ARBITRATION COMMITTEE

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, Organization,	)	Pursuant to Article I, Section 11 of the New York Dock Conditions
and	)	ICC Finance Docket No. 29805
NORFOLK AND WESTERN RAILWAY COMPANY, Carrier.	)	Case No. 3 Award No. 3

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 Carrier violated the provisions of the New York Dock Agreement, Finance Docket No. 29805, in connection with merger, AC&Y Railroad into the N&W Railroad Company, such merger resulting in adverse effects upon AC&Y employes, (all Car Department Employes), in that work previously performed by AC&Y carmen at Akron, Ohio, is now either being transferred to N&W Railroad, and infiltrated upon by N&W employes, or abandoned, causing monetary losses to AC&Y employes, as a direct result of such merger.

2. That the provisions granted in Finance Docket No. 29805 by the Interstate Commerce Commission allowing the New York Dock Conditions, be applied to each and every Car Department employee appearing on the AC&Y Carmens Roster, specifying the names of Carmen D. E. Fink, H. R. Henson and E. L. Tennant, who were in fact, subjected to furlough as a direct result of the Akron, Canton and Youngstown merger into the N&W, requesting that all be given test period averages and their entitlement to receive the full six (6) year protection or time equal to their length of service with the Carrier, whichever, is applicable.

CARRIER'S STATEMENT OF THE CLAIM

Claim on behalf of all carmen employees on the AC&Y seniority rosters for protective benefits under New York Dock II protective conditions.

OPINION OF THE COMMITTEE

I. INTRODUCTION

On December 18, 1981, the Carrier notified the Interstate Commerce Commission (ICC) that the Akron, Canton and Youngstown Railroad Company (AC&Y), a Carrier owned subsidiary, would merge into the Carrier. On December 24, 1981, the ICC exempted the merger from its usual regulatory process because the transaction was entirely "...within the corporate family..." for the purpose of "...corporate simplification." In the December 24, 1981 Notice of Exemption, the ICC stated that: "As a condition to use of the exemption, any ... AC&Y employees affected by the merger shall be protected pursuant to New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). This will satisfy the statutory requirements of 49 U.S.C. 10505(g)(2)." The Carrier effectuated the merger on or about January 1, 1982.

On August 16, 1982, the Organization filed a claim on behalf of all AC&Y Car Department employees. Unable to resolve the dispute, the parties submitted the claim to final and binding arbitration under Section 11 of the New York Dock Conditions.[1] At the Neutral Member's request, the parties waived the Section 11(c) forty-five day limitation period for issuing this decision.

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[1]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.

II. BACKGROUND AND SUMMARY OF THE FACTS

The ICC exempted the merger from its normal regulatory procedures based on the Carrier's representations that the merger would not cause any change in operations or service levels. Shortly after the merger, the Organization asked the Carrier why the transaction was implemented without advance notification. The Carrier again assured the Organization that the ICC exempted merger would not affect the employment status of AC&Y workers. By correspondence dated February 18, 1982, the Organization demanded an upward pay rate adjustment for AC&Y Carmen who were ostensibly directed to perform service on territory beyond the limits of the former AC&Y. However, the Organization neither objected to the work expansion nor claimed that any car employees were adversely affected as a result of the merger.

The Carrier furloughed Carmen Fink, Henson and Tennant from the former AC&Y Brittain Yard at Akron, Ohio on July 28, 1982. The force reduction undoubtedly triggered the August 16, 1982 grievance although the claim seeks dismissal or displacement allowances for every worker on AC&Y car department seniority roster.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

In its initial claim, the Organization listed a litany of complaints. First, the Carrier allegedly shifted AC&Y car repair and inspection work to Norfolk and Western (NW) workers at Brewster, Ohio. Second, NW officials and supervisors gradually took over work formerly performed exclusively by Carmen at

Akron. Third, NW workers "infiltrated" AC&Y wrecking service calls and assignments. Fourth, Claimant Hyde, a Carman, was prohibited from filling temporary foreman vacancies subsequent to the merger. Fifth, NW freight cars supplanted rolling stock owned by the former AC&Y. Sixth, after January 1, 1982, the Carrier eliminated Sunday work and overtime opportunities for all Carmen. And, seventh, three Claimants were furloughed due to the merger.

The Organization asserted that but for the merger of the AC&Y into the Carrier, Claimants would not have incurred any of the above described adverse employment effects. Despite the Carrier's representations to the ICC, the corporate reshuffling placed all AC&Y car employees in worse positions with respect to their compensation and working conditions. In essence, the Carrier arbitrarily and unilaterally transferred work from the former AC&Y to the NW reneging on its promise that the merger would not involve any operational changes. Consequently, all Claimants are entitled to protective benefits pursuant to the New York Dock Conditions.

While the Carrier presented statistics which tend to show a small decrease in business on the former AC&Y territory, the data is meaningless unless it is compared with the level of business at NW points surrounding the former AC&Y. Since the Carrier siphoned off work formerly performed on the AC&Y, it is not surprising that the AC&Y experienced a reduction in traffic volume. Once the Carrier moved work to the NW, it furloughed three Claimants and diminished the premerger earnings of all AC&Y

workers. The loss of Claimants' work was caused by the Carrier's radical changes in AC&Y operations as opposed to any genuine decline in business.

B. The Carrier's Position

At the onset, the Carrier contends that the Organization failed to identify a transaction within the definition of Section 1(a) of the New York Dock Conditions. As noted in the Exemption Notice, ICC approval of the merger was unnecessary. The New York Dock Conditions cover only those workers affected by an ICC approved transaction.

The merger was merely a simplification of corporate structures within the corporate family. Thus, the Organization has not proven a proximate nexus between the corporate simplification and a deprivation of employment. Since the AC&Y territory was operated in 1982 exactly as it had been operated in 1981, no changes emanated from the paper merger. As a result of the corporate simplification, the Carrier merely implemented changes in AC&Y accounting and payroll techniques which had no effect on Carmen. The Carrier did not transfer any work or rearrange forces. All Claimants held positions both before and after the merger.

The furlough of Claimants Fink, Henson, and Tennant as well as the loss of overtime opportunities was solely attributable to a drastic decline in business during a prolonged economic depression. Across its system, the Carrier experienced an increase in the number of both stored locomotives and cars in excess of shippers' demands. Along the territory served by the

former AC&Y, the business downturn was even more pronounced. In the Akron area, rubber and tire manufacturers suffered a severe business slump and thus, these customers generated fewer shipments and cars handled. For example, inbound and outbound traffic from four major tire companies (Firestone, General Tire and Rubber, Goodyear and Goodrich) decreased from 2,859 cars in 1981 to 2,081 cars in 1982. It is impossible for the Carrier to manipulate a decline in business by diverting traffic to NW points inasmuch as these shippers are located on the former AC&Y. Thus, Claimants were affected by a factor unrelated to the merger.

Most of the Organization's allegations concern disputes cognizable under the schedule agreement. It is not the province of this Committee to interpret and apply the classification of work rules in the working agreement. Nonetheless, the Carrier complied with all rules in the applicable collective bargaining agreements. The NW cars handled on the former AC&Y territory are identical to the rolling stock owned by the former AC&Y. The Carrier frequently utilized Hoesch wrecking equipment from Brewster to assist AC&Y wrecking service workers in rerailing engines and cars. The practice was prevalent for many years prior to the merger refuting the Organization's contention that using Brewster equipment was merger related.

III. 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.

The Carrier contends that the corporate simplification was not a Section 1(a) transaction since it was unnecessary for the Carrier to obtain the ICC's approval of the merger. Section 1(a) of the New York Dock Conditions defines a transaction as follows:

> "'Transaction' means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed."

Section 1(a) refers to activity which has been authorized by the ICC. Exempting a transaction from the formal scheme of interstate transportation regulation does not mean the merger was effected without the ICC's authorization. In this case, the ICC expressly imposed (on the Carrier) the New York Dock Conditions as "...a condition to use of the exemption..." Imposition of the New York Dock Conditions was undoubtedly a precautionary measure. The ICC guaranteed that in the unlikely event that any AC&Y employee was affected by the internal merger, they would receive either a dismissal or displacement allowance. Therefore, the Organization has properly identified a transaction as required by Section 11(e).

Aside from designating a transaction, the Organization has failed to come forward with pertinent facts coherently connecting the merger to an adverse change in Claimants' employment status. Although it enumerated a plethora of economic injuries which Claimants purportedly absorbed, the Organization has not shown how these adverse effects flowed from the paper merger. The Organization is obligated to do more than identify a transaction and simply assert that protected workers lost compensation. Section 11(e) also requires the Organization to show some rational relation between a merger transaction and the alleged consequences of the transaction. BMWE v. MEC, NYD § 11 Arb. (2/26/85; Lieberman); MP v. ATDA, NYD § 11 Arb. (7/31/81; Zumas). While the effects of a merger might be felt long after a transaction is actually implemented, not every employment adversity occurring subsequent to a transaction presumptively entitles workers to merger protective benefits. The gap in the Organization's allegations is glaring. It has not been able to articulate how an innocuous and simple transformation of corporate structures within a holding corporation either changed AC&Y operations or led to the furlough of three Claimants. The record reveals that AC&Y operations, service, work and positions were unaltered after the merger. Since the Organization has not satisfied its Section 11(e) burden of going forward, we need not address or consider the Carrier's decline in business evidence.

AWARD AND ORDER

The claims are denied.

DATED: July 16, 1986

R. P. Wojtowicz
Employees' Member

E. N. Jacobs, Jr.
E. N. Jacobs, Jr.
Carrier Member

John B. LaRocco
John B. LaRocco
Neutral Member