In the Matter of Arbitration	:	
Between	:	
Baltimore & Ohio RR Company Newburgh & South Shore Rwy Co.	:	
and	:	
Brotherhood of Maintenance of Way Employees United Steel Workers of America	:	
.. ..		
File	:	ICC Finance Docket No. 30095
Arbitrator	:	Jacob Seidenberg, Esquire
Hearing	:	June 10, 1983 - Washington, D.C.
Appearances	:	Baltimore & Ohio RR W.C. Comiskey, Manager of Labor Relations
		Newburgh & South Shore RR George E. Stein, General Superintendent
		Brotherhoof Of Maintenance of Way Employees John O'B. Clarke, Jr., Esquire, Counsel
		United Steel Workers of America Mary-Win O'Brien, Esquire, Counsel
Post Hearing Briefs Received	:	July 19, 1983
Reply Briefs Received	:	July 27, 1983
Issues	:	(1) Does the Board, acting pursuant to Article I, Section 4, of the New York Conditions, have the jurisdiction to terminate the Schedule Agreement of one group of employees and modify the Agreement of another group of employees, affected by a transaction?
		(2) Does the purchasing Carrier ha to recognize the re-employment rights of furloughed employees of the purchased carrier?

Background: This is an arbitration proceeding under Article I, Section 4 of the New York Dock Conditions resulting from the approval by the Interstate Commerce Commission of the purchase by the B&O RR of the property of the Newburgh and South Shore Railway, a property owned by the U.S. Steel Corporation and operating in the Cleveland, Ohio area.

The B&O stated that it intended to operate the N&SS as part of its Cleveland Yard. The N&SS has six miles of main line track and 16 maintenance of way employees on its roster. Six were currently active, seven on furlough, two on disability leave, and one acting as a foreman but with recall rights.

The Carriers and the Organizations differ as to the proper application of the New York Dock Conditions to this acquisition as it pertains to the class and craft of maintenance of way employees. On the B&O this class of employees are represented by the Brotherhood of Maintenance of Way Employees and on the N&SS they are represented by the United Steel Workers of America.

On December 13, 1982 the Carrier filed an application for approval of the sale which ICC approved on March 28, 1983, subject to the employees receiving the employee protective conditions of the New York Dock case.

While the Carriers' application was pending before the ICC, the Carrier initially served a notice on the requisite Organization on January 5, 1983 to negotiate an implementing agreement. The parties met on February 22, March 25, April 8

and April 15, 1983 but their negotiating efforts were unsuccessful. The Carriers thereafter served a joint notice on the two Organizations that they intended to progress the dispute to arbitration under Article I, Section 4. Because the parties were unable to agree upon a neutral, they petitioned the National Mediation Board to appoint one. On May 6, 1983, the NMB appointed the Undersigned to be the Neutral Member of the Arbitration Board. After the initial hearing, the parties requested, and were granted the privilege of filing post hearing and reply briefs.

The gravamen of the dispute arises from the B&O's intention to apply its existing BMW schedule agreement to those employees from the N&SS whom it wanted to transfer to the B&O as well as the dispute as to its New York Dock Conditions' responsibilities to the remaining N&SS employees.

In the course of the negotiations with the Organizations, the Carrier stated it would transfer to the B&O certain Newburgh employees who were in active service at the date of the sale, and dovetail these employees into the appropriate B&O Akron East End Seniority District Roster, and place such employees under the B&O-BMWC Agreement. The B&O stated that it initially intended to establish four positions to be filled by the transfer of N&SS employees to work, not only on the former N&SS property, but also on existing B&O property within the present B&O seniority district.

The Organizations made a counter proposal whereby the

purchased N&SS property would be operated as a separate seniority district under the terms and conditions of the Agreement between the N&SS and USWA, with the employees on the N&SS who currently possess seniority rights to N&SS maintenance of way work, be given the first opportunity to fill the positions established by the B&O as a result of the acquisition of the N&SS property.

The B&O stated that to dovetail N&SS employees on the B&O seniority roster, but still holding that N&SS employees were operating under the N&SS Agreement, would make it virtually impossible to integrate the N&SS into its work force because of the difference in the work rules between the B&O-BMWE Agreement and the N&SS-USWA Agreement. The B&O stressed there were differences in the two agreements on matters such as meal periods, overtime, entitlement to being held on duty after regular relieving time, notice of a force reduction, seniority rosters, qualification periods for promotion, time limits for advertising vacancies, and length of probationary periods.

Another major point of dispute between the parties was the Carriers' position that under the Sales Agreement, the B&O had the responsibility to assume the employment of N&SS who were in active service, but had no responsibility to furloughed N&SS employees. The Organizations stated the B&O should not be permitted to destroy the employment relationship which the N&SS furloughed employees possessed as a result of their

collective bargaining agreement with their carrier. The Organizations stressed the B&O was in error in maintaining that the Organizations were seeking to determine size of the Carrier's work force by insisting that the Organizations were maintaining that furloughed employees are entitled either to dismissal or displacement allowances under the New York Conditions. The Organization stressed that they were only seeking a ruling that furloughed employees are encompassed by the ICC protections imposed as a condition for its approval of the sale, as being employees involved in the acquisition transaction.

The Carrier maintained that the only N&SS employees for whom it has a responsibility are those employees who would be displaced or dismissed as a result of a transaction, and furloughed employees are not affected in this manner by said transaction.

In summary, conclusionary way, these were the major points of dispute between the parties that prevented them from agreeing upon an implementing agreement that would enable them to make a fair selection of forces.

The underlying cause of the dispute is the differing interpretations which the parties invest in Sections 2 and 4 of Article I of New York Dock Conditions.

These provisions state in part:

Article I, Section 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 a 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."

"4. Notice and Agreement or Decision - (a) 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) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by each 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 thirty (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. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for the adjustment in accordance with the following procedures: ..."

Carrier's Position

The Carriers stress that Section 4 of Article I vests in the Arbitrator the authority to frame an implementing order that will enable the B&O to apply its agreement with the BMWE to those employees who transferred to the B&O. The Carrier stated in their application to the ICC they stressed that in

order to achieve desired economies there would be a consolidation and integration of N&SS facilities into the B&O operation. The ICC recognized this fact in granting approval and stated:

> "B&O anticipates that by consolidating the Newburgh facilities with its own and attracting additional business to its own system it will be able to overcome the losses suffered by Newburgh and increase its annual net earnings by approximately $866,000."

The B&O added that the ICC also recognized that there would be adverse effects as a result of the consolidation when it states:

> "There will be adverse effects upon employees as a result of this transaction. It is equally true, however, that there would be an even worse effect upon Newburgh employees if it remained a separate entity and, as it appears likely, ultimately had to cease operations altogether as a result of continuing substantial losses."

The Carrier stressed that both the ICC and the Carriers envisioned that, as a result of the purchase of the N&SS, there would be a consolidation and integration of the Newburgh operations into the B&O property supervised by B&O management personnel. To accept the proposal of the Organizations would prevent the B&O from realizing the economies of operation which was the basis upon which the B&O purchased the property.

The Carriers state that the Organizations are advancing a false premise when they seek to maintain the status quo on the Newburgh property because the New York Dock Conditions prohibit in any way adverse effects of employees' right. The intent of the New York Dock Conditions is not to maintain the

status quo. The ICC clearly recognized there would be adverse effects on the employees when it approved the sale of the property to the B&O, and operate the N&SS property as a separate entity is contrary to the transaction as authorized by the ICC.

The Carrier maintains the contention of the Organizations is ill founded that Article I, Section 2, of the New York Conditions requires the Arbitrator to rule that the existing rules, seniority districts, seniority rosters must be maintained until the parties changed them by negotiations under Section 6 of the Railway Labor Act. The Organizations argue that Section 2 prohibits an arbitrator from terminating the application of an existing agreement. The Carriers insist this is a narrow and restrictive construction which the Organizations place on the New York Dock Conditions, when the parties fail to agree upon an implementing agreement, and it is contrary to the purpose and intent of the New York Dock Conditions. The ICC has recognized that transactions are made upon the expectations that there will be a more efficient use of the assets and the elimination of duplicate facilities. The Carriers add that the purpose of New York Dock was to facilitate rather than obstruct, the effectuation of such changes, although they may cause dismissal or displacement of employees, or rearrangement of forces. For this reason, the ICC provided in Article I, Section 4(a) means whereby an Arbitrator could resolve all disputes pertaining to the selection and reassignment of forces

when the parties were unable to resolve them by negotiations.

The Carriers state the Organizations rely for their position on a series of arbitration awards starting with the "N&W Trilogy" (N&W, IT-UTU-December 29, 1981 - Edwards), (N&W-IT-RYA-December 30, 1981 - Sickles), (N&W-IT-BLE, February 1, 1982 - Zumas), followed by Southern Railway-Kentucky Terminal - Brotherhood of Railway Signalmen, October 5, 1982 -Fredenberger.

The Carriers state the awards of these Referees are in serious error and they frustrate the very purpose for which ICC imposes an expeditious procedure for resolving impasses that arise out of a coordination or an acquisition. These decisions prevent a full integration of operations, and thus deny the Carriers the very purpose for which they sought the coordination or acquisition.

The Carriers note that Article I, Section 2, did not appear in earlier protective conditions such as the Washington Job Protection Agreement, or the Oklahoma, Burlington, New Orleans or Southern-Central of Georgia Conditions. It appears for the first time in the C-1 Appendix prescribed by the Secretary of Labor for those agreements whereby carriers discontinued their intercity rail passenger service which was assumed by AMTRAK, while the railroads continued to operate. The purpose of Appendix C-1 was to protect railroad employees who were adversely affected when passenger service was transferred to AMTRAK. The Carriers note, however, whenever such employees were employed by AMTRAK and were no longer employees of the

railroads which had discontinued passenger service, they were then covered by the AMTRAK Agreement and not that of their former railroad. The Carriers emphasize that Section 2 of Appendix C-1 was not treated as granting portability to the rules agreements of railroad employees after they became employees of AMTRAK.

The Carriers state when Congress passed Railroad Revitalization and Reform Act it amended the ICC Act (Section 5 [2][f]) to provide that, in protection cases, the Commission should issue provisions "no less protective of the interests of employees than those heretofore pursuant to this subdivision and those established pursuant to Section 405 of the Rail Passenger Act." This meant that the ICC had to formulate protection conditions based on the New Orleans conditions as modified by Southern-Central of Georgia, together with the provisions of Appendix C-1. Since the ICC found no parallel to Appendix C-1 in prior railroad protection provisions based on prior Section 5(2)(a) proceedings, it accordingly, incorporated verbatim Appendix C-1 into Article I, Section 2, when it issued the New York Dock Conditions to meet the Congressional directive stated in the 4-R Act.

The Carriers state that Section 2 has no antecedents in any prior merger, acquisition, or "control" situations fashioned to meet requirements of a particular position. On the contrary Section 2 was taken from Appendix C-1 that was designed to apply to cessation of passenger operations by a single

carrier, but then it was incorporated into New York Dock Conditions which applies only to cases involving combinations of two or more carriers. Appendix C-1 was intended to apply to employees who continued in service with their original railroad employer. It was applicable only to certain employees. Section 2 could not be expected to dispose of the question of agreement application and preservation in transactions where a carrier acquires the assets of another carrier and the latter carrier ceases to operate.

The Carrier states the parties have to rely on the Section 4 mechanism to take care of situations for determining questions relating to rearrangement of forces and interpretation of terms and conditions of protective arrangements. The Carriers maintain without Section 4 remedy, there could be no orderly resolution of the questions raised under Section 2. Arbitration under these conditions is the mandatory remedy for questions raised as to their meaning and application. There is no conflict between Section 2 read properly, and the principle that questions relating to agreement application should be left to the negotiation/arbitration process.

The Carriers assert that Section 4 provides for negotiation/arbitration of all changes of employee impact effected by a transaction. They add there is no language in Section 4 that makes an exception for changes in agreement application because of the provisions of Section 2. If the ICC had intended such an exception, it could have easily so stated. Without such a

stated exception it should not be inferred.

The Carrier notes that the ICC stated in a proceeding under the Short Line Conditions, which are virtually the same as the New York Dock, that the duty of a referee is to render a decision on every subject or issues discussed during the parties' discussions. The ICC opinion stated the referee must reconcile all disputes over which he has jurisdiction (Durango & Silverton Narrow Guage RR Co. - June 3, 1982).

The Carriers added the ICC stated in BLE-L&N and MoPRR-January 4, 1982 that, whether employees are placed under the collective bargaining agreement of the Carrier to which they are transferred, is a proper issue for a neutral to determine under the N&W Conditions, which are similar to NY Dock except they apply to a trackage agreement.

The Carriers maintain that although those arbitrators who stated they had no jurisdiction to terminate the application of an agreement, nevertheless, in every case, proceeded to amend rights under the collective bargaining agreements, when they dovetailed the seniority of the employees of the property being acquired into the seniority rosters of the purchasing carrier.

The Carriers state that those arbitrators who state they have no jurisdiction under Section 2 to terminate application of an agreement under Section 2, have misread the purpose of this Section. They have read a limitation into this Section which does not exist. They were not exercising

the full authority vested in them by Section 4. The Carriers state Section 2, taken from Appendix C-1 evolving out of the AMTRAK transactions was never intended in New York Dock Conditions to weld a particular employee to an agreement so as to prevent his transfer to another railroad employer or another craft on the same railroad without carrying his former agreement with him. The ICC recognized that transactions of purchase were likely to involve transfers of employees from one railroad to another. Section 4 was the mechanism to handle disputes arising out of such transfers.

The Carriers state the issue is not whether the Arbitrator has the authority under New York Dock Conditions to terminate application of an Agreement, but rather rather the Arbitrator choses to exercise the authority. The Carrier notes the Arbitrator chose to exercise the authority in the Detroit Terminal case to place the Detroit Terminal Yardmasters under the Conrail Agreement. The Arbitrator in the Point Consolidations between the Southern and N&W found that yardmaster functions at Lynchburg could be consolidated under the Southern RR Agreement and Yardmaster functions at Winston-Salem could be under the N&W working conditions, and that Yardmaster functions at Norfolk could be consolidated under the RYA N&W (Virginia) Agreement.

The Carriers note another problem that would arise if the N&SS employees transferred to the B&L, were permitted to retain their former collective bargaining agreement. The N&SS

property will become B&O property. Thus there will now be two different unions representing the class or craft of Maintenance of Way employees on the B&O. This is contrary to the provisions of the Railway Labor Act and the policy of the NMB, which is to recognize a single organization as the representative of the entire craft or class on a carrier.

The Carriers state there is no merit to the Organization's position that the Carriers are estopped from contending that an Arbitrator has the authority under Section 4 to terminate the application of a collective bargaining agreement. The Organizations state that because certain arbitrators found they do not have such authority, and since their awards were rendered before the Carriers filed their application with the ICC, the Organizations contend the Carriers were obligated to request the ICC to rule on the issue. The Carriers note, first, that not all arbitrators have ruled the same way on this issue. The Detroit Terminal and the Southern-Norfolk awards were also rendered prior to the filing of their ICC application, so there is no consistent arbitral authority on the issue.

The Carriers also maintain, that in any event, they have no obligation to ask the ICC to overrule arbitral decisions which were not uniform. The Carriers assert that they stated forthrightly in their application that the B&O was going to integrate the N&SS separate facilities into the larger B&O system. It adds that the ICC recognized the premises on which

the B&O intended to operate the facilities and gave its approval thereto.

The Carriers charge that the Organizations, instead, should be estopped because they had the opportunity to state their point of view to the ICC that the N&SS should be operated as a separate entity but they chose not to, and it is they who should be estopped.

The Carriers add that, because the ICC imposed the New York Dock Conditions without modifying arbitration decisions on the subject, it cannot be presumed that the ICC codified these decisions and interpretations. The Carriers note that the Commission has clearly stated its own interpretation of these conditions in the Durango and BLE-L&N and MOP cases, and that is what governs.

The other major question that the Carriers' raise is that if the B&O's existing agreement with the BMWE is to apply to the N&SS employees who transfer to it, does that deny the B&O the discretion as to the number of N&SS employees it will offer employment, and does it have to transfer to it all of the N&SS mainteance of way employees. The Carriers state in their ICC application, and in their notice of January 5, 1983, they only made reference to employees in the active service of the N&SS and did not refer to any other employees. They stress that since N&SS furloughed employees cannot be dismissed or displaced by the transaction, therefore, they are not entitled to any protection under NY Dock Conditions. The Car-

riers state the authority of a Neutral under Section 4 does not extend to reviewing a carrier's determination as to the size of the carrier's work force it will employ.

The Carriers state, by way of rebuttal, that it is aware of the different types of senaority provided for under the B&O and N&SS rules. They maintain, however, that once the transaction is consummated, N&SS employees who transfer must be put under a single collective bargaining agreement, i.e., the B&O Agreement, in order for the B&O to be able to integrate these employees into the B&O work force.

The Carriers also deny that dovetailing N&SS employees onto B&O rosters will create problems of great magnitude. The Carriers propose to dovetail Newburgh employees by their seniority date, i.e., date of hire, into the B&O Trackmen Seniority Roster for the Akron East End Seniority District. Trackmen seniority is the basic seniority for this class or craft. The Carriers add that the N&SS employees after the transfer could then establish seniority in the promoted classifications on the basis when they first qualified to perform service in this promoted classification as indicated by N&SS records.

The Carriers reiterate that dovetailing seniority is a fair and equitable method for merging rosters and stresses that even those arbitrators, upon whom the Organizations rely for support of their proposition that the Newburgh Agreement must continue to govern Newburgh employees, have ruled that dovetailing seniority was a fair and equitable method of merging rosters.

The Carriers further state that if the B&O was required to accept the transfer, and enter into an employment relationship with all N&SS maintenance of way employees on the seniority roster as of the day of sale, the B&O would incur substantial pension costs. The Carriers note the Sale Agreement between the parties protects the accrued pension benefits of all present N&SS employees, but divides further responsibilities for these employees between purchaser and seller depending on which employees are in active service on the date the transaction is consummated. Under the Sales Agreement the B&O will be responsible for subsequently earned pension benefits for non-management employees who are actively employed by N&SS on the date of consummation of sale. The B&O states that if it were required to hire furloughed N&SS employees, it would be exposed to additional pension costs, which is contrary to the Agreement it made with the N&SS. The B&O states it is unwilling to increase its pension liability to include N&SS employees who were furloughed on day of sale.

The Carriers raise another problem with regard to extending NY Dock Conditions to furloughed N&SS employees. It notes the NY Dock Conditions provide a protection period for up to six years for displaced or dismissed employees. They state a possible construction of the protective conditions might be that for furloughed employees the protection period could be of unlimited duration, while it is only six years for active employees. The Carriers stress that such a strained construction might come to

pass. They add that New York Dock Conditions were only intended to protect active employees adversely affected by the transaction but not furloughed employees.

The Carrier stated however they are willing to modify their original proposal and offer N&SS maintenance of way employees the same rights as granted BRAC employees, i.e., employ furloughed employees of N&SS as new B&O employees when needed, depending on their fitness and ability.

The Carriers deny that the Durango case supports the Organization's position on this issue. They assert that in this case it was held that for an employee to be eligible for status of "Dismissed" or "Displaced" employee, the employee had to have employment rights. However, the Carriers stress that the concepts of "Dismissed" or "Displaced" employees apply only to active employees.

The Carrier also contend there is no valid basis for the USWA's contention that the period used to determine when and whether there were active employees, should exclude the time when all N&SS employees are furloughed due to temporary shut down of the U.S. Steel Plant such as at Christmas and the furlough that is scheduled for August 1983. The Carriers state the allegations of USWA are misleading because there are no furloughs scheduled for August, or Christmas in the past. When furloughs have occurred in the past at Christmas they were the result of a lack of business and were varied depending on economic conditions. The Carriers state the furloughs did not occur

because they were scheduled. The Carriers further note that if USWA is concerned that the Carriers will schedule a furlough in anticipation of the transaction being consummated, there are provisions in the NY Dock Conditions to handle said arbitrary actions.

The Carriers also presented a detailed analysis of the Oranizations' Implementing Agreement noting the reasons why said Agreement was unacceptable, and instead urged the Arbitrator to adopt its proposed Agreement as amended. The Carriers stated they objected to the proposed Implementing Agreement primarily because it maintained the status quo with respect to the acquisition of the Newburgh property. Furthermore, some of the proposals were administratively burdensome while other proposals went beyond the requirements of New York Dock Conditions.

In summary, the Carriers contend that the Organizations are seeking to maintain the status quo with regard to the Newburgh property. The Organizations, in this case, have taken an even more extreme position than was taken by the Arbitrators upon whose awards they rely, in that the Organizations would not agree to permit dovetailing the N&SS employees who are transferred to the B&O onto the B&O Seniority roster.

The Carriers say that if the Organizations' position prevails, there will be no incentive for Carriers to enter into transactions, with the result that job opportunities will be lost to the employees of a carrier that will cease to operate as a separate entity.

Organizations' Position

The Organizations maintain that an Arbitrator functioning under Article I, Section 4 of the New York Dock Conditions lacks the jurisdiction to terminate an existing collective bargaining agreement or the representational status of a certified organization. They add the Carriers seek to use the New York Conditions to avoid their obligations under the Railway Labor Act not to change the rates of pay or working conditions except in accordance with the provisions of Section 6 of the Railway Labor Act.

The Organizations state that Section 2 of Article I was inserted by the ICC into the NY Dock Conditions at the direction of Congress in order to ensure that standard protective benefits in existence for employees prior to 1976, and those protective benefits dervied from the Appendix C-1 of the Rail Passenger Service Act of 1970, would continue to be available to employees in transactions encompassed by Title 49 USC 11347. The Organizations state the Congressional intent of protecting employee interests was achieved by Section 2 which expressly preserved existing collective bargaining agreements and employee rights affected by a transaction, unless they were changed by the procedures of the Railway Labor Act. The Organizations stress that the Carriers should not be permitted to transmute the NY Dock Conditions from a shield designed to protect employee interests into a sword to be used to deprive them of the protections granted by the Railway Labor Act.

The Organizations state Article I, Section 4, in light of its express provisions, cannot be a vehicle for negotiating or terminating collective bargaining agreements or representational status. Nor can Section 4 be a means for handling "major" disputes under the Railway Labor Act.

The Organizations assert that the Carriers are in error when they contend that Section 4 authorizes arbitrators to modify existing collective bargaining agreements when such modifications will aid in consummating the transaction. They contend such an interpretation of Section 4, ignores the express language of Section 2 that provides collective bargaining agreements and rights are to be preserved, and it reads into the language a provision that cannot be reasonably inferred therefrom. The Organizations assert there is no exception in Section 2 that states it does not apply where changes would aid the Carriers achieve more quickly the economies of consolidation.

The Organization states that, in light of the explicit language of Section 2, the Carriers cannot utilize Section 4, absent the consent of the parties, to change existing agreements, i.e., rates of pay, rules, or working conditions. This Section limits an arbitrator functioning thereunder, to determine the basic protection for employees who may be dismissed or displaced as a result of the transaction and to provide for the selection of forces from all the employees involved.

The Organizations assert their position with regard to

the applicability of Sections 2 and 4 of Article I, has been sustained by four recent arbitration decisions. Three cases arose out of the N&W acquisition of the Illinois Terminal and are known as the N&W-IT Trilogy. All three cases involved the issue of whether a Section 4 Arbitrator has the authority to eliminate or modify existing collective bargaining agreements. All three Arbitrators held that under Section 4 they lacked jurisdiction to amend collective bargaining agreements, and that their jurisdiction was confined to altering an existing agreement in order to effectuate the selection of forces.

In addition to the three N&W Trilogy cases the Organizations cite the Southern-Kentucky Indiana Terminal Signalmen case, wherein the Arbitrator was faced with the issue of the Southern RR seeking to consolidate the signal forces of the KIT with its own. The Organization notes that Arbitrator was faced with the same arguments the Carriers have advanced in this case, and he rules the N&W Trilogy applicable to the issue before him, and concluded that he had no jurisdiction to apply the Southern Agreement as requested by that Carrier.

The Organizations also cite another Arbitration Award, wherein the Arbitrator decided that the attempted transfer of two machinists and work from the shop of one railroad to the shop of another carrier, through the proposed New York Dock implementing agreement, could not be accomplished, because Section 4 did not confer the jurisdiction upon him to alter rates of pay or other benefits preserved by Section 2.

These interpretations of an arbitrator's jurisdiction under Section 4 of the New York Dock are entirely consistent with the scope of an arbitrator's authority under the employee protective provisions imposed by the ICC prior to the 1976 amendment by which Congress substantially expanded the protection it required to be imposed to protect employees. That amendment required an arrangement, such as in this case, that combined the New Orleans conditions with Appendix C-1. The Organizations also cited the Southern-Central of Georgia case (1967) wherein the ICC recognized the separate nature of employee rights derived from collective bargaining agreements from those imposed on carriers as a result of ICC conditions.

The Organizations further state that, although the Carriers are dissatisfied with the Arbitrators' interpretation of their jurisdiction of Article I, Section 4 in the N&W Trilogy and Southern-KIT cases they still seek to expand the Arbitrator's jurisdiction in this case by advancing the same arguments which were rejected by the other arbitrators. The Organizations suggest that the Carriers should be estopped from raising those arguments in this present case because the Trilogy and Southern-KIT cases were issued long before the Carriers made their Purchase Agreement. Nor did the Carriers request the ICC to overrule those arbitrators' decisions, and the ICC approved the Purchase Agreement subject to the New York Dock Conditions without reference to the awards of those arbitrators.

The Organizations assert that there must be a finality

to the Awards. The Carriers should be estopped from seeking to overrule those Awards, based on the arguments already advanced, especially in those situations where the Carriers had the opportunity to present its arguments against the Awards to the ICC but failed to do so.

The Organizations state the particular facts of this case made it unfair to accept the Carriers' arguments. To accept the B&O proposal would insure N&SS employees working in an unauthorized expansion of the B&O-BMWE seniority district would be receiving the same wage rates as B&O employees, but the B&O would also have to pay these new N&SS employees the supplemental pension they still enjoy - thus employees working side by side, will not be receiving equal compensation. This will create dissenion and make employees believe they have been unfairly treated.

The Organizations state another problem arising in integrating the seniority of N&SS employees with those of B&O employees, is that this will result in the integration of two different types of seniority. B&O employees have seniority based on service in a particular classification while N&SS employees have an industrial or general type of seniority without regard to length of service in a particular type of classification. The Organization states that before integrating such rosters, one type of seniority should be converted into the other, but this could result in a rearrangement of the seniority order of active versus furloughed N&SS employees. Because there are so

many inequities in the Carriers' proposals, the Organizations state to impose them would violate the cardinal tenet of NY Dock, i.e., to provide fair and equitable protections for employees affected by the transaction.

The Organizations state a major objection to the Carriers' proposal for integrating rosters is that it would deny protection to N&SS furloughed employees. While the B&O states it accepts its obligation to the four N&SS employees who it will put in active service, it contends that, since the 12 furloughed employees will not be displaced or dismissed employees as a result of the transaction, these furloughed employees will have no claim to any type of protection under NY Dock. The Organizations, however, insist that 49 U.S.C. 11347 and Article I, Section 2 provide protection for all affected employees. It makes no distinction between furloughed and active employees. Section 2 requires the preservation of employment rights of all employees affected by a transaction. The Carriers' proposal would not preserve the collective bargaining rights of furloughed N&SS employees. It would place them in a worse position with respect to their employment and this is in contravention of the Congressional directive.

The Organizations urge one seniority district for all 16 N&SS employees. It stresses it has not argued that all 16 employees must be employed. It has only urged a method to ensure that the 16 employees continue to maintain their existing recall rights to the B&O-employment. These recall rights exist by vir-

tue of existing collective bargaining agreements and must be preserved. They assert that no implementing agreement can abolish or curtail these rights.

The USWA states that the purpose of the New York Dock Conditions is to protect employees who are involved in this acquisition, and there is no valid basis to have a wholesale exclusion of N&SS furloughed employees. These employees are entitled to be listed on a seniority roster. The Organizations state the test for their selection as part of the work force is not whether they are eligible for a dismissal or displacement allowance, but rather whether they are involved employees in this Acquisition.

The Organizations assert that the Carriers amended proposal to treat all furloughed N&SS employees as new B&O employees is a proposal that offers illusory rather than meaningful protection to them.

The USWA urges that the N&SS area be established as a separate seniority district, not only because it preserves the respective collective bargaining agreements, but also because it facilitates the implementation of the selection of forces in a fair and equitable manner. Having such a separate district would give the furloughed N&SS employees a reasonable prospect of future employment without interfering with the operation of the railroad.

The Organizations further state that in the proposed Implementing Agreement its proposals for claim procedures,

should be adopted rather than the claim procedures of the current B&O collective bargaining agreement. They assert that the collective bargaining agreements procedures deal with claims under the rules Agreements, but not claims for benefits under the New York Dock Conditions. The former provisions are designed to handle claims for protective benefits.

The Organizations also contend its test period proposal, i.e., that only those months in which an employee performed compensated service for more than 50% of the normal working days, be included in the test period. They deny that this is an undue enrichment scheme, but a recognition that employees who are apt to be dismissed or displaced will not have worked a full 12 months in a given year.

The Organizations state because the ICC has held that not all railroads have shown they needed such a modified test period, it has not honored such a request. However, the ICC left open the issue for consideration under Article I, Section 4 depending on the specific facts of a case. In this case there are facts that warrant adopting such a test period.

The record shows that N&SS has recently undertaken cost savings measures and this results in an unfair reduction in the protective allowances to displaced or dismissed N&SS employees.

For all of the foregoing reasons the Organizations request the Arbitrator adopt their proposals for framing an implementing agreement, with the exception as to the effective

date of the arrangement. The Organizations state they are agreeable to accepting the Carriers' proposal on this item.

Findings:

When we turn to the core issue in this dispute, i.e., our authority under Article I, Section 4, when the parties are unable to agree upon the terms of an implementing agreement, we must conclude that we lack the authority under Section 4 to alter the rates of pay, the working rules and other terms and conditions of an existing collective bargaining agreement, because these contractual provisions are preserved by the explicit language of Section 2 of Article I.

We are fortified in our conclusion by the awards rendered in the N&W-IT Trilogy, the Southern-KIT and the B&O-L&N-IAMAW cases. We have carefully reviewed these awards and find them directly in point with the present case. The four neutrals who rendered these awards, seasoned and knowledgeable arbitrators, clearly and unequivocally held that the proscriptions of Section 2 denied arbitrators, acting under the mandate of Section 4, the authority to modify or terminate the terms and conditions of existing collective bargaining agreements. They held that Section 4 did not invest arbitrators with the authority to be a compulsory interest arbitrator and to change or abolish existing collective bargaining agreements in contravention of the procedures prescribed by Section 6 of the Railway Labor Act.

We are convinced that stability of railroad labor relations would not be served by our departure from the basic holdings of these five cited awards. Several hundred years ago, the great English Jurist, Lord Coke states:

> "The known certainty of the law is the safety of all."

Were we to issue an award of a different tenor, it would create uncertainty and lead the parties to relitigate the issue endlessly. Stability and certainty regarding legal and contractual rights are as important as abstract correctness of position.

We find the arbitration awards cited by the Carriers seeking to prove that other arbitrators have rendered awards with different conclusions, are awards that did not deal precisely with the issue of the authority of a Section 4 Arbitrator in light of Section 2. For example, in the Detroit Terminal case, the issue herein involved was never raised because the Detroit Terminal Yardmasters did not object to their contract being terminated. They wanted to be placed on the Conrail Yardmaster seniority roster, and their primary concern was to receive favorable positions on the Conrail Yardmaster seniority roster upon being integrated thereon. The Peterson awards were only tangential to the instant case. Referee Peterson was not called upon to extinguish any existing collective bargaining agreement, and in one terminal the yardmasters were not operating under any collective bargaining agreement. We do not find that the Peter-

son awards represent a material departure from the Trilogy and the other cited awards. They did not deal with the specific issue in our case.

With regard to the ICC rulings cited by the Carriers, those rulings did not deal with the juxtaposition of Section 4 versus Section 2 of Article I. Because we find that the Trilogy and Southern-KIT and B&O-L&N cases are directly in point with the core issue in the instant case, and the other cases cited by the Carriers are not, we are not inclined to depart from the awards in point, and therefore must conclude that we lack the authority to set aside the collective bargaining agreement in effect between N&SS and the USWA, even though it may impede the speedy integration of the N&SS and the B&O.

When we next turn to the putative contractual relation between the B&O and the N&SS employees whom the B&O did not want to add to its work force, or who were in a furloughed status at the time the ICC approved the application for purchase, we conclude that all the N&SS employees were involved in the transaction and had viable rights that should be protected and not vitiated by this proceeding. While it is unquestioned that the B&O has the sole discretion to determine the size of the work force it wants to use from N&SS forces. No Neutral can prescribe the size of the work force that must be utilized. However, this does not mean that the B&O can, or should be permitted, unilaterally to extinguish the vested seniority and pension rights of inactive N&SS employees. The B&O intends to operate on N&SS property and it is inappropriate for the B&O to

take action that would cause the N&SS to lose permanently their recall rights to work on N&SS territory, if the exigencies of operations should warrant such a happy state. We find the B&O's amended proposal to hire inactive N&SS employees as new B&O employees, is not a satisfactory resolution of this problem.

We find the instant situation does not represent situation where the carrier is abandoning a property or closing an office. The B&O intends to integrate and operate the N&SS property as part of its Cleveland Yard. Consequently, this continued operation will require the services of maintenance of way employees. We find that it is only fair and just to permit N&SS employees active and inactive, under appropriate circumstances, to have a priority to perform work on the N&SS property. It seems particularly appropriate to preserve the seniority of these 16 employees whose seniority covers a range from 33 to 4 years. All the N&SS employees should be on a seniority roster and not be excluded from whatever work opportunities might develop in due course in the N&SS area.

We find, therefore, that it is appropriate, based on the facts in this case, to establish the N&SS property or area as a separate seniority district because it will facilitate the protection of the seniority rights of the N&SS employees, as well as make for a fair and equitable selection of forces. As previously stated, since the B&O intends to operate over the N&SS property, and since the property will require maintenance of way services, it will not interfer with the operation of

the railroad to have a seniority roster composed of N&SS employees available to render necessary service. The B&O will still have absolute control of how many of these employees it will use, but when it needs maintenance of way employees in the N&SS territory, it should be compelled to utilize those N&SS employees who are able and fit to perform the work.

We find that it is also more appropriate to maintain separate roster and seniority district for N&SS employees rather than integrate them into the existing requisite B&O seniority roster because of the different nature of seniority, and the difference in gross compensation, and to preserve employment rights. There are too many disparate contractual elements in respective collective bargaining agreements to dovetail them. However, the present Implementing Agreement does not have to be frozen for all time. After the acquisition becomes operative, there is no reason why the parties cannot negotiate an agreement that will be congruent with their respective needs. But we must conclude that for the time being, a separate seniority district and roster will preserve to the affected N&SS employees their employment and supplemental pension rights, which would be in accord with the Congressional intent.

We have drafted an Implementing Agreement which we believe is consistent with the above stated Findings. We find inappropriate some of the proposals of the Organizations with regard to a moving allowance, or a modified test period and certain procedural aspects of the claim procedures, and have

not adopted them.

We believe that the attached Implementing Agreement represents an appropriate basis for the selection of forces pursuant to this Acquisition.

AWARD: (1) The Arbitrator lacks the authority to modify, substitute or terminate the existing collective bargaining agreements, or any terms thereof, without the express mutual consent of parties.

(2) The parties are directed to execute the attached Implementing Agreement to effect an appropriate selection of forces resulting from the Acquisition.

(3) This Decision and Award and attached Implementing Agreement are intended to resolve all outstanding issues, as provided for by Article I, Section 4, of the New York Dock Conditions.

Jacob Seidenberg, Arbitrator

August 31, 1983