John S. LaRocco, Arbitrator
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In the Matter of the
Arbitration involving:

SEABOARD SYSTEM RAILROAD
(SEABOARD COAST LINE RAILROAD
COMPANY AND LOUISVILLE AND
NASHVILLE RAILROAD COMPANY)
AND THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
Carriers

and

BROTHERHOOD OF RAILWAY, AIRLINE
AND STEAMSHIP CLERKS, FREIGHT
HANDLERS EXPRESS AND STATION
EMPLOYES,
Organization

I.C.C. Finance Docket No. 28905

OPINION AND AWARD

Date of Hearing: May 24, 1983
Place of Hearing: Washington, D.C.
Date of Award: June 30, 1983

APPEARANCES

For The Carriers:

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For The Organization:

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OPINION

I. BACKGROUND AND SUMMARY OF FACTS

This arbitration proceeding is conducted pursuant to Article I, Section 4(a) of the labor protective conditions set forth in New York Dock Railway--Control--Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979); affirmed, New York Dock Railway v. United States, 609 F. 2d 83 (2nd Cir. 1979) ("New York Dock Conditions"). See also, 49 U.S.C. § 11347. In its decision in Finance Docket No. 28905 (Sub No. 1), the Interstate Commerce Commission (ICC) permitted the CSX Corporation to acquire and control the Carriers involved in this case and imposed the New York Dock Conditions on all the Carriers.

On January 26, 1983, the Carriers notified the Organization that the Carriers intended to coordinate certain Commercial Department functions at off-line traffic offices in various cities. Specifically, the Organization was notified that commercial and sales duties performed by Chesapeake and Ohio (C&O) employees at Atlanta, Boston, Oakland, Portland (Oregon), and Kansas City would be coordinated with Seaboard Coast Line (SCL) functions performed in the same cities. In addition, functions performed by SCL employees at Cleveland and Pittsburgh would be coordinated with similar C&O functions performed in those two cities. The Carriers also notified the Organization of the coordination of comparable functions between Louisville and Knoxville which concerned C&O employees and Louisville and Nashville (L&N) employees. To effect the desired coordination, the Carriers were abolishing eight C&O clerical positions. Apparently, the Carriers also intended to eliminate two SCL clerical positions. Except for the positions scheduled for abolition, no other changes were contemplated. No positions were to be transferred. No new positions would be established.

The parties attempted to negotiate an implementing agreement but were unable to reach an understanding on two fundamental issues and one minor issue. During negotiations, the Carriers presented a proposed implementing agreement. While the Organization took immediate exception to some of the Carriers' proposals, the Organization did not submit any proposals during negotiations because it claimed that it lacked sufficient information on which to base a proposal. Nonetheless, the Organization did present its proposals regarding the outstanding issues at the arbitration hearing. The two proposed memoranda demonstrate that the parties have reached impasse over: a) the method for selecting and allocating forces arising from the coordination and, b) at what point in time an employee affected by this transaction may make an election between the benefits conferred under the New York Dock Conditions and the protective conditions afforded employees by the collective bargaining agreements on each property. The Organization has also suggested a proposal which attempts to clarify a dismissed employee's obligation to apply for unemployment benefits where the Railroad Retirement Board has already determined that the employee is ineligible for such benefits.

All parties have agreed that the three issues are properly before the Arbitrator and that the Carriers have complied with all the conditions precedent to invoking arbitration in accord with Article I, Section 4(a) of the New York Dock Conditions. At the Arbitrator's request, all parties agreed to extend the time for issuing an Award beyond the thirty day limitation period imposed by Article I, Section 4(a).

II. POSITIONS OF THE PARTIES

A. The Carriers' Position

Emphasizing the portion of Article I, Section 4 which provides for a selection of forces ". . . on a basis accepted as appropriate for application in the particular case. . . ," the Carriers argue that the mere abolition of

certain clerical positions does not require the massive allocation of coordinated positions to employees of both Carriers at the particular location. A comprehensive allocation is unnecessary because the Carriers are neither transferring any positions nor establishing any new positions at the surviving office in each city. Allocating the surviving positions would unduly upset employees (by displacement) who would not have been otherwise affected by the transaction. The Carriers contend that New York Dock does not require the involvement of employees (and the possibility of paying protective benefits to those employees) who presently occupy positions unrelated to the transaction. Incumbents of the abolished positions are adequately protected since they could properly exercise their seniority to fill other positions on their respective properties. If no other position was available to them, the incumbents could become dismissed employees within the terms of the New York Dock Conditions. Consistent with their reasoning, the Carriers offered the following proposal for inclusion in the implementing agreement:

> "Exercises of seniority resulting from this Memorandum Agreement will be accomplished through the application of the respective General Clerical Agreements in effect on the date of coordination on the C&O and SCL properties, unless otherwise agreed between the Management and the General Chairman of the C&O System Board of Adjustment or the General Chairman of the SCL System Board of Adjustment."

To further buttress their contention, the Carriers point to an implementing agreement entered into by these same parties on March 15, 1981 which concerned a similar issue. In that agreement, clerical positions which assumed part of the coordinated functions were not specifically included in the implementing agreement. Rather, the allocation of employees from either the C&O or the SCL who held abolished and/or transferred positions was expressly restricted to positions which were transferred or new positions which were created at the coordinated offices.

As to the second issue, the Carriers concede that affected employees are entitled to choose between the benefits conferred by either the New York Dock Conditions or the Job Stabilization Agreements in effect on the respective properties. However, the Carriers contend that the right of an employee to make an election of benefits accrues only after the employee has qualified as a displaced or dismissed employee within the meaning of the New York Dock Conditions. Since the Carriers are engaging in a transaction pursuant to New York Dock, any employee adversely affected by the transaction should first satisfy the prerequisites for obtaining New York Dock benefits before triggering his right to receive pre-existing property protective benefits.

In this case, the Carriers are especially concerned about the costly consequences of allowing employees to opt for the applicable property protection benefits before the employees qualify for the New York Dock benefits. Since many of the clerical employees are assigned to points far removed from the respective Carrier's mainstream of operations, incumbents of abolished positions may very well elect to receive benefits accruing under the property protection agreements (which ostensibly permit employees to forego exercising their seniority if it causes a residence change) without even qualifying for the New York Dock benefits.

According to the Carriers, the language in Article I, Section 3 of the New York Dock Conditions shows that an employee's right to an election is triggered only when the employee becomes eligible for protection under both the New York Dock Conditions and the existing job security agreements. To further support their arguments, the Carriers have called the arbitrator's attention to an affidavit submitted by the Organization's counsel during the ICC adjudicatory proceedings of Finance Docket No. 28905. In summary, counsel petitioned to modify that portion of New York Dock which compelled

an employee involved in a transaction to exercise his seniority even if it required the employee to change his residence. Since the ICC rejected the Organization's suggested modification, the Carrier contends the Organization is now barred from trying to achieve through this arbitration what it was unsuccessful in obtaining from the ICC.

The Carriers urge the Arbitrator to issue a finding that the Carriers' proposed implementing agreement fully complies with all the requirements set forth in the New York Dock Conditions.

B. The Organization's Position

As to the first outstanding issue, the Organization places emphasis on the language in Article I, Section 4(a) which states that any agreement must provide ". . . for the selection of forces from all employees involved. . .." The Organization reasons that the coordination of functions at the Carriers' off-line traffic offices involves all the clerical employees occupying positions at the respective carrier's "coordinated office." Thus, any agreement should include provisions addressing the rights of employees currently occupying positions scheduled for abolishment to claim positions in the "coordinated offices. At the arbitration hearing, the Organization submitted the following proposal (with supporting terms);

> "Positions in the coordinated offices shall be filled by offering such positions, in seniority order, to occupants at the respective locations holding positions (C&O or SCL) directly affected as a result of the coordination."

The Organization opposes the Carriers' proposal on this issue since it would deny a senior employee the right to exercise his seniority over a junior employee in the same city. The Organization claims that it is not contesting the Carrier's prerogative to set the number of positions in each "coordinated office" but it is disputing the Carriers' unilateral attempt to decide who will fill the positions.

Turning to the second issue in dispute, the Organization argues that the Carriers are attempting to evade their obligation under the respective property protection agreements. The Carriers' proposal, according to the Organization, undermines an employee's independent right to benefits under the applicable property protective agreements by excluding the employee from property protective benefits until the employee qualifies for benefits pursuant to the New York Dock Conditions. Article I, Section 3 specifically disavows a construction which would lead to an employee's deprivation of benefits under an existing job security agreement. Further, Section 2 of Article I expressly provides for the preservation of all benefits under pre-existing collective bargaining contracts. If an employee's election right accrued only after he first qualified for New York Dock benefits, the employee might be required to change his residence when such change would ordinarily not be a prerequisite to receiving benefits under the property protective agreements. Delaying the employee's right to make an election would place the employee in a worse position which is prohibited by the relevant statute. 49 U.S.C. § 11347.

The Organization requests the Arbitrator to find that its proposals are consistent with the New York Dock Conditions.

III. DISCUSSION

A. The First Issue

The initial outstanding issue between the Carriers and the Organization concerns the proper scope for the allocation of employees in this particular case. Both parties rely on the following pertinent portion of Article I, Section 4 of the New York Dock Conditions:

> "Each transaction which may result in a dismissal or displacement or 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." (Emphasis Added)

The ICC recognized that the above referenced language should be applied on a case by case basis depending on the peculiarities of each transaction. The Commission observed that, "Particular problems arising from varying facts of specific cases are best handled by the individual parties involved within the framework of negotiation and arbitration . . . ." 360 I.C.C. 60, 75. Since the parties were unable to agree on the scope of the selection of forces, the arbitrator will decide the scope but he expressly confines his decision to the particular facts of this transaction.

Article I, Section 4 provides for the selection of forces which is most appropriate in each case. The most reliable evidence for determining the appropriate method for allocating forces in this case is to look at how the parties resolved a similar issue in the past. Though the March 15, 1981 implementing agreement also involved the transfer of positions as well as the establishment of positions, the parties also deemed it proper not to disturb the occupants of many clerical positions at the coordinated facility even though some of those occupants assumed a portion of the coordinated functions. To maintain consistency, the proposed implementing agreement in this case should be structured in the same fashion as the March 15, 1981 agreement.

Furthermore, the Organization's proposal on allocation of forces is overly broad. Its proposal unduly upsets clerical employees who are only remotely concerned or completely uninvolved with the coordination of commercial functions. Article I, Section 4 does not contemplate an expansive selection of forces where there is no evidence forces have been rearranged in the surviving office.

Under the particular circumstances of this case, the Carriers' proposal covering the allocation of forces satisfies the requirements of the New York Dock Conditions.

B. The Second Issue

The second issue is when may employees make an election between benefits which might be available under applicable property protective agreements and New York Dock benefits where the adverse effect on employees is attributable to a New York Dock transaction.

Article I, Sections 2 and 3 of "New York Dock" states:

> "2. 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.
>
> 3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security of other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement."

While this arbitrator cannot interpret what righ , if any, employees have under the applicable property protection agreements, the arbitrator can decide if property protective benefits should be held in abeyance pending each employee's compliance with the qualifying conditions in the New York Conditions.

The language in Sections 2 and 3 demonstrates that the New York Dock Conditions were not intended to impair any employee security arrangements on the respective properties. Section 3 contains three specific provisos. All the provisos are designed to prevent employees from receiving duplicative benefits or to prohibit employees from pyramiding their benefits. If the ICC wanted to delay an employee's right to elect benefits, such a proviso could have been easily incorporated in Section 3. Absent such a restriction on the timing of an election, the Arbitrator concludes that an employee may obtain the applicable benefits whenever he qualifies under either the property protective contracts or the New York Dock Conditions even though the Carriers are engaging in a transaction under the auspices of New York Dock.

The portion of Article I, Section 3 which is cited by the Carriers does presume that an employee making an election is eligible for New York Dock benefits as well as any available benefits in an existing job security agreement. However, the purpose of Section 3 was to make certain that an eligible employee was not bound to accept New York benefits. When Section 3 is read in conjunction with Section 2, it becomes clear that the parties could agree to eligibility criteria in their property agreements which are less stringent than the qualifying requirements for benefits under the New York Dock Conditions. If an employee's election right arose only after he became a dismissed employee, the employee's collective bargaining benefits would no longer be preserved as required by Section 2.

Counsel for the union, in his testimony before the ICC, was attempting to relax the New York Dock qualifications. The testimony has no bearing on the parties negotiated property agreement to provide separate protective benefits to employees based on different eligibility factors.

Thus, to the extent employees are entitled to benefits pursuant to any property agreement, those benefits cannot be vitiated or indefinitely delayed merely because the Carriers are engaging in a New York Dock transaction.

C. The Third Issue

The Organization has proposed a term in the implementing agreement which attempts to clarify a dismissed employee's obligation to apply for unemployment compensation when the Railroad Retirement Board has issued a finding that the employee is ineligible to receive unemployment. (See the Note to Section 16 of Employes' Exhibit K.) The arbitrator concludes that such language need not be included in an implementing agreement. Because an actual dispute may never develop and because the facts underlying any dispute which might develop are not readily ascertainable in this case, it is preferable to leave the resolution of any such dispute to the procedures set forth in Article I, Section 11 of the New York Dock Conditions.

AWARD AND ORDER

The implementing agreement relating to the January 26, 1983 Notice between the Carriers and the Organization shall:

1. Provide for a selection of forces based on the Carriers' proposal as set forth in Section 8 of Carriers' Exhibit 3;

2. Insure that any employee represented by the Organization and affected by this transaction and who is eligible for both property protective benefits and New York Dock benefits must make an election between those two benefits. Any employee eligible for benefits pursuant to an applicable property protective agreement may, if he chooses, receive the property protective benefits without first qualifying for New York Dock benefits; and,

3. Not include the Organization's proposal as set forth in the Note to Section 16 of Employes' Exhibit K.

DATED: June 30, 1983

John B. LaRocco
Arbitrator