

# ARBITRATION COMMITTEE

BROTHERHOOD RAILWAY CARMEN OF	)	Pursuant to Article I,
THE UNITED STATES AND CANADA,	)	Section 11 of the
	)	New York Dock Conditions
Organization,	)	
	)	
and	)	ICC Finance Docket No. 29430
	)	
NORFOLK AND WESTERN RAILWAY	)	
COMPANY,	)	
	)	
Carrier.	)	Case No. 2
	)	Award No. 2

---

Hearing Date: May 9, 1986  
Hearing Location: Roanoke, Virginia  
Date of Award: July 16, 1986

## MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz  
Carrier Member: E. N. Jacobs, Jr.  
Neutral Member: John B. LaRocco

## ORGANIZATION'S QUESTION AT ISSUE

1. That the Norfolk and Western Railway Company violated the Implementing Agreement dated May 7, 1982, wherein the Interstate Commerce Commission (ICC) imposes the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 ICC 60 (1979) (New York Dock Conditions), in Finance Docket No. 29430, when Carman Z. G. Sheff was deprived of employment September 30, 1982, including compensation, effective same date.

2. That the Norfolk and Western Railway Company be ordered to comply with test period averages, the May 7, 1982 Implementing Agreement and the protective provisions as set forth by the New York Dock II Conditions for Carman Z. G. Sheff, account, being furloughed and/or deprived of employment on September 30, 1982.

3. That the Norfolk and Western Railway Company violated the Implementing Agreement dated May 7, 1982, wherein the Interstate Commerce Commission (ICC) imposes the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 ICC 60 (1979) (New York Dock Conditions), in Finance Docket No. 29430, when Carman M. C. Hart was deprived of employment September 30, 1982, including compensation, effective same date.

BROTHERHOOD RAILWAY CARMEN  
OF THE UNITED STATES AND CANADA

and

NORFOLK AND WESTERN RAILWAY COMPANY

ORGANIZATION'S QUESTION AT ISSUE, Continued

4. That the Norfolk and Western Railway Company be ordered to comply with test period averages, the May 7, 1982 Implementing Agreement and the protective provisions as set forth by the New York Dock II Conditions for Carman M. C. Hart, account, being furloughed and/or deprived of employment on September 30, 1982.

CARRIER'S STATEMENT OF THE CLAIM

Claim on behalf of Carmen M. C. Hart, Jr. and Z. G. Sheff, Winston-Salem, North Carolina, for protective benefits under New York Dock II protective conditions.

OPINION OF THE COMMITTEE

I. INTRODUCTION

In 1982, the Interstate Commerce Commission (ICC) approved the coordination of operations between the Norfolk and Western Railway Company (Carrier or NW) and the Southern Railway Company (SR). [ICC Finance Docket No. 29430 (Sub-No. 1).] To compensate and protect employees adversely affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Carrier and the SR pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

Since they were unable to resolve this dispute on the property, the parties submitted the claims to final and binding arbitration under Section 11 of the New York Dock Conditions.<sup>1</sup> At the Neutral Member's request, the parties waived the Section 11(c) forty-five day limitation period for issuing this decision.

II. BACKGROUND AND SUMMARY OF THE FACTS

In anticipation of the ICC's approval of the NW and SR merger, the parties negotiated the May 7, 1982 Implementing Agreement. The introductory sentence in Article I, Section 1 of the Implementing Agreement required the Carrier to post a

---

<sup>1</sup>All sections pertinent to this case are set forth in Article I of the New York Dock Conditions. Thus, the Arbitrator will only cite the particular section number.

bulletin and provide the Organization's representative with thirty days advance notice of a coordination at certain points common to the Carrier and the SR. According to Section 1(a), Winston-Salem, North Carolina (one of the common locations) would, upon consummation of the merger, be a Carrier controlled point.

Effective June 1, 1982, the Carrier closed the SR's Winston-Salem facility (Salem Yard) and shifted the existing work and positions to the Carrier's North Winston Yard. Both Claimants herein held positions at Salem Yard and they moved to available Carmen jobs at North Winston. Pursuant to Article II of the May 7, 1982 Implementing Agreement, Claimants' seniority was dovetailed into the journeymen roster at the consolidated facility. Claimants Sheff and Hart held seniority dates of December 26, 1978 and April 10, 1980, respectively.

On September 30, 1982, the Carrier furloughed Claimants. The record does not reveal when, if ever, either Claimant was recalled to service. Claimants promptly applied for dismissal allowances under the New York Dock Conditions. Claimants alleged that they were deprived of employment on June 1, 1982 due to the elimination of their Salem Yard positions. The Carrier rejected Claimants' protective benefit requests.

The Organization has presented additional, uncontested facts which, from its perspective, are relevant to Claimant Sheff's petition for New York Dock benefits. On May 20, 1982, the SR entered into a letter agreement with the Brotherhood of Maintenance of Way Employees wherein the SR promised Mr. W. J.

Boler, an S&R Sand Dryer Department employee covered by the New York Dock Conditions, "...comparable employment by SR or NW." Subsequently, the Carrier offered Maintenance of Way Employee Boler a Carmen Helper position at the coordinated North Winston Yard. Mr. Boler accepted the offer. Even though Mr. Boler retained his maintenance of way seniority, the Carrier assigned him a June 15, 1982 carman helper seniority date which was apparently the day Mr. Boler began working in his new craft. At the time, no Carmen Helpers were employed at Winston-Salem. When Claimant Sheff was laid off, Mr. Boler remained actively employed.

### III. THE POSITIONS OF THE PARTIES

#### A. The Organization's Position

Claimants would have kept their SR positions but for the coordination of SR and NW facilities at Winston-Salem. They were furloughed only after Salem Yard closed. Since Claimants were adversely affected by the coordination, they became entitled to dismissal and/or displacement allowances in accord with the New York Dock Conditions and the May 7, 1982 Implementing Agreement.

Contrary to the Carrier's contentions, Winston-Salem experienced only a slight decline in business. Using the Carrier's statistics, the decrease in business during the period from June, 1982 to September, 1982 was, at most, a modest three percent. Winston-Salem actually handled an average of 88,908 cars per month during 1982 instead of the 71,459 monthly average computed by the Carrier. The Carrier erroneously calculated the reduction in cars handled in a futile attempt to blame Claimants'

deprivation of employment on a business decline. Claimants declared that, before the coordination, the volume of work far exceeded the level of manpower at Salem Yard. There was a labor shortage. Thus, the Committee should reasonably infer that Claimants' furlough, which occurred almost immediately after the Winston-Salem coordination, was directly related to the merger transaction. Therefore, Claimants are dismissed employees as defined by Section 1(c) of the New York Dock Conditions.

As to Claimant Sheff, the Carrier violated the May 7, 1982 Implementing Agreement. Also, it improperly furloughed Carman Sheff ahead of W. J. Boler, a junior Carmen Helper. Neither before nor after the parties signed the Implementing Agreement did the Carrier notify the Organization that it was transferring an SR maintenance of way worker to the NW facility. (See Article I, Section 4 of the May 7, 1982 Implementing Agreement.) The Carrier suddenly and arbitrarily assigned W. J. Boler a June 15, 1982 seniority date in a new craft. Even today, the Organization does not know when former maintenance of way worker Boler actually moved from the SR to the NW. Although the Implementing Agreement calls for dovetailing seniority, Boler stands alone on the Winston-Salem Carmen Helper roster.

Besides breaching the May 7, 1982 Implementing Agreement, the Carrier furloughed workers out of seniority order. In the past, the Carrier habitually laid off helpers and apprentices before journeymen. With its submission, the Organization included some prior layoff bulletins to demonstrate the existence of the past practice. Mr. Boler received special treatment.

Instead of first furloughing the sole Carmen Helper, the Carrier abolished Carmen positions held by workers with greater seniority. If the Carrier had not unilaterally shifted Boler from another railroad and another craft to a Helper job at North Winston, Claimant Sheff would have remained in his position. Similarly, the court judgment relied on by the Carrier dealt with apprentices as opposed to helpers. The Carrier has historically and traditionally furloughed helpers ahead of journeymen.

B. The Carrier's Position

The Organization has failed to prove a causal nexus between Claimants' loss of employment and any New York Dock transaction. The Carrier coordinated SR and NW operations in strict accord with the May 7, 1982 Implementing Agreement. Claimants laterally transferred with their work on June 1, 1982 and their seniority was properly dovetailed into the NW Carmen's roster. The Organization has not articulated exactly how Claimants were detrimentally affected by a coordination which was completely implemented four months prior to the September 30, 1982 furloughs.

Nonetheless, Claimants' furlough was entirely attributable to a severe decline in business stemming from a prolonged economic depression. Thus, the layoffs are traceable to a factor other than the June 1, 1982 Winston-Salem consolidation. Along with workers in other crafts, Claimants were furloughed since the Carrier needed fewer employees at Winston-Salem to maintain and repair equipment.

In the Eastern Region, the average number of cars handled per month went from 546,461 in 1981 to 430,463 in 1982 (and the downward spiral continued to 343,065 cars in 1983). Excluding foreign freight cars, trailer trains and Railbox equipment, the percentage of cars in excess of shippers' orders started to increase in 1982. In addition, the percentage of stored locomotives rose from 25.9% to 34.8%. Business activity in the Eastern Region is heavily dependent on the coal industry. Unfortunately, the average total of fifty ton cars (loaded at mines) declined from 133,297 to 126,388 per month during 1981 and 1982 respectively. The regional business decline reduced the flow of traffic through Winston-Salem. Based on a monthly average, the number of cars handled decreased by 21.8%. For two reasons, the Organization's figures are incorrect. First, in making the 1981 to 1982 comparisons for each month, the Organization neglected to add the cars handled at Salem Yard to the 1981 statistics. For example, Salem and North Winston handled an aggregate of 22,171 cars in July, 1981 as compared with 17,332 cars through the coordinated facility in July, 1982. By not counting the 6,241 cars handled at the former Salem Yard during July, 1981, the Organization distorts the true magnitude of the traffic flow reduction. Second, in its calculations, the Organization used the total number of cars handled with interchanges at the coordinated facility. Since the car interchange figure includes cars handled twice, the Organization inflated the actual volume of traffic. Furthermore, the loss of local shipments aggravated the business decline at



Winston-Salem. In July, 1892, the Carrier experienced a 49.26% reduction in traffic handled at the Schlitz Brewery.

Employees are not absolutely vested with protective benefits merely because they incur a loss of earnings subsequent to a merger. Arbitral precedent has consistely rejected the Organization's "but for" argument. A layoff precipitated by a decline in business is outside the ambit of the New York Dock Conditions.

With regard to Claimant Sheff, the Organization has raised issues involving the interpretation of the applicable working agreement. Deciding whether or not the Carrier may furlough journeymen carmen before laying off helpers with less seniority (in their class) is beyond the jurisdiction of this Committee. Without waiving its jurisdictional argument, the Carrier contends that it furloughed Claimants in seniority order. Recently, the Carrier prevailed in litigation where the Plaintiffs charged that furloughing journeymen while apprentices, with less seniority, continued to work was a violation of Title VII of the 1964 Civil Rights Act.<sup>2</sup> The Court ruled that under the collective bargaining agreement, the Carrier reserved the discretion to furlough, in proper seniority order within each class, apprentices and journeymen even if some journeymen are furloughed before all apprentices provided the ratio of apprentices to

---

<sup>2</sup>Strange v. Norfolk & Western Ry., et al., Cir. No. 84-0195, Final Judgment (D.C.W.D. Va. August 27, 1985).

journeymen did not exceed the ratio in the working agreement and, provided further, there were no upgraded apprentices.

Finally, Mr. Boler was akin to a new hire. The Carrier is not under any duty to consult with the Organization when it employs a new Carmen Helper. Moreover, the Carrier was bound by the May 20, 1982 letter of understanding.

#### IV. DISCUSSION

Section 11(e) of the New York Dock Conditions sets forth the Organization's burden of going forward and the Carrier's burden of proof. As the moving party, the Organization must identify a Section 1(a) transaction (or transactions) and specify "...pertinent facts of that transaction relied upon." The Carrier's burden of proof is conditional. If the Organization first fulfills its burden of going forward, then the Carrier assumes the burden of proving "...that factors other than a transaction affected the employee." On the other hand, if the Organization fails to either identify a transaction or state pertinent facts, the Carrier prevails regardless of whether it has satisfied its burden of proof.

In this case, the Organization identified a Section 1(a) transaction and stated some pertinent facts showing a coherent connection between the named transaction and an adverse employment effect. Both Claimants declared that they were furloughed as a result of the June 1, 1982 coordination. The layoffs occurred just four months subsequent to the coordination. As Arbitrator Zumas observed in NYDR v. BRAC, NYD § 11 (4/22/83), the relative proximity between the transaction

and the adverse effect creates the rebuttable presumption that the two events are related. Thus, the Carrier bears the burden of proving that extrinsic factors caused the furloughs.

At least as to Claimant Hart, the Carrier has presented sufficient evidence demonstrating that a substantial decline in business compelled the Carrier to commensurately reduce its manpower at Winston-Salem. Although the Organization vigorously contested the Carrier's car handling figures, the cars handled and interchanged statistic is a less objective measurement of business activity since it includes duplicative car counts. The Carrier's data discloses not only a substantial decline in business on the Eastern Region but also a significant loss of business from its Winston-Salem shippers. Employees adversely affected by externalities, such as a decline in business, are not entitled to New York Dock protective benefits. Special Board of Adjustment No. 917, Award No. 2 (Peacock); BRC v. BN, NYD § 11 Arb. (1/17/83; Marx).

Unlike Claimant Hart, Claimant Sheff persuasively argues that his furlough was the direct result of the Carrier's unilateral decision to provide a Carmen Helper position to a protected SR maintenance of way employee. This Committee need not address the propriety of furloughing a Carman while a junior Carmen Helper remains in service. We agree with the Carrier that such an issue primarily concerns an application of scheduled rules as opposed to the New York Dock Conditions or the May 7, 1982 Implementing Agreement. However, the Carrier utilized a decline in business as a subterfuge for laying off Claimant Sheff

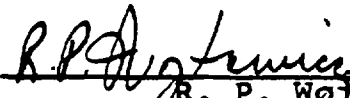
and simultaneously promising continued compensation to a former, protected SR worker who, until the Winston-Salem coordination, never held any type of seniority in the Carmen's craft. Indeed, Mr. Boler retained his maintenance of way seniority. We logically infer that the Carrier's maneuver was designed to evade paying protective benefits to either Claimant Sheff or Mr. Boler. While a decline in business is a factor relieving the Carrier from paying protection to employees affected by the resulting force adjustments, the Carrier may not use a business downturn as a pretext for avoiding its obligations under the New York Dock Conditions. Although, in a purely technical sense, Boler was a new hire, his continued employment as a Carmen Helper led to the abolition of an additional carman's position when the September 30, 1982 force reductions occurred. Put differently, the Carrier's promise (to another labor organization) to grant Mr. Boler a position became a pretext when it provided Boler with employment to the detriment of another protected employee.

We stress that our conclusion that Claimant Sheff is entitled to New York Dock protective compensation is confined to the peculiar facts and unique circumstances contained in this record. Nothing in our Opinion should be construed to nullify the May 20, 1982 Letter Agreement between the Carrier and the Brotherhood of Maintenance of Way Employees.

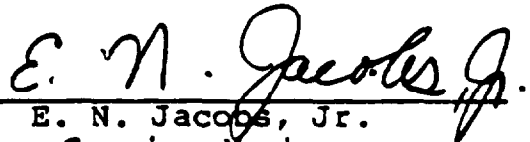
AWARD AND ORDER

1. M. C. Hart's claim is denied.
2. Z. G. Sheff's claim is sustained. The Carrier shall pay Claimant Sheff a displacement and/or dismissal allowance commencing October 1, 1982 in accord with the New York Dock Conditions.
3. The Carrier shall comply with this Award within thirty days of the date stated below.

DATED: July 16, 1986



R. P. Wojtowicz  
Employees' Member



E. N. Jacobs, Jr.  
Carrier Member

  
John B. LaRocco  
Neutral Member