

ARBITRATION

UNDER

NEW YORK DOCK II, APPENDIX III

(Jack W. Cassle, Neutral)

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In the matter of	)	
	)	
BUTTE, ANACONDA & PACIFIC	)	
RAILWAY COMPANY (BA&P),	)	
	)	
Carrier,	)	Finance Docket No. 28490
	)	
and	)	
	)	
UNITED TRANSPORTATION UNION,	)	
T & E (UTU),	)	
	)	
Organization.	)	
	)	

ORDER

THE ABOVE-CAPTIONED ACTION having come before the Neutral for the second phase of the bifurcated hearing as previously ordered and the BA&P having appeared by and through its attorney, Donald C. Robinson, of the firm Poore, Roth & Robinson, P. C., and its Carrier Member of this Board, Robert M. Solari and the United Transportation Union (UTU) having appeared through its attorney, David M. Mclean, of the firm Knight, Dahood, McLean & Everett, and its Employee Member of this Board, Vice-President Kenneth Levin, and both parties having had the opportunity to present their witnesses, exhibits and arguments in support of their respective positions and, at the close of such hearing the Neutral having left the record open pending review of the records, testimony of witnesses and exhibits furnished by the parties, the Neutral issues this interim ruling upon the issues raised therein, and makes the following Findings and Order.

A. DISCUSSION AND FINDINGS

The parties, in general, complied with the Phase I Findings and Order.

The parties now come before the Neutral and this Board for the purpose of resolving the disputes of the employees who filed claims as provided in the Phase I Order.

The hearings in the Phase II proceedings were commenced on May 13, 1985 and continued through 12:00 noon, May 16, 1985 at Fairmont Hots Springs, Montana.

The Carrier presented a MEMORANDUM identified as "STATED REASONS FOR DENIAL OF CLAIMED NEW YORK DOCK BENEFITS, dated February 11, 1985, copy of such MEMORANDUM is appended hereto as Appendix A.

The Carrier requested rulings during the hearings on each Reason for Denial. Such rulings were held pending completion of the evidentiary record concerning each employee's claim.

The rulings on the Memorandum's statements are now made.

"1. You have failed to show a job displacement that is a result of the control transaction approved by the I.C.C. in Finance Docket 28490.

(a) You have failed to specify pertinent facts of that transaction relied upon."

The pertinent facts of the "transaction" have been detailed in Phase I of the these proceedings. It would be superfluous and it is hereby found to be unnecessary for each employee claimant to come in now and be required to specify either the pertinent facts of the transaction or the causal connection with the job displacement.

The parties are hereby ordered to comply with the above.

"2. There was no job displacement that occurred between February 15, 1978 and February 14, 1982."

49 U.S.C. 5(2) (2) provides:

In its Order of Approval the Commission shall include terms and conditions providing that during the period of four (4) years from the effective date of such Order, such transaction will not result in employees of the Carrier or Carriers by railroad effected by such Order being in a worse position with respect to their employment,...

On February 1, 1982, a date within the four year period of the effective date of the I.C.C. Order in this Finance Docket, all employees of the Carrier were placed on extra board service, an act which had the immediate effect of placing each employee of the Carrier in a worse position with respect to his employment. The effect of such an act was to make seniority within the crafts and under the respective governing labor agreements the only criteria for work on a daily basis with the ultimate and conclusive result of loss of earnings. This act by the Carrier eliminated all regularly assigned runs and/or operations.

The above-referenced statute does not require actual job displacement during the four (4) year period. It only requires that an employee be placed in a worse position. On any railroad, the act of being placed on an extra board is an action which results in an employee being placed in a worse position with its attendant irregularity of hours, jobs (yard, road etc.) and loss of earnings due to the application of the seniority consideration governing work assignments. This worse position result did, in fact, occur on the railroad.

The parties are hereby ordered to comply with the above.

"3. You did not hold a position with the Butte, Anaconda and Pacific Railway Company as of February 15, 1978."

On page 10 of the Phase I Order, the following statement was made:

The question then becomes whether such representations and the subsequent grant of authority to acquire the BA&P conditioned thereon are sufficient to form a basis for extending New York Dock II, Appendix III, Benefits, to UTU members employed as of February 14, 1978.

Notwithstanding the above, it is consistent with the statutory scheme involved and it is hereby ordered that if any employee of the Carrier, no matter what the date of hire, is placed in a worse position with respect to employment and/or earnings during the four (4) year period following the date of the I.C.C. Order, that employees should be entitled to benefits. The statutes and I.C.C. Orders do not place a restriction for extending benefits only to those persons who were employees on the date of the I.C.C. Order. It is the stated public policy of the I.C.C. that no employees are to be effected by an acquisition or merger of railroads and that policy should extend to all employees of the railroad no matter when employed.

The parties are hereby ordered to comply with the above.

"4. You have not verified that you are a member of the United Transportation Union at the times covered by the application for benefits."

The need for membership in the United Transportation Union at the time of the I.C.C. Order is not a requirement by statute or the Phase I Award. The only requirement is that the individual be an employee. The specification of Union membership in the Phase I discussion is improper under the I.C.C. Order and the statute.

The parties are hereby ordered to comply with the above.

"5. The record of compensation shows that you did not sustain any adverse compensation effects from the job displacement alleged in your application."

The time period of six years from the date of an adverse action or of being placed in a worse position is six (6) years as stated in the text of New York Dock II, Appendix III.

As identified during the hearing, each employee was adversely affected insofar as employment and/or earnings is concerned. The six (6) year period expires on January 31, 1988.

The parties are hereby ordered to comply with the above.

"6. You refused the offer of steady work on May 9, 1978."

This offer was not reasonable nor practical nor possible under the circumstances of craft jurisdiction in the railroad industry. The steady work consideration, if one did exist under the statute and I.C.C. Order, would be a requirement only within the employee's craft.

The parties are hereby ordered to comply with above.

"7. Due to your death (within the time frame) you are not entitled to benefits."

The question is whether such benefits are vested in the employee prior to his date of death, and if so, his personal representative or executor should be entitled to claim such vested benefits as an asset of the estate of the employee.

The Carrier, by its actions alone, has made it impossible for those deceased employees to enjoy any of the benefits provided under New York Dock II, Appendix III. Therefore, the deceased employee's estate is due an amount computed as provided in New York Dock II, Appendix III, plus interest at the Montana statutory interest rate.

The parties are hereby ordered to comply with the above.

"8. Due to your resignation on (date) you are not entitled to benefits."

The employees who resigned are in the same position as those who became deceased or retired. The principle is the same for each category.

The parties are hereby ordered to comply with the above.

"9. Due to your retirement on (date) you are not entitled to benefits."

The employees who retired on or before February 14, 1982, or thereafter are entitled to benefits under New York Dock II, Appendix III, provided a factual basis is established by each such claimant that he chose to retire based solely upon his belief that if he did not retire then, he would suffer a loss of retirement benefits from those which he normally would be entitled to at age sixty-five (65) under Railroad Retirement Rules and Regulations.

Any retirement payments received are to be an off-set against whatever New York Dock II, Appendix III, Benefits which accrued as result of the Order in Phase I and in this Phase II Order.

The parties are hereby ordered to comply with the above.

"10. This application was not signed by the person stated in the application as an employee applying for benefits."

Claims not signed by the employee provided the employee is competent to do so are denied.

"11. You, as beneficiary of the Cantrell Agreement, effective May 29, 1981, agreed that no "transaction" as defined under I.C.C. Finance Dockets 28250 and 28940 occurred prior to the effective date of the Agreement.

The Cantrell Agreement does not eliminate any requirement under the I.C.C. Order or under the Phase I Order previously issued in this matter.

The payments received under the Cantrell Agreement were not a gift. Therefore, such payment qualifies as an off-set against any entitlement under New York Dock II, Appendix III Benefits.

All benefits under New York Dock II, Appendix III are to bear interest at the Montana statutory interest rate from the date upon which the employee suffered an adverse impact on his earnings. The parties are to make such computation as to the amount of benefits due and payable to each employee.

The parties are hereby ordered to comply with the above.

"12. Due to your dismissal for cause on (date) you are not entitled to benefits."

The only employee in this category is R. T. King who was reinstated under Public Law Board No. 3133.

R. T. King is entitled to New York Dock II, Appendix III Benefits but his earnings from other employment are to be an off-set against the benefits as computed by the parties.

The parties are hereby ordered to comply with the above.

"13. The issue of anticipation of a transaction on August 26, 1977, was dismissed by the Order of February 3, 1984.

The above represents the findings and rulings relative to the Carrier's requested rulings in its Memorandum of Stated Reasons for Denial of Benefits.

In addition, the Carrier's consideration of the time lost by BA&P employees due to the 1980 strike at the Anaconda Company's facilities as voluntary time off is improper and

such was the ruling during the hearing. The ruling requires the Carrier to recompute the base hourly and base earnings guarantee. Such computation is a matter of arithmetic. It is ordered that agreement be achieved by the parties of the resulting change in the base hourly and earnings guarantee.

Further, the Carrier's argument that since the BA&P has new ownership as of April 27, 1985, the BA&P has no further liability for New York Dock II, Appendix III Benefits is incorrect. The BA&P and ARCO have a joint responsibility for the six (6) year period ending January 31, 1988 and it is so ordered.

#### AWARD AND ORDER

The parties are to recompute the base hourly and base earnings guarantee under the rulings of this Phase Two Order.

The parties are to achieve agreement as to the total benefits due and payable under this Order.

The Employee's counsel is to take those steps necessary to establish factually the effect of the early retirement of each of those retirees who terminated employment due to the effect of the establishment of the extra board for job assignment purposes upon future retirement benefits.

The Neutral and the Board will retain jurisdiction for Phase II of this Arbitration until such time as all questions are resolved and the benefits paid.

The recomputation of benefits is to be completed no later than thirty (30) days from the date that the second (2nd) Board Member signs this Order.

7/7/85

DATE

Jack W. Cassle

Jack W. Cassle, Chairman and Neutral Member

DATE

Robert M. Solari, Carrier Member

7/20/85

DATE

Kenneth Levin

Kenneth Levin, Employee Member

## MEMORANDUM

STATED REASONS FOR DENIAL OF  
CLAIMED NEW YORK DOCK BENEFITS

1. You have failed to show a job displacement that is a result of the controlled transaction approved by the ICC in Finance Docket No. 28490.
  - (a) You have failed to specify pertinent facts of that transaction relied upon.
2. There was no job displacement that occurred between February 14, 1978 and February 15, 1982.
3. You did not hold a position with the Butte, Anaconda and Pacific Railway as of February 15, 1978.
4. You have not verified you are a member of the United Transportation Union at the times covered by the application for benefits.
5. The record of compensation shows that you did not sustain any adverse compensation effects from the job displacement alleged in your application.
6. You refused the offer of steady work on May 9, 1978.
7. Due to your death (within the time frame), you are not entitled to benefits.
8. Due to your resignation on (date), you are not entitled to benefits.
9. Due to your retirement on (date), you are not entitled to benefits.
10. This application was not signed by the person stated in the application as an employee applying for benefits.
11. You, as beneficiary of the Cantrell Agreement effective May 29, 1981, agreed that no "transaction" as defined under ICC Finance Dockets 28250 and 28490 occurred prior to the effective date of the Agreement.
12. Due to your dismissal for cause on (date), you are not entitled to benefits.
13. The issue of anticipation of a transaction on August 26, 1977 was dismissed by the Neutral's Order of February 3, 1984.