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. 28905 (Sub. No. 1) and related proceedings

PARTIES TO DISPUTE	International Association of Machinists and Aerospace Workers and The Baltimore and Ohio Railroad Company Louisville and Nashville Railroad Company	DECISION

QUESTIONS AT ISSUE:

What provisions shall be contained in an arbitrated implementing agreement pursuant to Article I, Section 4 of the New York Dock Conditions in order to provide an appropriate basis for the selection and assignment of forces and the application of the New York Dock Conditions with respect to the transaction which was the subject of the Carrier's September 2, 1982, notice?

BACKGROUND:

On September 25, 1980, the Interstate Commerce Commission (ICC) served its Decision in Finance Docket No. 28905 (Sub. No. 1) approving acquisition of control by CSX Corporation of rail carriers subsidiary to Chessie System, Inc. and Seaboard Coast Line Industries, Inc. The Commission in its Decision imposed conditions for the protection of employees set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979) (New York Dock Conditions).

On September 2, 1982, the Baltimore & Ohio Railroad Company (B&O) and the Louisville & Nashville Railroad Company (L&N), two carriers over which CSX Corporation had acquired control by virtue of the Commission Decision in Finance Docket No. 28905 (Sub. No. 1), served notice upon the International Association of Machinists and Aerospace Workers (IAM or Organization) pursuant to Article I, Section 4 of the New York Dock Conditions. The notice stated that the Carriers intended to discontinue operation of the B&O Car Wheel Shop at Glenwood, Pennsylvania and to transfer and coordinate such work with the work performed on the L&N railroad at its South Louisville Shops, Louisville, Kentucky. The notice also stated that positions of 12 machinists and 4 machinist helpers would be abolished at the Glenwood Shop and 9 machinists' positions established at the South Louisville Shops.

Further pursuant to Article I, Section 4 of the New York Dock Conditions, the parties met on September 15 and 16, October 21 and 22 and November 1, 1982, for the purpose of reaching agreement with respect to the selection and assignment of forces resulting from the coordination and with respect to the application of the New York Dock Conditions to the coordination. The Carriers submitted a written proposal at the October 21 meeting. However, the parties were unable to reach agreement, and the dispute remained unresolved.

Thereafter, the Carriers invoked the arbitration procedures of Article I, Section 4 of the New York Dock Conditions. The parties did not select a Neutral Referee as provided in Article I, Section 4 and as further provided therein the Carriers applied to the National Mediation Board for appointment of a Referee. That agency appointed the undersigned

on November 30, 1982. Hearing was held in this matter pursuant to Article I, Section 4(a)(1) on December 20, 1982, at which time the parties presented written submissions and oral argument.

FINDINGS:

The parties have complied with the procedural requirements of Article I, Section 4 of the New York Dock Conditions, and the question at issue noted above is properly before this Neutral for determination.

The Carriers take the position that their proposed agreement covering this transaction is fair, equitable and appropriate. The Organization holds a contrary view on several points.

At the outset the Organization contends that the question at issue in this proceeding must be resolved against the background of another coordination which the Organization urges has direct and substantial impact upon the coordination here. On September 2, 1982, the same date the Carrier served notice triggering this proceeding, the B&O and the Chesapeake & Ohio Railway (C&O) served notice upon the IAM of the Carriers' intent to discontinue all work in connection with locomotive repair performed at the B&O Glenwood Backshop, Glenwood, Pennsylvania, and to transfer and consolidate such work with work being performed at the C&O Huntington Locomotive Shop, Huntington, West Virginia. The notice stated that 25 machinists' and 4 machinist helper's positions would be abolished at Glenwood Backshop and 13 machinists' and 2 machinist helper's positions added to the Huntington Locomotive Shop. This notice was furnished pursuant to the C&O-B&O-Western Maryland coordination agreement (Master Transfer Agreement) with the IAM, and

the effective date was set for December 6, 1982, the same effective date set for the closure of the Glenwood Car Wheel Shop and the abolition and creation of machinists' and machinist helpers' positions in connection therewith.

Both notices served on September 2, 1982, affected the same seniority group, and apparently much of the time spent in the negotiating meetings held pursuant to Article I, Section 4 of the New York Dock Conditions was spent discussing the notice served under the Master Transfer Agreement and its potential effects. The Carriers implemented the notice concerning the Glenwood Backshop on December 6, 1982, although at that time, as is evidenced by the instant proceeding, no agreement had been reached pursuant to Article I, Section 4 of the New York Dock Conditions. As a result the Glenwood Backshop was closed, and several employees on the seniority roster transferred to Huntington, West Virginia.

The Organization contends that the Carriers' action was unfair and asks this Neutral to right the perceived wrong to the employees by providing in the arbitrated implementing agreement that any machinist employees holding as assignment at the Glenwood Shop on September 2, 1982, be given thirty days to elect the benefits flowing from the Decision in this proceeding or those under the Master Transfer Agreement.

The Organization points out that by closing the Glenwood Backshop on December 6, 1982, the Carrier forced employees to exercise their seniority, either to transfer to Huntington, West Virginia, which several did, or to displace junior employees working in the Glenwood Car Wheel Shop. As a consequence, most present members of the machinist craft working in the Glenwood Car Wheel Shop are very senior employees, while

junior employees are out of work and collecting dismissal allowances, all under the Master Transfer Agreement.

The Carriers argue that under Article I, Section 3 of the New York Dock Conditions, inter alia, employees must elect between the protections of the New York Dock Conditions and those offered by any other protective arrangement under which they are entitled to benefits. However, the Organization argues that the Carriers' actions deprived employees of a meaningful choice between benefits under the Master Transfer Agreement and benefits under the New York Dock Conditions because on December 6, 1982, no agreement had been reached or arbitrated pursuant to Article I, Section 4 of the New York Dock Conditions.

The Carriers argue that the Organization seeks to "unscramble the eggs" which would unduly burden the Carriers. The Carriers point out that they attempted to effectuate simultaneously the closure of the Backshop and the Car Wheel Shop at Glenwood, Pennsylvania, but were unable to do so by December 6, 1982, because the parties failed to reach agreement by that date.

The unfairness of the Carriers' actions, emphasized so strongly by the Organization, is more apparent than real. What the Organization actually seeks is the option for the most senior employees, and thus the least likely to lose their positions, to transfer to Louisville or Huntington. While the choice between transferring to Louisville or Huntington understandably is a highly desirable one, there is nothing fundamentally unfair about the absence of that choice under the circumstances of this case.

Closure of the Glenwood Backshop and the resulting effects on employees flowed from a transaction under the Master Transfer Agreement and not the New York Dock Conditions. Once employees exercised their seniority pursuant to the Master Transfer Agreement only those remaining at Glenwood actually would be affected by the transfer pursuant to New York Dock. With respect to Article I, Section 3 of the New York Dock Conditions, there simply is no election remaining for the machinist employees who transferred to Huntington, because by transferring they elected to take jobs at Huntington rather than to bump into the Car Wheel Shop at Glenwood which they knew would be closed within a short time and all machinists' positions abolished there.

It is true that the difficulties here were to some extent created by the Carriers. Furthermore, the fact that the Carriers served both notices on the same day would support the inference that they were attempting to exert pressure on the Organization to reach agreement under Article I, Section 4 of the New York Dock Conditions by creating the potential situation which actually resulted. Nevertheless, the Carrier apparently tried to effectuate both transactions simultaneously, and if they had been successful the employees would have had the choice the Organization seeks here. Only the parties' failure to reach agreement precluded that choice. Under these circumstances the Carriers did not violate their obligations under the New York Dock Conditions.

It must be borne in mind that the function of the New York Dock Conditions as well as most protective arrangements is to preserve

employment for those capable of holding it through the exercise of seniority and to make whole those employees who must take positions producing less compensation or who lose their positions altogether. In the final analysis the Organization's request for language is not necessary to a fair and equitable arrangement for the selection of forces, and accordingly it will not be included in the arbitrated implementing agreement.

The Organization disputes the need for the creation of nine new machinists' positions at the South Louisville Shops and argues that the work to be performed by employees in those positions should accrue to L&N employees, many of whom are on furlough. The Carriers argue that inasmuch as substantial work is being transferred from the Glenwood Car Wheel Shop to the South Louisville Shops, the positions are justified and that they should accrue to the Glenwood Shop machinists to whose craft the work originally belonged.

By its Decision in Finance Docket No. 28905 (Sub. No. 1) the ICC granted the Carriers authority to engage in the transaction which was the subject of the Carriers' September 2, 1982, notice. Creation of the machinists' positions at the South Louisville Shops is an integral part of that transaction. The authority of a Neutral acting under Article I, Section 4 extends to the selection of forces to fill those positions, but it does not extend to review of the Carriers' decision to create such positions.

The Carriers' proposal recognizes the equitable interest of the Glenwood Shop machinists in the work which was part of their craft. It permits those employees to follow their work. It allows the L&N machinists

the opportunity for the work in the event the Glenwood Shop machinists do not follow their work. This appears to be a more appropriate basis for the assignment of forces than that urged by the Organization.

The Organization contends that the Glenwood Shop machinists cannot be forced to transfer to Louisville at the peril of losing protecti under the New York Dock Conditions because such a move requires a change of residence. The Carriers urge that they cannot refuse such transfer and continue to be dismissed employees within the meaning of Article I, Section 1(c) of the New York Dock Conditions.

In support of its contention the Organization analyzes the treatment of the terms "dismissed employee" and "change of residence" in various protective agreements and arrangements. The Organization argues that it is the intent of those conditions and arrangements that employees not be forced to move against their wishes if such move involves a change of residence. The Organization seeks specific language in the arbitrated implementing agreement which it contends would apply this protection to the coordination in this case.

The basic defect in the Organization's argument, as the Carrier notes, is that it ignores the history of this issue before the ICC. In its Decision in Finance Docket No. 28905 the Commission was requested by labor organizations to expand the definition under Article I, Section 1(c) of the New York Dock Conditions of a dismissed employee so as to protect employees from having to relocate. The ICC specifically rejected the organizations' request. The ICC has spoken authoritatively on the matter, and this Neutral must follow the ICC's pronouncement.

The Organization relies upon an Award in an Article I, Section 4 proceeding, issued after the ICC's Decision in Finance Docket No. 28905, involving the CSX Corporation and the Brotherhood of Railway Airline and Steamship Clerks, Freight Handlers, Express and Station employees-Irvi Lieberman, Neutral. That Award contains language which appears contrary to the thrust of the ICC's Decision. However, that Award dealt with a displacement allowance and not a dismissal allowance. Furthermore, the Award does not assess the ICC's Decision. Accordingly this Neutral does not find the Award persuasive.

Thus, it is concluded that the Glenwood Shop machinists may not refuse to transfer to Louisville and still come within the definition of a dismissed employee set forth in Article I, Section 1(c).

The Organization urges that seniority be observed in the transfer of employees from the Glenwood Car Wheel Shop to the South Louisville Shops, and the Carriers do not disagree. In fact the Carriers' proposed agreement recognizes that proposition. However, the Organization seeks a provision in the arbitrated implementing agreement allowing employees who do transfer a reasonable time to report. This Neutral does not believe that specification of a time or period for reporting is necessary. It is contemplated that the parties will follow the rule of reason in this regard.

Both the Carriers and the Organization agree that any transferees to Louisville should have their seniority dovetailed into the Louisville roster. The only apparent difference between the Carriers' proposal and the Organization's proposal on this matter concerns the situation where

two employees may have the same seniority date and the same service date. The Carriers would resolve the ranking by lot, but the Organization proposes that the oldest employee in chronological age be ranked ahead of the younger employee. The Organization's proposal seems more consistent with the principle of seniority, and it will be included in the arbitrated implementing agreement.

The Carriers and the Organization failed to reach agreement on whether the L&N working agreement should apply to Glenwood machinists who transfer to the South Louisville Shops or whether the B&O working agreement should apply. The Organization challenges the jurisdiction of this Neutral to resolve the issue on the basis of Section 2 of the New York Dock Conditions 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 Carriers argue that such jurisdiction exists and that the L&N agreement should apply because that agreement will be applicable to all other machinists working at the South Louisville Shops.

In support of their jurisdictional argument the Carriers rely upon a Decision under Article I, Section 4 of the New York Dock Conditions by Neutral Robert Peterson involving the Southern Railway Co.-Norfolk & Western Railway Co. and Railroad Yardmasters of America. In that Decision Neutral Peterson applied to transferees the agreement in effect on the property to which they transferred as a result of a coordination. The

Organization relies upon a Decision by the undersigned in an Article I, Section 4 proceeding between the Southern Railway Co. and the Brotherhood of Railroad Signalmen which the Organization contends supports its position.

As the Carriers note, this Neutral's Decision in the Southern Railway case involved a situation where to grant the Carrier's request would have extinguished a collective bargaining agreement, a factor not present in the case decided by Neutral Peterson and so noted by him. Nevertheless, this Neutral's review of the Peterson Decision and his Decision in the Southern Railway proceeding forces the conclusion that no jurisdiction exists in this case to grant the Carriers the relief they request.

It is true as the Carriers contend that in the instant case the B&O agreement will continue in effect at the Glenwood Shop and thus application of the L&N agreement would not result in the destruction of the Glenwood Shop agreement. In this Neutral's opinion that distinction does not vest jurisdiction in him to apply the L&N contract.

The rationale of this Neutral's jurisdictional ruling in the Southern Railway case, and the awards upon which it was based, is that a Neutral under Article I, Section 4 has no authority to alter rates of pay, rules or other benefits preserved by Section 2 of the New York Dock Conditions. Accordingly, such Neutral has no authority to modify a collective bargaining agreement where the parties have not agreed to confer that authority upon him. In the instant proceeding the Organization has not agreed to the Carriers' proposal or to submit the issue voluntarily to arbitration.

This Neutral is sensitive to the fact that his Decision of January 12, 1983, in an Article I, Section 4 proceeding between these Carriers and the Brotherhood Railway Carmen of the United States and Canada involving the transfer of carmen to the South Louisville Shops provided for application of the L&N working agreement to the transferees. However, in that case the Carriers and the Organization agreed that the L&N agreement would have such application.

Accordingly, no provision will be contained in the arbitrated implementing agreement applying the L&N agreement to machinists who transfer to the South Louisville Shops.

The attached arbitrated implementing agreement, 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 rearrangement of forces pursuant to the coordination which gave rise to this proceeding. This Decision and the implementing agreement are intended to resolve all outstanding issues in this proceeding as provided in Article I, Section 4 of the New York Dock Conditions.

William E. Fredenberger, Jr.
Neutral Referee

DATED: January 19, 1983

ATTACHMENT

ARBITRATED IMPLEMENTING AGREEMENT

BETWEEN

THE BALTIMORE AND OHIO RAILROAD COMPANY

LOUSIVILLE AND NASHVILLE RAILROAD COMPANY

AND THEIR EMPLOYEES REPRESENTED BY

INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS

WHEREAS, this transaction is made pursuant to Interstate Commerce Commission decisions in Finance Docket No. 28905 (Sub.-No. 1) and related proceedings, and

WHEREAS, The Baltimore and Ohio Railroad Company and Louisville and Nashville Railroad Company, hereinafter designated respectively as "B&O" and "L&N" gave notice in accordance with Article I Section 4(a) of the conditions for the protection of employees enunciated in New York Dock Ry. - Control Brooklyn Eastern Dist., 360 I.C.C. 60(1979) hereinafter designated as "New York Dock Conditions" of the intent of the B&O to discontinue operation of the wheel shop at Glenwood, Pennsylvania and transfer such work to the L&N Railroad South Louisville Shops,

WHEREAS, the parties have conferred, but have reached no agreement,

NOW, therefore, it is determined:

1. The Labor Protective Conditions as set forth in the New York Dock Conditions which, by reference hereto, are incorporated herein and made a part hereof, shall be applicable to this transaction.

2. As a result of this transaction, the B&O will discontinue operation of the car wheel shop located at Glenwood, Pennsylvania, and the B&O machinist and machinist helper positions assigned at that location will be abolished. Thereafter, B&O's car wheel operations will be performed by L&N at their South Louisville Shops, Louisville, Kentucky, and all work at that location accruing to machinists under the provisions of the Collective Bargaining Agreement between L&N and the International Association of Machinist and Aerospace Workers will be performed by employees on the Machinist's Seniority Roster at South Louisville, Kentucky.

3. Positions to be established on L&N at South Louisville Shops, effective with the date of coordination, will be bulletined at Glenwood, Pennsylvania, for

a period of ten (10) days and will accrue to employees holding assignment on the Glenwood Machinist Roster, Central Region Seniority Point 6.

4. (a) Upon expiration of the ten-day bulletin, determination will be made of the employees who have bid and who have been awarded a position at South Louisville Shops. At the same time, determination will also be made of those employees whose jobs are being abolished as a result of this coordination and who, rather than bid on a position in the coordinated operation at South Louisville Shops, have elected to exercise displacement rights over junior regularly assigned employees whose positions are not being abolished. Such employees will designate the positions on which they intend to exercise seniority rights, and junior employees to be affected thereby shall make the same determination.

(b) In the event any positions advertised in the coordinated operation at South Louisville Shops are not filled in accordance with Paragraph (a), Glenwood employees whose positions are to be abolished and who have not bid on advertised positions in the coordinated operation or who do not have sufficient seniority to exercise seniority on other positions on the roster, and employees who are to be displaced through the exercise of seniority as described in Paragraph (a) and are unable to exercise seniority on other positions on the roster, will be assigned to the unfilled position(s) at South Louisville Shops in reverse order of seniority. Such assignment will be by letter signed by the appropriate Carrier officer with copies to the Local Chairman and General Chairman. An employee assigned a position at South Louisville Shops who fails to report to the position on the effective date of assignment, or as otherwise arranged with the L&N officer having jurisdiction at that location, except under circumstances beyond his control, shall forfeit protection as set forth in Article I, Section 6 of the New York Dock Conditions.

(c) The junior Glenwood employee(s) will be assigned in accordance with Paragraph (b) until the position(s) are either filled or until the employees described in such Paragraph (b) are exhausted.

(d) In the event employees at Glenwood fail to accept positions to which they are entitled at South Louisville Shops, such unfilled positions shall then accrue to the employees at the latter location . Positions then unfilled will be filled by recall of furloughed employees, if any, and then by new hires.

5. (a) Employees accepting positions at South Louisville on the L&N will have their seniority date, as it appears on the Glenwood Machinist Roster, dovetailed on the appropriate roster to which transferred upon reporting to work, and their name will be removed from the Glenwood Machinist Roster. Where, following this procedure results in two (2) or more employees having the same seniority date on the dovetailed roster, their respective positions on the roster will be determined by continuous service standing and then by age, eldest fi

(b) Employees transferring to South Louisville will be assigned positions in accordance with the bulletins advertising positions.

6. In order that the provisions of the first proviso set forth in Article I, Section 3 of the New York Dock conditions may be properly administered, such employee determined to be a displaced or dismissed employee as a result of this Agreement, who also is otherwise eligible for protective benefits and conditions under some other job security or other protective conditions or arrangements shall, within ten (10) days after notification of his monetary protective entitlement under the New York Dock Conditions, elect between the benefits thereunder and similar benefits under such other arrangement. In the event an employee does not make an election within the ten (10) day period specified herein, he shall be considered to have elected to retain the protective benefits he is presently eligible to receive. This election shall not serve to alter or affect any application of the substantive provisions of Article I, Section 3.

7. (a) Each dismissed employee shall provide either B&O or L&N with the following information for the preceding month in which he is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the Carrier:

1. The day(s) claimed by such employee under any unemployment insurance act.

2. The day(s) each such employee worked in other employment, the name and address of the employer and the gross earnings made by the dismissed employee in such other employment.

(b) In the event an employee referred to in this Section 7 is entitled to unemployment benefits under applicable law but forfeits such unemployment benefits under any unemployment insurance law because of his or her failure to file for such unemployment benefits (unless prevented from doing so by sickness or other unavoidable causes) for purposes of the application of Sub-section (c) of Section 6, Article I of the New York Dock Conditions, they shall be considered the same as if they had filed for, and received, such unemployment benefits.

(c) If the employee referred to in this Section 7 has nothing to report under this Section 7 account of their not being entitled to benefits under any unemployment insurance law and having no earnings from any other employment, such employee shall submit, within the time period provided for in Sub-section (a) of this Section 7, on the appropriate form annotated "Nothing to Report".

(d) The failure of any employee referred to in this Section 7 to provide the information required in this Section 7 shall result in the withholding of all protective benefits during the month covered by such information pending Carrier's receipt of such information from the employee.

8. Nothing in this implementing agreement shall be interpreted to provide protective benefits less than those provided in the New York Dock Conditions or exclude coverage to those covered by New York Dock Conditions imposed by the I.C.C. and incorporated herein by paragraph 1.

9. The provisions of this Agreement shall become effective upon ten (10) days advance written notice by the B&O and L&N to their respective General Chairman.