In the Matter of Arbitration Between	)	
SEABOARD SYSTEM RAILROAD	)	
and	)	Finance Docket Nos. 29916, 29985, and 30053
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	

OPINION AND AWARD

Background

This is an arbitration proceeding pursuant to the provisions of the New York Dock Labor Protective Conditions (under Article I, Section 4), imposed by the Interstate Commerce Commission in Finance Docket Numbers 29916, 29985 and 30053.

Hearing was held at Jacksonville, Florida on June 17, 1983, at which time oral argument was heard and exhibits offered and made part of the record.

In addition to the extensive submissions presented prior to the hearing, the parties filed post-hearing submissions that were received on July 30, 1983.

Carrier was represented by Messrs R. I. Christian, John M. Sale and Ralph Miller. The Union was represented by William G. Mahoney, Esq.

Statement of the Case

I.C.C. Action

On April 22, 1982, CSX Corporation (CSX) filed a Notice of Exemption

with the Interstate Commerce Commission (I.C.C.) in Finance Docket No. 29916 informing the I.C.C. of its intent to acquire all of the common stock of the Caroina, Clinchfield and Ohio railway. At the time CSX already owned 100 percent of the stock of the Seaboard Coast Line Railrod Company (SCL) which in turn owned 100 percent of the capital stock of Louisville and Nashville Railroad Company (L&N). The Notice of Exemption was processed by the I.C.C. as a Petition for Exemption, and by decision served June 1, 1982, the transaction was exempt from prior I.C.C. approval. In its decision, the I.C.C. found that the proposed acquisition of control merely involved a change in ownership; the Carolina, Clinchfield and Ohio had been operated by the two CSX subsidiaries (CSL and L&N) for over fifty years. Thus, the I.C.C. noted that the lines would continue to be operated by SCL and L&N, just as they had since 1924. The I.C.C. then concluded that "[i]n granting an exemption under section 10505, we may not relieve a carrier of its obligation to protect the interests of its employees as otherwise required by 49 U.S.C. Subtitle IV." Accordingly in its Order, the I.C.C. "exempt[ed] CSX's control of CC&O from the requirements of 49 U.S.C. 11343, subject to the employee protective conditions imposed in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

Shortly thereafter on July 1, 1982, the SCL and L&N jointly filed a Petition for Exemption with the I.C.C. in Finance Docket No. 29985 to purchase the railroad properties of the Georgia Railroad and Banking Company (GRB). The L&N has operated the railroad properties under a lease for the past 80 years. By decision rendered September 14, 1982, and effective October 15, 1982, the I.C.C. approved the petition and authorized the purchase of the GRB. In exempting the purchase of the GRB from the requirements of 49 U.S.C.

11343, the I.C.C. found, in part, that the transaction proposed was limited in scope; the purchase of the GRB properties involved contained operation of GRB and its properties through ownership instead of through lease. The I.C.C. decision also included employee protection language similar to that found in Finance Docket No. 29916, discussed above. That part read: "In granting an exemption under 49 U.S.C. 10505, we may not relieve a carrier of its obligation to protect the interests of employees, 49 U.S.C. 10505(g). We have determined that the employee protective conditions developed in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) satisfy the statutory requirements of 49 U.S.C. 11347 for protecting employees involved in the proposed purchase under 49 U.S.C. 11343. Therefore, we have imposed these conditions here."

In the last Finance Docket involved herein (Finance Docket No. 30053), the SCL and L&N jointly filed a Notice of Exemption with the I.C.C. informing the I.C.C. of their intent to merge the L&N into SCL, and to change the name of the surviving corporation to Seaboard System Railroad, Inc. The I.C.C. issued a Notice of Exemption on November 8, 1982, stating:

> At present, SCL owns 100 percent of L&N's capital stock. SCL and L&N have common officers and are operated as a single system, known generally as the Family Lines System. SSR will acquire all assets of LN& and will assume all of its liabilities. All outstanding shares of L&N stock will be canceled. No securities will be issued relating to the merger. No operating changes will be made by Family Lines. The merger will not have anticompetitive effects on carriers outside the corporate family, and will not have adverse effects on shippers.
>
> The planned merger will be a transaction within a corporate family that will not result in adverse changes in service levels, significnat operational changes, or a change in the competitive balance with carriers outside the corporate family. Thus, it is an exempt transaction pursuant to 49 CFR 1111.2(d)(3), 366 I.C.C. at 94.

> As a condition to the use of this exemption, any employee affected by this transaction shall be protected pursuant to New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). This wil satisfy the statutory requirements of 49 U.S.C. 10505(g)(2).

The merger of SCL and L&N was consummated on December 29, 1982.

Collective Bargaining Agreements and Seniority Districts

The Organization submitted six separate collective bargaining agreements negotiated with the prececessor Carriers: the SCL agreement, effective July 1, 1968; the L&N agreement, effective October 1, 1973; the L&N - Monon Division agreement, effective April 1, 1973; the L&N - Chicago & Eastern Illinois District agreement, effective July 1, 1982; the Georgia Railroad agreement, effective July 1, 1977; and the Clinchfield Railroad agreement, effective July 1, 1973.

Maintenance of Way employees covered by the L&N agreement work in fourteen seniority districts covering territory from St. Louis and Cincinnati in the north to New Orleans and Pensacola in the south. Those employees covered by the agreement with SCL work in four seniority districts, running along the East Coast from Richmond, Virginia, to Miami, Florida. The four other agreements have single seniority districts. Thus, the work force of the merged CArrier is currently distributed throughout twenty-two seniority districts.

The Carrier's Notice

On February 2, 1983 and February 4, 1983, the Carrier served Notices on the Organization of its intent to realign seniority districts and consolidate

seniority rosters of Maintenance of Way employees to conform to the thirteen (13) newly established Operating Divisions. The February 2 Notice read, in part:

> Gentlemen:
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> Please consider this as notice served pursuant to Section 4 of the "New York Dock" labor protective conditions as imposed by the Interstate Commerce Commission in Finance Dockets Nos. 33053, 28250 [sic] and 29985, of the intent of the Seaboard System Railroad to realign seniority districts and consolidate seniority rosters of Maintenance of Way Employees to conform to the newly established operating divisions of the Seaboard System Railroad which became effective January 1, 1983. The operating divisions of the former railroads comprising the Seaboard System Railroad have been realigned as follows:
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> Raleigh - Will include all existing Raleigh Division tracks except mileage between Bostic and Monroe (MP SF 306.4) and all existing Rocky Mount Division tracks except between Pee Dee (MP AC 341.1) and Whiteville including Chadbourn to Myrtle Beach.
>
> * * *
>
> It is contemplated that the following forces will be established on a system seniority basis.
>
> Rail laying gangs, including assigned welders and helpers
> Weldin plants
> Roadway machine mechanics (MofW and shop craft)
> Pile drivers and locomotive cranes
> Shovesl with four or more dump cars
> Jordan ditchers
> Tandem ditchers
> Off-track grading gangs
> Bridge gangs repairing or construcing metal structures and foundations
> Bridge gangs repairing or constructing concrete bridges
> Scale gangs
> Water service, fuel and air conditioning subdepartment employees
> Cooks

It is contemplated that certain gangs such as timbering gangs, surfacing gangs, timbering and surfcing gangs, track construction gangs consisting of seven or more employees, bridge gangs—basic maintenance and construction (timber and concrete), except as listed above, and carpenter forces, will be worked on a regional seniority basis. There will be two regions—Eastern and Western. The Eastern region will be comprised of the Raleigh, Clinchfield, Florence, Savannah, Tampa, Jacksonville and Atlanta Divisions. The Western region will be comprised of the Louisville, Evansville, Corbin, Nashville, Birmingham and Mobile Divisions.

All other gangs will be worked on a District basis. There will be four Districts, as follows:

District 1 will be comprised of Raleigh, Clinchfield and Florence Divisions.

District 2 will be comprised of Savannah, Tampa, Jacksonville and Atlanta Divisions.

District 3 will be comprised of Louisville, Evansville and Corbin Divisions.

District 4 will be comprised of Nashville, Birmingham and Mobile Divisions.

In accordance with this notice, it is also our intent to consolidate all working rules agreements into a single working agreement for the Seaboard System Railraod. We do not contemplate any force reduction in our Maintenance of Way Employees as result of these consolidations.

It is proposed that these changes will become effective May 16, 1983.

It is suggested that meeting be held at 10:00 a.m., February 22 through February 25, 1983 in this office and continuing thereafter as necessary for the purpose of negotiating the necessary implementing agreements. It is our desire that this matter be handled expeditiously as required by the conditions imposed by the Interstate Commerce Commission.

If you cannot be present on this date, please advise who will represent you in the conference.

Attached is copy of bulletin notice which is being posted today for the benefit of affected employees.

The posted Notice, as referenced, stated the Carrier's intent to merge and realign seniority districts and to consolidate all working rule agreements into a single working agreement.

On February 17, 1983, the Organization responded, as follows:

> Gentlemen:
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> This refers to your notice dated February 2, 1983, File: G-126-MofW J3, advising that it is the intent of the Seaboard System Railroad to realign seniority districts and consolidate seniority rosters of Maintenance of Way Employees to conform to the newly established operating divisions of the Seaboard System Railroad, which became effective January 1, 1983, as well as your intention to consolidate all existing working rules agreements into a single working agreement for the Seaboard System Railroad, pursuant to Section 4 of the New York Dock protective conditions.
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> This is to advise you, the place, time and date suggested for a meeting is satisfactory. Accordingly, we will meet with you to discuss your notice. However, we reserve the right to express our views regarding the propriety of the subject matters of the notice. It will not be our intent to enter into discussions pursuant to the notice that would have the cause and effect of consolidating and/or changing the existing working agreements.

The parties met on February 22 and February 23, 1983. On either February 23 or the next day, the Carrier presented a proposed implementing agreement. At some point during these initial discussions, the Carrier withdrew its proposal to consolidate the working agreements.

The parties met again on March 16, 1983. The Organization had reviewed the Carrier's proposed implementing agreement. However, as the Oranization considered the notice and proposal as improperly presented, it declined further discussion under Section 4 of the New York Dock conditions. The Carrier

advised that it would initiate arbitration under Section 4. Thereafter, on March 22, 1983, the Carrier wrote, in part:

> Gentlemen:
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> This refers to the Carrier's notice dated February 2, 1983 (notice sent General Chairman D. E. DeLoach on February 4, 1983) wherein we advised you of the intent to realign seniority districts and consolidate seniority rosters of Maintenance of Way Emplyees to conform to the newly established Operating Divisions of the Seaboard System Railrod which became effective January 1, 1983; to establish the gangs as listed on page 3 of our notice to work on a System basis, a Regional basis and to work all other gangs on a District basis.
>
> In the fourth paragraph on page 3 of our notice we stated that it also was our intent to consolidate all working rules agreements into a single working agreement for the Seaboard System Railroad. During our February 22 and 23, 1983 conference we advised you that while it would be desirable to have all employees covered under one agreement, we were agreeable to dropping that portion of our February 2, 1983 notice. Therefore, this item will not be pursued as a part of our notice except as necessary to implement the proposals outlined in the paragraph above.
>
> On Febraury 23, 1983, we handed you a proposed agreement which contained the necessary modifications to the existing working rules agreements to consolidate the seniority rosters and seniority districts and to provide for the establishment of System, Regional and District Gangs resulting from the Carrier's notice of Februay 2, 1983. We asked that you give careful consideration to the proposal and if a particular area of it did not meet with your approval to be prepared to discuss alternatives you felt appropriate so that the dispute could be resolved in our next conference, which we scheduled for 10:00 a.m. on March 16, 1983.
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> You advised in the March 16 conference that you could not agree that our February 2, 1983 notice was proper; that you "did not agree with anything contained in the proposal handed to you in the February 23 conference" and accordingly had no reason to present a proposal to us in an effort to resolve the matter. Contrary to your contentions, the Carrier's proposal is a proper one under Section 4 of the New York Dock conditions.

Therefore, as a result of our failure to reach agreement within thirty (30) days from our initial meeting date, this is to advise that the Carrier is submitting the matter to arbitration pursuant to Article I, Section 4, of the labor protective conditions imposed by the Interstate Commerce Commission in Finance Dockets Nos. 30053, 29916 and 29985 and related proceedings.

The Organization through its attorney, replied on March 25, 1983, as follows:

Gentlemen:

Your joint letter of March 22, 1983, to Messrs. DeLoach, Denton, Keyes, Pugh, Spencer, Wallace and Watts has been referred to me for reply. In your letter of March 22, 1983, you state that as a result of the parties' failure to reach agreement with respect to the application of the New York Dock conditions (NYD) pursuant to the Carrier's (apparently the newly formed Seaboard System R.R. Inc.) notices of February 2, 1983 and February 4, 1983, the Carrier was submitting the matter to arbitration pursuant to Article I, Section 4 of the NYD conditions imposed by the Interstate Commerce Commission in Finance Docket Nos. 30053, 29916, and 29985.

As you were advised during the several conferences held regarding this matter, it was and is the position of the Brotherhood of Maintenance of Way Employees (BMWE) and their addressee General Chairmen that the notices were wholly improper and indeed invalid and that the actions described in the notices did not constitute "transactions" within the meaning of the NYD, i.e., actions pursuant to authorizations of the Interstate Commerce Commission in the subject Finance Dockets.

BMWE clearly pointed out to the Carrier representatives present at those conferences the fact that the notices did not contain proposed changes involving unification, consolidation, merging or pooling of any railroad facilities, operations or services and that only such changes as would affect employees would give cause for the issuance of notices and negotiation of agreements under the provisions of Article I, Section 4 of the NYD. BMWE representatives invited the Carrier to identify specific areas where such changes in operations, services or facilities could be demonstrated and the Carrier

representatives replied that none were intended. The Carrier representatives stated that the Carrier's objective stated that the Carrier's objective in its notices was to realize economies through what it considered to be better utilization of its employees and work equipment. Such economies as desired by the Carrier could not be realized without substantially modifying the seniority district provisions of each of the collective bargaining agreements in effect between BMWE and the carriers which have been taken over through merger or purchase by the Carrier.

The BMWE representatives at the conferences responded to the Carrier's statements by pointing out that the actions contemplated involved modification of collectively bargained rights of the employees that could be changed only by following the procedures prescribed within the Railroad Labor Act and that the Carrier by its present actions was attempting to circumvent those clear and unambiguous procedures and evade its obligations under that Act.

Because of the above-stated position the BMWE representatives advised the carrier representatives during the conference on March 16, 1983, that the subject matter contained in the notices of February 2, 1983 and February 4, 1983, as well as the proposals submitted in confeernce on February 23, and the notices themselves were improperly presented and accordingly the BMWE representatives could not continue further discussion regarding that subject matter as a Section 4 negotiation.

It is the position of the BMWE that the notices served by the Carrier on February 2, 1983 and February 4, 1983, regarding modifications of seniority districts as set forth in current collective bargaining agreements are invalid. The Interstate Commerce Commission has no authority to supersede provisions of the Railway Labor Act; was not requested to do so; and, indicated no intent to do so. Indeed, the I.C.C. authorized nothing. It merely exempted the carriers involved in the applications before it from all requirements of Section 11343 on condition that their employees would be protected under Section 11347.

The imposition of the so-called New York Dock Conditions pursuant to Section 11347 provides no vehicle for superseding provisions of collective bargaining agreements except in the very limited area of seniority roster consolidation made necessary by the proposed effectuation of a "transaction", that is, changes in operation, services or facilities undertaken pursuant to an authorization of

the Commission and no such "transaction" is contemplated in the instant situation.

For these reasons, among many others, no arbitrator purportedly chosen or appointed pursuant to Section 4 of NYD would have authority or justification to modify the seniority districts as they are set forth in the various collective bargaining agreements. In fact and in law, Section 4 of NYD has no application to the present situation. Should an arbitrator be selected and a hearing be convened in this matter, the BMWE reserves its right to challenge the jurisdiction of such arbitrator. Should such an arbitrator overrule BMWE's jurisdictional objections, it reserves the right to challenge any award issued in the courts.

Subject to the above reservations and in order to avoid undue delay and expense, the BMWE states that the first listed arbitrator in your letter of March 22, 1983, Mr. Nicholas H. Zumas, is agreeable to it. It must be understood that the threshhold issue to be presented to Mr. Zumas will concern the challenge to his jurisdiction to entertain any proceeding based upon the carriers' notices of February 2 and 4, 1983.

Issues to be resolved

One Are the items contained in Carrier's notices dated February 2 and 4, 1983 considered proper transactions as contemplated by Article 4 of the "New York Dock" protective condition imposed by the Interstate Commerce Commission in Finance Dockets Nos. 30053, 29985 and 29916 and are they properly referable to this Arbitration Board for decision?

Two If answer to the above is in the affirmative, does the Carrier's proposed agreement handed the Organization representatives on February 23, 1983 constitute a fair method of consolidating seniority rosters, seniority districts and the establishment of system, regional and district gangs?

Position of the Carrier

It is the Carrie's position that the changes proposed in its Notice — that is, the consolidation of the seniority rosters and seniority districts — are changes provided for in the definition of a "transaction" as set forth in Section 1(a) of the New York Dock Conditions and Section 4 of those Conditions dealing with the "rearrangement of forces." The specific provisions relied upon read as follows:

> 1. Definitions — (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
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> * * *
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> 4. Notice and Agreement or Decision — (a) Each Railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.
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> Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:...

The Carrier argues that the "transaction" that has triggered the applicability of the New York Dock conditions is the consolidation of seniority rosters and seniority districts, and the establishment of system, regional and seniority district gangs. According to the Carrier, these changes were necessitated by the merger of SCL and L&N and the acquisitions of the Georgia Railroad properties and the CC&O stock. The Carrier argues that it needs flexibility to better utilize its Maintenance of Way forces as well as the heavy roadway equipment. The Carrier indicated that there are many roadway machines that are operated by Maintenance of Way Employees that cost in excess of $100,000; many of the larger machine, such as pile drivers, locomotive cranes,etc., cost from $195,000 to $725,000. The Carrier claims that in order to justify the investment made in these machines, it needs the flexibility to operate them over the entire Seaboard System and also that maximum production is achieved with well-qualified operators.

According to the Carrier, the twenty-two (22) seniority district boundaries seriously hamper the Carrier in the utilization of its gangs and equipment. As an example, the Carrier stated that a well-qualified employee achieving average or maximum production on a roadway machine reaches the artificial "barrier" at a seniority district boundary. The Carrier must then abolish the position and readvertise it to employees of the other district. When this occurs and the new machine operators and helpers are assigned, it apparently takes a week or longer for the operators and helpers to become "acclimated" and to get the gang working at maximum efficiency. The productivity of these gangs, some of which have a complement of 90 men, suffers badly. The Carrier claimed that it has sustained damage to some of its equipment because of having to assign

inexperienced machine operators. As a specific example, the Carrier has two large welded rail laying gangs (approximately 75 employees in each) assigned to laying welded rail on two separate seniority districts of the former Louisville and Nashville Railroad property. Because of vacancies on these gangs, Carrier was required to hire 36 employees with no previous experience in the Maintenance of Way Department to fill these vacancies even though there were 383 furloughed, experienced Maintenance of Way employees on the other 20 seniority districts of the Seaboard System Railroad.

In support of its contention that New York Dock conditions are applicable the Carrier has cited the New York Dock Railway - Brooklyn Eastern District Terminal arbitration decided pursuant to Finance Docket 28250 (Quinn, 1980). Moreover, the Carrier claims that its argument is consistent with the holdings in three separate Section 4 arbitrations held pursuant to the acquisition of the Illinois Terminal Railroad by Norfolk and Western Railway authorized in Finance Docket 29455. In each of the three cases, awards were issued permitting, inter alia, the consolidation of seniority rosters.

The Carrier acknowledges that neither the Carriers' petitions nor the I.C.C. authorizations contemplated the imposition of "operating changes". However, the changes now proposed by the Carrier are not, in its view, "operating changes" as that term was used in the I.C.C. proceedings. To the Carrier, the term "operating changes" means changes in train service, service to shippers, etc. The rearrangement of Maintenance of Way forces, as proposed by the Carrier, is not such an "operational change" and thus not proscribed by the I.C.C. exemptions. In any event, the Carrier argues, this Board does not have

the authority to interpret the decisions of the I.C.C.; its jurisdiction is limited to interpreting the provisions of the New York Dock Conditions that were imposed. In this context, the question, according to Carrier, is whether the changes proposed invoke the provisions of the New York Dock Conditions and the Carrier answers that question in the affirmative.

Because the Carrier is now the employer of all Maintenance of Way Employees on the merged lines, it views its proposals as "transactions" made pursuant to I.C.C. authorization. The Carrier argued, in its post-hearing brief, that:

> [t]he merger of the L&N into SCL, the CSX acquisition of CC&O stock, and the SCL and L&N's acquisition of the Georgia Railroad properties are all actions taken pursuant to authorizations of the I.C.C. on which the New York Dock conditions were imposed. They are all actions which could not have been taken without the I.C.C.'s authority.
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> In any merger or consolidation of two companies the employees, properties, and facilities of those two companies become the employees, properties, and facilities of the surviving company. In the instance of the SCL-L&N merger, the trackage of SCL and the trackage of L&N became the trackage of Seaboard System Railroad, Inc. (SBD). The employees of SCL and the employees of L&N all became employees of SBD. By its very nature a merger or consolidation obviously suggests that there will be some changes made relating to the employees of the two companies involved. This is true not only for organization members, but also at the management levels of both companies. Thus, the I.C.C. anticipated changes in labor by imposing the New York Dock conditions.
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> As a result of the three transactions approved and authorized by the I.C.C., Carrier now wishes to consolidate its seniority rosters and seniority districts and to establish system, regional and district gangs. This action will allow the Carrier to reap some of the benefits anticipated by the three transactions.

> The Organization argues that absent contemplated changes in operations,services or facilities of the Carriers, Article I, Section 4 of New York Dock does not apply because there then exists no "transaction" to which it can apply. The "transaction" triggering the applicability of New York Dock conditions is the consolidation of seniority rosters and seniority districts, and establishment of system, regional and seniority district gangs. These changes were necessitated by the merger of SCL and L&N and the acquisitions of the Georgia Railroad properties and the CC&O stock. These legal transactions obviously affect how maintenance will now be performed on the prior railroads. For example, prior to the SCL-L&N merger, SCL organization employees could only work on SCL trackage and L&N employees could only work on L&N trackage. Now, neither SCL nor L&N legally exist. In their place is a new corporation, SBD, by whom all organization employees are employed. Clearly the merger has brought about a change in the facilities of both prior companies thus requiring the transaction requested in this arbitration.

Also in its post-hearing brief, the Carrier described the purpose of I.C.C. exemptions and the procedures required for obtaining an exemption. This explanation was given in response to an argument, raised by the Organization, that the Carrier's corporate restructuring was not something "authorized" by the I.C.C. since the I.C.C. merely granted an exemption from approval. The Carrier points out that even though it was granted an exemption under 49 U.S.C. 10505, the actions taken by the Carrier in all three Finance Dockets were actions "authorized" by the I.C.C..

Position of the Organization

The Organization has made two jurisdictional arguments objecting to the Carrier's invocation of New York Dock. The Organization argues that an Arbitrator acting under Article I, Section 4 of the New York Dock Conditions has no jurisdiction to compel the elimination, modification, and consolidation of

provisions in collective bargaining agreements. The Union also argues that an Arbitrator has no jurisdiction to take any action under Article I, Section 4 in the absence of a transaction, i.e., changes in operations, services or facilities of a railroad, undertaken pursuant to authorizations of the Interstate Commerce Commission.

With respect to its first argument, the Organization relies on the three arbitration awards arising from the Norfolk and Western's acquisition of the Illinois Terminal. According to the Organization, all three cases concerned the issue of whether, under Section 4, a Carrier can compel the arbitration of disputes involving the modification or elimination of provisions of schedule agreements as part of an implementing agreement. In all three cases, the Arbitrators decided that they did not have the authority, under Section 4, to terminate or modify collective bargaining agreements. A more recent decision involving the Southern Railway Company and the Kentucky and Indiana Terminal is cited for this proposition as well. All of these cases rely, to some extent, on Section 2 of New York Dock, which reads:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

In support of the second argument the Organization contends that the Carrier's notice does not state, or give effect to, any transaction authorized by the I.C.C.. The Organization notes that every case (save one) that has involved the authority of an Arbitrator under Article I, Section 4 of New York Dock II

has involved a proposal by one or more Carriers to change in some manner their physical operations, services or facilities. In the instant case, however, no such changes are contemplated; the changes Carrier has proposed are not, the Organization argues, comparable to previous Section 4 cases. Absent contemplated changes in operations, services or facilities of the carriers that would necessitate rearrangement of forces, the Union argues that Article I, Section 4 does not apply because there exists no "transaction" to which it can apply. A purely internal labor relations act such as revision of the terms of collective bargaining agreements is not an "action" taken pursuant to I.C.C. authorizations and therefore is not a "transaction". The Organization set forth its reasoning in support of this position as follows:

> 1. The I.C.C. has no explicit or implicit general jurisdiction to authorize or compel changes in collective bargaining agreements governing rates of pay, rules and working conditions. That jurisdiction is explicitly reserved to the parties by Section 2, Seventh and Section 6 of the Railway Labor Act.
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> 2. Assuming arguendo the Commission to have such jurisdiction there is no evidence that the I.C.C. exercised such jurisdiction or intended to exercise such jurisdiction in any of its exemption notices and orders in this case:
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> A. The merger of the L&N into the SCL was accomplished by an exemption from the requirements of Section 11343 and a primary basis for the granting of that exemption was a finding of the I.C.C. based on assurances of L&N and SCL that "no operating changes will be made by the Family Lines."
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> B. The increase in financial control of A&WP and WofA was found by the I.C.C. not to require exemption because not subject to the Act, but the acquisition of the Clinchfield and the Georgia were each the subject of an exemption from the requirements of Section 11343 based upon a "maintenance of the status quo." Each of these carriers remains a separate railroad entity.

C. The I.C.C. has no jurisdiction under the "exemption" provision of the act (49 U.S.C. 10505) to exempt carriers from the requirements or prohibitions of other Acts such as the Railway Labor Act.

3. Assuming arguendo the Commission to have jurisdiction to compel changes in collective bargaining agreements in merger and acquisition orders and even in "notices" or orders granting exemptions from provisions of the Interstate Commerce Act, there is no indication in the I.C.C. records that it was requested to exercise such jurisdiction or that changes in such agreements would be needed or sought. It cannot be argued with conviction that the I.C.C. could override the explicit requirements and prohibitions of the Railway Labor Act by inadvertence or implication.

4. Assuming arguendo the I.C.C. was requested to authorize sweeping changes in the six collective bargaining agreements, the most that can be argued is that the Commission responded by imposing New York Dock II and those conditions prohibit changes in collective bargaining agreements other than by mutual agreement of the parties in future collective bargaining. (NYD, Art. I, §2.)

5. Modifications of collective bargaining agreements per se are not "transactions" under NYD.

6. The authority of an arbitration panel established under Art. I, Sec. 4 is limited to determining the provisions of an implementing agreement which must be restricted solely to the application of the basic protections to employees and to the selection and assignment of employees affected by operational, service or facilities changes on the railroad.

In sum, the Organization argues that Section 4 is available only to deal with the "selection and assignment of forces" made necessary by a proposed consolidation or coordination of the operations, services or facilities of a railroad.

Findings and Conclusions

For the following reasons, the Arbitrator concludes that no transaction exists that allows the exercise of jurisdiction under Article I, Section 4 of New York Dock II.

The Carrier's notice of Februay 2, 1983 sets forth proposed changes that it views as necessary for improved efficiency. The Carrier asserts that the changes in question could not have been accomplished without the merger and acquisition that took place in 1982. Since those actions were themselves authorized by the I.C.C., the Carrier reasons that the I.C.C. authorization extends to the changes now contemplated. As the Carrier points out, the I.C.C. anticipated changes in labor by imposing the New York Dock conditions.

The Carrier's reasoning commences by establishing the goal: improvement in efficiency through the consolidation of seniority districts — and concludes by finding that I.C.C. permits the accomplishment of the goal through its imposition of the New York Dock conditions. The Arbitrator, however, cannot start with, or follow, the same analysis. Although the ultimate goal may have tremendous merit, an Arbitrator must begin by assessing his jurisdiction. This is particularly true where, as here, the jurisdiction has been challenged by one of the parties. Thus, this Arbitrator must first determine the extent of his authority and what he is and is not permitted to do. This necessarily requires a careful reading of the basic grant of jurisdiction, i.e., Article I, Section 4 of the New York Dock conditions.

Section 4 permits an Arbitrator to decide certain disputes that the parties have been unable to resolve through negotiations. The negotiations, which may

ultimately give rise to an arbitration, are invoked whenever a Carrier, on which the New York Dock conditions have been imposed, contemplates a transaction that may cause the dismissal or displacement of any employees, or the rearrangement of forces.

The Carrier argues that since (1) New York Dock conditions have been imposed on it and (2) the Carrier contemplates a rearrangement of forces, then (3) the Arbitrator is authorized to impose an accord after unsuccessful negotiations. Section 4, however, clearly requires the presence of an additional element, viz., a transaction that triggers the rearrangement of forces. In the absence of that element, an Arbitrator has no authority to resolve any dispute under Section 4.

"Transaction" is defined as any action taken pursuant to authorization of the I.C.C., on which the New York Dock conditions were imposed.1/ Thus, in order for either party to invoke Section 4, the Carrier must be authorized to take some action pursuant to an I.C.C. order, the result of which would be a rearrangement of forces. A rearrangement of forces itself cannot be a transaction; it is the necessary and inevitable consequence of the transaction.

1/ It might be appropriate to note that the Organization has questioned whether, in the circumstances here, the Carrier has been authorized to take any actions since they sought and received from the I.C.C. exemptions from the necessity of seeking and receiving authorizations. As indicated above, the Carrier responded to this argument, indicating that the form of I.C.C. approval was immaterial. In order to remove any doubt as to this point, the Arbitrator expressly rejects any contention that there could be no "transaction" here merely because the Carrier received an exemption under 49 U.S.C. 10505 rather than approval pursuant to 49 U.S.C. 11343.

In the Finance Dockets under consideration here, the I.C.C. authorized, or exempted from approval, the corporate restructuring of several railroads. It made no authorizations that, by their nature, required the rearrangement of forces. While the New York Dock conditions may be applicable at some point, the Arbitrator will not speculate on what set of circumstances would establish a transaction, given the very limited nature of the I.C.C. authorizations. In any event, this Arbitrator cannot adopt the Carrier's view that the I.C.C. would not have imposed the protective conditions if it did not envision changes in assignments, such as the consolidation of seniority rosters. Such contention by Carrier is without factual basis in this record.

In essence, what the Carrier seeks is sanction in making changes in working rules. The New York Dock provisions may be used to gain that sanction, either through negotiations or arbitration, but only when the changes are necessary to implement an I.C.C. approved action. As indicated above, the I.C.C. approved a purely corporate restructuring that did not mandate the rearrangement of forces as a necessary consequence.

This conclusion is not at variance with the three arbitration awards decided under Finance Docket 29455 wherein the I.C.C. approved the acquisition of the Illinois Terminal Railroad by the Norfolk and Western Railway. In each of those arbitration Awards under Section 4, the Arbitrators approved the consolidation of seniority rosters. Unlike the case here, however, the Organizations and Carriers in Finance Docket 29455 recognized that the proposed "rearrangement of forces" were a necessary consequence of the transactions authorized by the I.C.C. Among other things, the I.C.C. had approved N&W's plan to close two yards previously operated by the Illinois Terminal. Thus, the questions before

the Arbitrators concerned the proper application of New York Dock conditions, not whether jurisdiction existed at the outset.2/

Carrier strongly urges consideration of an award rendered in New York Dock Railway - Brooklyn Eastern District Terminal and Brotherhood of Locomotive Engineers (1980). In that dispute the Carriers proposed to consolidate the seniority rosters and districts of engineers. The BLE contended that the consolidation of seniority rosters did not constitute a "transaction" as contemplated by the New York Dock conditions. In finding that the consolidation of rosters as contemplated by Carriers constituted a transaction "as envisioned by the I.C.C.," the Arbitrator stated:

> The record indicates that NYDR and BEDT employees may become adversely affected as a result of the merging or dovetailing of seniority rosters since the intended consolidation requires a rearrangement of forces, which may cause the displacement of BLE employees. Therefore, by definition, the employees come under protective conditions as specified in Appendix III, Article I, Section 4, of Finance Docket 28250. The challenge of the BLE to this arbitration and its jurisdiction is not valid.

In an earlier award (N&W/IT, 1982), the undersigned had occasion to review the award cited and quoted above, and concluded that there was no logical basis for concluding that a "transaction" existed so as to vest jurisdiction. That award has been re-examined by this Arbitrator relative to this dispute, and the conclusion remains unchanged.

In effecting seniority consolidation, Carrier has recourse to the provisions of the Railway Labor Act. Absent a "transaction" that gives an Arbitrator

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2/ It is noted that the approval of the consolidation of seniority rosters was a secondary issue. The primary holding in each of those Awards was that there was no jurisdiction to modify, change or terminate working agreements.

jurisdiction, seniority consolidation cannot be accomplished under the arbitration provisions of New York Dock II. This Arbitrator agrees with the Organization that a contrary holding would embrace the premise that compulsory interest arbitration may be instituted in all cases in which the I.C.C. has imposed New York Dock II employee protective conditions.

AWARD

1. The Answer to Issue No. One is in the negative. The Arbitrator has no jurisdiction under Article I, Section 4 of New York Dock II conditions to consider the items contained in Carrier's Notices dated February 2 and 4, 1983, and this proceeding is dismissed for lack of jurisdiction.

2. In light of the above, it is not necessary to consider Issue No. Two.

Nicholas Zumas

Nicholas H. Zumas, Arbitrator

Date August 29, 1983