To remand the outstanding issues to the parties for further negotiations and retain jurisdiction would frustrate this result.

This is not to say that further negotiations would be improper or inadvisable. Indeed,Arbitrator Edwards in one of the IT trilogy cases remanded outstanding issues concerning the modification of schedule agreements to the parties,and retained jurisdiction. However, he did so after ruling that he lacked jurisdiction to modify or terminate such agreements, and in an interpretation of his decision he made clear that he had retained jurisdiction only over the disputes unsettled by further negotiations which the parties mutually chose to submit to him for arbitration. In the instant case the parties are fully free to negotiate

with respect to whether or to what extent the Southern contract with the Organization should apply to the former K&IT employees as well as whether the K&IT agreement with the Organization will be terminated or modified. The parties are equally free to submit these questions to final and binding arbitration if they mutually agree to do so.

In the neutral's opinion the principal elements of the Carrier's proposals for the coordination noted above are fair and equitable to all. Accordingly, they will be implemented.

Accordingly, it is determined that:

1. The neutral has jurisdiction in this case to render a decision pursuant to Article I, Section 4 of the New York Dock conditions;

2. The neutral has no jurisdiction under Article I, Section 4 of the New York Dock conditions to apply the Organization's agreement with Southern to former K&IT employees;

3. The protective conditions specified in New York Dock Ry.-Control-Brooklyn Eastern District Terminal, 360 ICC 60 (1979) (Appendix III to that decision) will apply to all employees affected by the coordination of the signal facilities, operations and services of Southern Railway Company on the Lines West Seniority District with the signal facilities, operations and services of the Kentucky and Indiana Terminal Railroad Company;

4. The attached appendix,which is hereby made a part of this decision,constitutes the neutral's determination under Article I, Section 4 of the New York Dock conditions as to the appropriate basis for the selection and assignment of forces pursuant to the coordination described in paragraph 3;

5. This decision and the attached appendix are intended to resolve all outstanding issues in this case, as provided in Article I, Section 4 of the New York Dock conditions.

William E. Fredenberger, Jr.
Neutral Referee

DATED: October 5, 1982

Section I

On the effective date of this agreement, all signal work on K&IT shall be consolidated with that on Southern and its affiliates.

Section II

(a) Effective with the date of the coordination described in Section I above, the former K&IT seniority rosters for signal employees will be merged into the Lines West Seniority roster with the identifying designation "K&IT" placed opposite their names.

(b) Should the ranking of current K&IT employees on the Lines West Seniority roster result in employees on such rosters having identical seniority dates, roster standing among such employees shall be determined as follows:

1. The employee with the earliest date of continuous employment with K&IT, Southern or its affiliates shall be designated the senior ranking employee.

2. In the event two or more such employees have identical dates of employment relationship, the employees shall be ranked by chronological age, the oldest employee to be given the senior ranking.

This provision shall not operate to change the relative standing of employees currently on K&IT or Southern rosters or those of its affiliates, respectively.

(c) In cases where separate K&IT rosters are not established for certain classes, and separate Lines West rosters on Southern or its affiliates do exist for such classes K&IT employees shall be given dates on such Southern rosters or those of its affiliates as the date their service records indicate they first were assigned by bulletin to work in such classes.

(d) Notwithstanding the provisions of Section II(a) above, current K&IT signal employees shall continue to have preferential rights to positions which are specifically bulletined to work over the property of the K&IT. Provided, however, employees assigned to

such positions may be used at Carriers' discretion to perform work off K&IT in the Louisville, Kentucky, area or elsewhere on the Lines West Seniority District when required by the service.

(e) K&IT employees shall be credited for vacation purposes with all time spent in the employ of K&IT in the same manner as though all such time spent had been in the service of Southern under Southern Agreements.