ARBITRATION COMMITTEE

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| 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. 29430 |
| NORFOLK AND WESTERN RAILWAY COMPANY, Carrier. | ) | Case No. 4 Award No. 4 |

Hearing Date: August 20, 1986
Hearing Location: Roanoke, Virginia
Date of Award: October 10, 1986

MEMBERS OF THE COMMITTEE

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

ORGANIZATION'S STATEMENT OF THE CLAIM

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 47 Portsmouth, Ohio Carmen were deprived of employment on or about January 2, 1986, 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 the 47 Portsmouth, Ohio Carmen, account, being furloughed and/or deprived of Employment on or about January 2, 1986.

CARRIER'S STATEMENT OF THE CLAIM

Claim on behalf of forty-seven listed carman employees at Portsmouth, OH, for protective benefits under New York Dock 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. In anticipation of the ICC's approval of the NW and SR merger, the parties negotiated an Implementing Agreement dated May 7, 1982.

On January 28, 1986, the Organization initiated a merger benefit claim on behalf of forty-seven furloughed Carmen at Portsmouth, Ohio. Since they were unable to resolve this dispute on the property, 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

On December 17, 1985, the Carrier and SR served written notice that they intended to coordinate certain box car repair work between the Carrier's Roanoke Shops and the SR's Hayne Shop in Spartanburg, South Carolina beginning on January 2, 1986. Specifically, the general repair and painting of two hundred NW sixty foot auto parts box cars and two hundred NW eighty-six foot auto parts box cars as well as the general repairs of one hundred and twenty-five NW eighty-six foot box cars would shift from Roanoke Shops to Hayne Shop. The notice, which was issued under Article I, Section 3 of the May 7, 1982 Implementing Agreement, also described other forthcoming work coordinations including the transfer of office car repair work from Hayne Shop to Roanoke Shops.

As a result of the transfer of box car repair work to the SR's Spartanburg facility, the Carrier and the SR anticipated adding twenty-seven Carmen to the Hayne Shop forces but they predicted that no workers on either railroad would be adversely affected by the coordination. While the record is unclear, the Carriers presumably implemented the coordination on or about January 2, 1986.

Claimants, who held permanent positions prior to the merger, were furloughed at Portsmouth during April and May, 1985. Most Claimants (thirty-eight) were laid off on May 31, 1985. Although they were on furlough status at the time of the Roanoke-Hayne coordination, the Organization alleges that Claimants were deprived of employment on or about January 2, 1986

and, thus, Claimants seek dismissal allowances commencing the same date.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The primary thrust of the Organization's claim is that the Carrier purportedly furloughed Claimants in anticipation of transferring car repair work from the Carrier to the SR. Since the shop was conveniently located in the center of the former NW system, Portsmouth became a major box and hopper car repair point. Program box car repairs were rarely performed at Roanoke Shops but were regularly accomplished at Portsmouth. According to the Organization, the Carrier gradually shifted box car repair work to Roanoke Shops after the merger. Constructing a facade, the Carrier could superficially represent that Claimants were unaffected by the further transfer of the repair work to the SR. In essence, the Organization argues that the Carrier evaded the New York Dock Conditions by implementing two transfers instead of one. If the Carrier had transferred the work directly from Portsmouth to Spartanburg, it would have been obligated to provide Claimants with protective benefits.

Contrary to the Carrier's assertions, the Organization submits that overall business conditions have improved during recent years. The Carrier cannot constantly hide behind the well-worn decline in business defense. Since 1984, the Carrier's systemwide business increased except at a few points, like Portsmouth, where the Carrier manipulated car repair work to create an artificial business decline.

In addition, the coordination between Roanoke Shops and Hayne Shop concerned repairing and painting special high utilization box cars. The demand was great for the high use specially-equipped box car repair work which would have ordinarily been performed at Portsmouth. The Carrier's statistics concerning the excess supply of box cars are misleading since the figures do not disclose what type of box cars were counted. Certainly, there was not an overabundance of box cars if the Carrier planned to repair six hundred cars at Spartanburg.

Absent the transfer of work to the SR, Claimants would have resumed active service to perform program repairs. Alternatively, there was at least sufficient work for twenty-seven Claimants since the SR needed to recall an equivalent number of Spartanburg Carmen to perform the repair work.

Finally, the Organization charges that the Carrier breached Article I, Section 4 of the May 7, 1982 Implementing Agreement (as well as Section 4 of the New York Dock Conditions) inasmuch as it failed to provide the Organization's General Chairman with thirty days advance written notice of the Roanoke Shops-Hayne Shop coordination.

B. The Carrier's Position

At the onset, the Carrier contends that the Organization has not identified a New York Dock transaction. The December 17, 1985 notice did not mention Portsmouth, Ohio. Work at Portsmouth Shops was not transferred to the SR at the time the Carrier furloughed Claimants.

Assuming the Organization is relying on the Roanoke Shops-Hayne Shop coordination, Claimants were wholly unaffected by the transaction. The Organization has failed to specifically support its allegation that the Carrier moved work from Portsmouth to Roanoke with the goal of eventually transferring the work to the SR. Rather, factors other than a New York Dock transaction led to Claimants' furloughs. Claimants were laid off seven months before the January 2, 1986 coordination. A soft demand for box cars caused the Carrier to store four to five thousand cars (during 1984-1986) and obviously, due to the excessive supply, there were fewer box car repairs. Therefore, the Carrier commensurately decreased its Portsmouth car forces. The reduced box car demand was attributable to two factors. First, basic heavy manufacturing industries, such as steel and construction, have barely survived a prolonged period of economic depression. Since those industries rely extensively on rail transportation, the railroads experienced the same significant business slump suffered by their major customers. Second, the only fast growing segment of rail freight transportation is intermodal traffic. The proliferation of trailers on flat cars substantially lessens the demand for ordinary box cars. It is necessary to utilize a box car only when a shipper's commodity cannot be efficiently hauled in intermodal equipment. Thus, Claimants' furloughs can be traced to sources other than a New York Dock transaction.

Even if Claimants could prove that the Carrier transferred work from Portsmouth, Claimants do not have the exclusive contract right to repair box cars. Both regular maintenance and

program repairs have been performed at a variety of locations throughout the system.

Finally, the Organization misrepresented that Claimants were deprived of employment on January 2, 1986. Furloughed workers are not dismissed employees within the meaning of employee protective conditions. Amtrak Bd. of Arb. No. 15 (Moore, 7/9/71). Regardless of whether the January 2, 1986 coordination decreased the probability that Claimants would be recalled to service (at any time), the reduced chance of being recalled did not transform Claimants into dismissed employees. UTU v. UP, Appdx. C-1 Arb. (Rohman, 7/27/72). Even if the Roanoke Shops-Hayne Shop coordination had not occurred, there is no evidence that either the work would have been performed at Portsmouth or Claimants would have been recalled to work.

In summary, the Organization has not shown a proximate, causal nexus between Claimants' furloughs in mid-1985 and the January 2, 1986 transaction.

III. DISCUSSION

In our prior decisions, this Committee succinctly summarized the parties' respective burdens in a Section 11 case. In Award No. 1, we stated that Section 11(e) required the Organization, as the moving party, to:

> "...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 transaction cited by the Organization occurred almost eight months after Claimants were furloughed. The Roanoke Shops-Hayne Shop coordination was remote from Claimants in terms of both time and locale. To satisfy its initial burden under Section 11(e), the Organization must demonstrate a discernible link between the identified transaction and Claimants' loss of employment. Despite the amount of time which elapsed between the furloughs and the transaction, the Organization argued that the Carrier diverted box car repair work (which would have normally been performed at Portsmouth) to Roanoke and then later transferred the work to Spartanburg. However, the Organization has not presented any probative evidence to support its serious accusations. Broad, unsubstantiated allegations are insufficient to fulfill its threshold burden under Section 11(e). To establish a causal link between the January 2, 1986 coordination and the earlier Portsmouth layoffs, the Organization must not only show that repairs on high utilization cars dissipated at Portsmouth while the same quantum of box car repair work simultaneously appeared at Roanoke Shops but also demonstrate that the Carrier's true motive for transferring the work was to engage in anticipatory layoffs. Put differently, the Carrier must have transferred the work from Portsmouth to Roanoke with the objective of evading its liability for New York Dock protective benefits. (See Section 10 of the New York Dock Conditions.) The record does not contain even a scintilla of

specific factual information showing how the Carrier manipulated box car repairs to prematurely deprive Claimants of employment in April and May, 1985. Moreover, bad ordered cars can be sent to any suitable facility on the Carrier's system. The Portsmouth Box Car Shops did not have an exclusive hold on any particular amount of box car repair work. There is simply a dearth of evidence showing that an initial transfer of work from Portsmouth to Roanoke coincided with Claimants' furloughs.

Besides alleging that Claimants were laid off in anticipation of the transaction, the Organization also asserts that the coordination directly and adversely affected Claimants on January 2, 1986. Under this theory, the Organization suggests that Claimants' chances of being recalled to service diminished once special box car repair work was transferred from the NW Roanoke Shops to SR Hayne Shop. The main problem with this argument is that if the work had remained on the NW system, the repairs would have been performed by Carmen at Roanoke Shops. Claimants' employment status remained unchanged on January 2, 1986. The Organization bears the heavy burden of conclusively proving that Claimants would have been recalled earlier but for the transaction especially when no Roanoke Carmen were adversely affected as a result of the coordination. Within the context of this case, it is too speculative to conclude that Claimants' chances of recall lessened due to the January 2, 1986 transaction. Thus, Claimants were wholly unaffected by the coordination.

Inasmuch as the Organization has not satisfied its threshold burden of going forward, the Carrier need not prove that Claimants were affected by externalities unrelated to a New York Dock transaction.

We note that the Organization also contended that the Carrier violated Article I, Section 4 of the May 7, 1982 Implementing Agreement. In this instance, the Carrier tendered the December 17, 1985 notice under Section 3 of Article I because the transaction did not involve a rearrangement of forces. Unlike Section 4, Section 3 requires only a fifteen day notice provided there was, as in this case, "...no relocation of forces..."

## AWARD AND ORDER

Claim denied.

DATED: October 10, 1986

R. P. Wojtowicz
Employees' Member

E. N. Jacobs, Jr.
Carrier Member

John B. LaRocco
Neutral Member