Before ARBITRATION COMMITTEE appointed pursuant to Article I, Section II of Appendix III, I.C.C. Finance Docket No. 28250

In the Matter of UNITED TRANSPORTATION UNION (T) and CONSOLIDATED RAIL CORPORATION DOCKET NO. CRT-1691	O P I N I O N A N D A W A R D

SUBMITTED ISSUES

1. Is trainman J. A. Varga entitled to the benefits described in the "New York Dock Conditions" as requested on September 13, 1983 due to the abolishment of his position on September 12, 1983?

2. Is trainman S. A. Jankowski entitled to the benefits described in the "New York Dock Conditions" as requested on September 10, 1983 when claimant said "because of having been placed in a worse position with respect to my compensation and benefits as a result of the Conrail-Raritan River Merger?

BACKGROUND FACTS

On January 11, 1980, the U. S. Interstate Commerce Commission issued as Finance Docket 29805 a Notice of Exemption from the requirements of 49 U.S.C. 11343-11347 to the proposed merger of Consolidated Rail Corporation (CONRAIL) with the Raritan River Railroad Company (Raritan), the latter wholly owned by Conrail at the time. This grant was made "subject to the conditions imposed for the protection of employees imposed in New York Dock

Ry-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), affirmed by slip opinion of U. S. Court of Appeals for 2nd Circuit, November 7, 1979." The latter document provides certain payments to individuals caused to be displaced or dismissed because of merger. It bears the designation of Finance Docket No. 28250 and will be referred to herein as New York Dock Conditions or NYDC. Provisions of this document which are material and pertinent to the instant controversy have been quoted in our Award for Docket CRT-906.

The Raritan-Conrail merger became effective April 24, 1980.

CIRCUMSTANCES

Claimant, J. A. Varga, entered the employ of the Raritan River Railroad as a Trainman on January 30, 1956, claimant S. A. Janowski on April 10, 1961. Because Raritan was a wholly-owned subsidiary of Conrail, its employees were subject to the protection provided by Title V of the Regional Rail Reorganization Act of 1973, as amended (hereinafter, Title V).

Effective September 12, 1983, positions of both claimants were abolished.

In a letter dated April 17, 1980, Conrail notified the Raritan employees subject to Title V protection, including claimants, of "certain rights and obligations

you will have in the event you are adversely affected by the Raritan River-Conrail merger to be effective 12.01 A.M., April 24, 1980." The letter explained that if employees are already protected under Title V, they had the choice of remaining under such protection or electing to substitute the ICC-imposed merger protective conditions commonly known as the New York Dock Conditions. Those wishing to make such substitution were instructed that they could do so by notifying Conrail's Manager, Labor Relations within 7 calendar days of becoming an adversely affected employee.

It is undisputed that neither of the claimants made such substitute selection. Instead, claimant Varga submitted his initial application for a Title V monthly displacement allowance for the month of June 1980; claimant Jankowski submitted his initial application for a Title V monthly displacement allowance for the month of May 1980. They continued thereafter to file for and be paid Title V monthly displacement allowances until September 1, 1981, the date when the employee protective provisions of Title V of the Regional Rail Reorganization Act of 1973 were repealed.

By letter dated September 10, 1983, claimant Jankowski requested the benefits of NYDC "because of having been placed in a worse position with respect to my

compensation and benefits as a result of the Conrail-Raritan River merger." In a letter dated September 13, 1983, claimant Varga requested NYDC benefits "due to the abolishment of my position of trainman on assignment YJRR #10 effective as of September 12, 1983."

POSITIONS OF THF PARTIES

The basis put forward by Carrier for denying the claimants NYDC coverage, is their having failed to elect or substitute NYDC for Title V protective benefits when they were offered such opportunity. Instead, both claimants continued to file for and receive Title V benefits and first notice of their desire to receive NYDC benefits was asserted by them about three and one-half years later.

By failing to elect substitution of NYDC benefits and availing themselves instead of Title V benefits, claumants had chosen more favorable protective benefits payable until age 65 as against the six-year protective period under NYDC.

Carrier cites Section 3 of NYDC as pertinent and controlling on the circumstances here. That Section obligates the beneficiary to make a choice between NYDC or "any existing job security or other protective conditions or arrangements" 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."

Attention is called by Carrier to an interpretation of Section 3 issued by the U. S. Court of Appeals for the Second Circuit in a matter involving N. Y. Dock Railway & Bklyn Eastern District Terminal vs. Interstate Commerce Commission (1979). The Court ruled that employees electing coverage under one set of protective conditions were ineligible to receive "counterpart" benefits of the same kind (notwithstanding that they may differ in such aspects as amount and duration) under another set of protective conditions.

It is acknowledged by Carrier that the employee protective benefits of Title V were amended effective September 1, 1981 by Title VII of the Northeast Rail Service Act of 1981. This, in Carrier's view, nevertheless continued the "Title V" choice which claimants had elected in April 1980, albeit the amendment eliminated the monthly displacement allowance and provided compensation benefits for employees deprived of employment.

In its denials to claimants in 1983, Carrier invoked the so-called "Weston Award". This is an arbitration award issued on January 6, 1972 by an arbitration board chaired by H. M. Weston and involving the former Penn Central Transportation Company and B.R.A.C. The decision deals with Appendix C-1 of the National Passenger

Corporation Agreement (not involved here) and states that the election of benefits under C-1 obviates application of the Merger Protective Agreement of May 20, 1964.

Organization regards the Weston Award as inapplicable to the instant claim, inasmuch as it dealt with the application of Appendix C-1, not involved here.

With respect to Carrier's reliance on Section 3 of "New York Dock Conditions", Organization calls attention to the inclusion in that section of this proviso after the statement cited by Carrier concerning employee's obligation to elect protective benefit rights: "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."

Organization notes that the above quoted language does not appear in Appendix C-1 to the National Railroad Passenger Corporation, the document dealt with in the "Weston Award"; accordingly, said award does not establish precedence for the instant matter. These words applied, however, to the situation involved here can mean only that (1) as long as the Title V protective provisions remained available to claimants for their full "protective period" they could not become eligible for the New York

Dock protective provisions, but (2) when, as for the instant claimants, the Title V protective provisions cease, NYDC benefits to which eligible may be invoked for the duration of the statutory life of NYDC (a total of six years from its origination).

OPINION

Did the "Weston Award" of January 6, 1972 and/or the U. S. Court of Appeals, 2nd Circuit decision of November 7, 1979 in N. Y. Dock Railway/Bklyn Eastern Dist. Terminal (79-4086) dispose of the kind of controversy presented here? We think not. As Organization points out, both the Weston Board and the Court had before them only one of the instruments involved here - the New York Dock Conditions enactment; the other was Appendix C-1 to Section 405 of the National Railroad Passenger Corporation Agreement, not Article V, as in the instant claims. In its decision, the Court was reacting to the prohibition in Appendix C-1 against the duplication of or "pyramiding" of benefits (Article I,3) and, also, to the Weston Board's interpretation thereof. Neither Article V or NYDC make such a statement as appears in C-1. Article I, Section 3 of New York Dock does require a choice between sets of existing protective benefits and bars the deriving of "the same type of benefit" from the unselected provisions while

such benefits are being garnered from the elected set of arrangements. But it concludes with a proviso permitting the beneficiary to go on to a previously unselected set of benefits which may have survived the demise of the benefits originally chosen.

Our reading of this proviso in Section 3 (the last "provided further" statement therein) is that it states that when the protective arrangement he had chosen "expires", the employee who had earlier been displaced or removed by the subject transaction (i.e. the merger) may then be entitled to "protection under the other arrangement" for whatever remains of a benefit period under such "other arrangement." The section makes it clear at its beginning that "other arrangement"refers to such benefits which might accrue to the affected employee "under any existing job security or other protective conditions or arrangements".

The two subject claimants opted for and received Title V coverage; the Title V benefits ran out; they then exercised their right to receive NYDC benefits - the "other protective condition" - as long as such would be in force for them.

We find that they acted within their rights, and are entitled to those successor benefits.

AWARD

J. A. Varga and trainman S. Janowski are entitled to the benefits described in the "New York Dock Conditions", effective September 10, 1983 for Jankowski, effective September 13, 1983 for Varga. Said "New York Dock Benefits" shall be available from the effective dates set forth to the expiration of the New York Dock protective conditions computed from June of 1980 when both elected Title V Benefits. Claims for monthly displacement allowance may be submitted on a retroactive basis from the respective effective dates. Such retroactive claims must be submitted by a date, not later than thirty (30) days from the date of the issuance of this award.

LOUIS YAGODA, Neutral Member

C. W. BRYANT, Organization Member

ROBERT O'NEILL, Carrier Member

Dated JUN 18 1985