In the Matter of the Arbitration Between

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

MAINE CENTRAL RAILROAD COMPANY

OPINION AND AWARD
Interstate Commerce
Commission Finance
Docket 29720
Case Nos. C-4 and C-5

The hearing in the above matter, upon due notice, was held on January 14, 1985, in Portland, Maine, before Irwin M. Lieberman, serving as Neutral Chairman of the Arbitration Committee by appointment of the National Mediation Board dated September 24, 1984. The appointment was made pursuant to Section 11(a) of the New York Dock Conditions for resolution of the particular cases cited above. The Carrier Member of the Arbitration Committee is Mr. D. J. Kozak. The Employee Member of the Arbitration Committee is Mr. William E. LaRue.

The case for Maine Central Railroad, hereinafter referred to as the Carrier, was presented by Mr. Daniel J. Kozak, Staff Officer of Labor Relations. The case for the Brotherhood of Maintenance of Way Employees, hereinafter referred to as the Organization, was presented by Mr. William E. LaRue, Vice President. At the hearing, the parties presentedsubmissions and files containing documents in support of their positions as well as cases cited in support of positions. At the hearing the parties were afforded full opportunity to offer additional evidence and argument.

ISSUE

From the entire record, the issue may be posed as follows:

> "Whether equipment maintainers Donald Sabins and Everett McCaw are entitled to dismissal allowances as defined in Section 6 of the New York Dock Conditions commencing on the date of their furloughs until recalled to work?"

The claims were filed by the Organization January 18, 1984 and amended by letter dated January 23, 1984.

BACKGROUND

The Guilford Transportation Industries acquired the Maine Central Railroad on June 16, 1981. Subsequently Guilford Transportation Industries (hereinafter referred to as GTI) acquired the Boston and Maine Corporation and that acquisition was approved by the Interstate Commerce Commission in Finance Docket 29720 on April 23, 1983. In that approval, the ICC imposed the New York Dock Labor Protective Provisions. The Plan of Reorganization was approved by the courts on June 30, 1983, and that was the date on which GTI's control of the various carriers was finalized.

On November 3, 1983, the two claimants herein, Mr. McCaw and Mr. Sabins, were furloughed. As of the date of the hearing Mr. Sabins was still on furlough. Mr. McCaw was recalled on June 25, 1984, and was furloughed on July 20, 1984, and then recalled again on October 1, 1984, and as of the date of the hearing, was still working. The record indicates that in the Engineering Department the seniority roster of work equipment maintainers contains nine employees and Mr. McCaw was second most junior with a seniority date of May 19, 1980, and Mr. Sabins was the most junior employee with a seniority date of July 1, 1981.

On or about November 3, 1983, Carrier transferred two tampers (ET-3 and ET-4) and two tie handlers to the repair shop at East Deerfield, Massachusetts, from its Portland, Maine, operation. The Organization alleges that repair work on this equipment had always been performed by Maine Central equipment repair personnel and now the work was being accomplished by Boston and Maine personnel in East Deerfield. Thus, there was a change in operations and the result was the furlough of the two claimants. Carrier, on the other hand, indicates that the equipment was moved from Waterville to East Deerfield but not serviced. Carrier maintains that the two tampers which were of an outmoded electromatic variety were retired from Carrier's books and are no longer owned by the Carrier. The other two pieces of equipment, were ultimately returned to Waterville and serviced at Waterville, according to the record. Those records indicate that there were approximately 132 man hours expended at Waterville on one tie handler and 43 man hours on the other.

By letter dated May 21, 1984, Carrier notified the Organization that in accordance with Section 4 of the New York Dock Labor Conditions, it intended to consolidate

its work equipment maintenance activity at the maintenance of way shop located at the Delaware and Hudson facilities in Colonie, New York. Following negotiations, by letter dated November 14, 1984, Carrier withdrew and cancelled its prior notice of intention to consolidate the work equipment maintenance acitivity.

The relevant portions of the New York Dock Labor Conditions are as follows:

> "1. Definitions. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
>
> Section 1 (c) of the Conditions reads as follows:
>
> (c) 'Dismissed employee' means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.
>
> 11. Arbitration of Disputes. . .
>
> (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee."

CONTENTIONS

A. THE ORGANIZATION

The Organization maintains that from the inception of GTI's plan to consolidate the activities of the Boston and Maine Corporation and the Maine Central Railroad, GTI had always intended to consolidate work equipment repairs of the two railroads. Specifically, the Organization states that in the documents in support of its application to the ICC Carrier indicated that the Boston and Maine had a modern work equipment repair facility at East Deerfield, while the Maine Central had its central repair facilities at Waterville, Maine. The Organization contends that Carrier's actions in November of 1983 specified its intent to effectuate the proposed changes of consolidating the repair of

equipment activities. The Organization argues further that the actions of Carrier resulted in widespread disruption in its forces affecting not only the maintenance of way employees but other crafts as well. The intent of the Carrier is best indicated, according to the Organization, by the proposed change specified in the notice of May 22, 1984. In the meetings held to discuss that notice Carrier's representative indicated that the maintenance of way work equipment repair shop at Colonie was a much better facility than the East Deerfield location as had been originally planned. It is apparent, according to the Organization, that the diversion of maintenance of way equipment repair work from the Waterville equipment repair shop to the East Deerfield location, as indicated in the actions prior to the violations alleged herein, resulted in the furloughing of the two claimants.

The Organization relies substantially on Section 11(e) of Appendix C-1 and the New York Dock Conditions which provide as follows:

> "In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then by the railroad's burden to prove that factors other than a transaction affected the employee."

From this language, the Organization notes that for the employee to prevail in a claim he must initially identify the transaction involved and, further, cite the causal nexus. These obligations were satisfied by the claim letters, according to the Organization, in the following paragraphs:

> "This employe is entitled to a dismissal allowance because as a result of the acquisition of the Boston & Maine Corporation by Guilford Industries, the Boston & Maine and the Maine Central Railroad Company are able to operate as an end to end rail system that connects the Maine Central points in Maine with the Boston & Maine western points located at Mechanicville and Rotterdam, New York.
>
> "This fact has allowed the carrier to transfer the repair work that previously was done at the Maine Central Waterville Shop to the Boston & Maine East Deerfield shop facilities. According to the Brotherhood's investigation, on or about November 3, 1983, Carrier's Tampers ET-3 and ET-4 and Tie Handlers 101 and 102 have been transferred to the repair shop at East Deerfield, Massachusetts.

> "Therefore, in light of the fact that the transaction approved by the Interstate Commerce Commission allows the carrier to transfer repair work from its Waterville shop to its East Deerfield shop, the employes who have been furloughed by the Maine Central Railroad Company since November 3, 1983, must be considered as having been placed in a worse position with respect to their compensation and accordingly are entitled to a dismissal allowance as determined by Section 6 of the New York Dock Conditions."

Concerning the pieces of equipment which were moved and are at issue herein, the Organization argues that it is incredible for the Carrier to have abandoned two expensive pieces of equipment (tampers) as Carrier would have us believe. Further, the Organization insists that Carrier's statement that no work was performed on the tie handlers is untrue since they came back from their stint at another location with new markings on them. Further, if the Carrier is correct, there is no logical explanation for the need to send the equipment away to a shop located on another property when the equipment was to be used on Maine Central property. The only explanation, according to the Organization, is that the equipment was sent to East Deerfield in anticipation of Carrier's plan to consolidate all of its repair work at that location.

It is the Organization's position that the movement of the four pieces of equipment resulted in the furloughing of the two claimants. Neither claimant had ever had their positions abolished prior to the furloughing in November of 1983. In addition, the Organization notes that both claimants were completely qualified to perform the type of overhaul work required on the equipment which had been transferred.

It is the Organization's position that the movement of work off the property constituted a transaction. This diversion of equipment directly related to the Carrier's intent to establish a system repair shop at Colonie, New York, and transfer all work equipment maintainers from the GTI properties to that location. The conclusion is inescapable, therefore, according to the Organization, that the claimants herein were furloughed as a result of a Carrier decision to rearrange its forces in effectuating the plan to consolidate the work equipment maintenance operation.

B. THE CARRIER

The Carrier argues initially that only a transaction as defined under the New York Dock Conditions can trigger protective benefits of that program and that situation did not obtain with respect to claimants. Carrier indicated that it recognized the conditions imposed by the ICC to protect employees who might adversely be affected by transactions resulting from the consolidation by GTI. However, the adverse effect complained of must be directly attributable to such transaction, according to Carrier. Carrier notes that there has been extensive precedent with respect to the linkage between a "transaction" and the adverse effect with respect to any protections accorded employees. This connection has been termed a "causal nexus". Thus, according to other arbitral decisions, every action initiated subsequent to a merger cannot be considered, per se, to be a transaction resulting in protective benefits. Thus, there have been numerous decisions which state that the abolition of a position in order to result in protective benefits must be causally related to a transaction as defined by the New York Dock Conditions. An adverse effect, therefore, must be a direct result of the coordination involved. Carrier cites numerous prior arbitration cases in support of this thesis. Among those decisions was an award rendered in a case involving the same Carrier and the Brotherhood of Railway Carmen by Referee Cushman which stated in part as follows:

> "The leading arbitral decisions stress necessary relationships of cause and effect between the 'transaction' and the adverse effect for an employee to achieve entitlement to the whole spectrum of benefits under the New York Dock Conditions."

The Carrier concludes therefore that an employee must be adversely affected pursuant to a transaction as defined in Section 1(a) of the New York Dock Conditions in order to be eligible for benefits under those conditions.

In this dispute, Carrier maintains that the claimants were furloughed because of a decline in business and resulting financial problems to the Carrier. Carrier presented evidence indicating that it had suffered a substantial decline in traffic in 1982 and 1983. This decline in traffic resulted in a very serious reduction in ton miles and revenue car loadings during the period involved. During the period from January 1980 to December 1983, as a result of the decline in

business, there was a 28% decline in employment on the Carrier. Thus, the figures presented indicate that the decline in business and employment was across the board and extremely serious during the period involved.

Carrier argues that declines in business have not in the past triggered protective benefits under Washington job protection agreement situations or New York Dock Condition situations. In support of this proposition, Carrier again cites a series of arbitration awards. Among those awards was that of Award No. 1 of Public Law Board No. 3160 involving the Burlington Northern Railroad and the UTU. In that award, the Referee stated as follows:

> "Changes in volume of Carrier's business, which results in an employee's loss of earnings or furlough, is not a 'transaction' within the meaning and intent of the merger protective agreement. Lost earnings or furloughs resulting from a decline in business is not a direct result of a 'transaction', and such employees who lose earnings or are furloughed do not qualify for protective benefits under the definitions in the merger protective agreement."

Carrier argues that the claimants herein were furloughed due to a serious decline in business and Carrier's intention to reduce expenses because of those conditions. This type of business decision, according to Carrier, is within its inherent management rights and does not trigger New York Dock or other protective benefits.

Carrier points out that the two claimants herein were the two most junior employees on the seniority roster of work equipment maintainers. For this reason, the claimants were the most vulnerable to the ebb and flow of business and adverse financial conditions. Carrier argues that it has the right and duty to maintain a work force which is only large enough to care for the requirements of its operations. In this instance, the furloughs of the two claimants were a result of necessary cost cutting moves brought about by the decline in business. Carrier also notes that one of the employees was called back twice (the last time for a long period of time, including up to the present) since the initial furlough took place.

Carrier argues most significantly that no transaction occurred which could result in triggering protective benefits. With respect to the transfer of pieces of

equipment alleged by the Organization, the Carrier notes that no work was performed on this equipment in East Deerfield. None of the equipment was serviced in Deerfield, according to the Carrier and, in fact, the tie handlers were returned to Waterville during the winter of 1984 and serviced at that location. Carrier supplied documentation indicating the repair work which was done and the man hours needed in the period ending March 7, 1984 and the period ending February 7, 1984, on the two pieces of equipment in Waterville.

With respect to the tampers, Carrier notes that these pieces of equipment were the last electromatic tampers on the equipment roster of Carrier. It had a decision to make and it did and the two pieces of equipment were retired from the books of the Company. They were subsequently sold to another carrier, which Carrier insists was within its management prerogatives. Such a transaction of moving equipment, according to Carrier, does not require ICC approval and does not trigger employee protective benefits. In this instance, the two pieces of equipment were transferred to a sister railroad of the Carrier. Carrier argues that the protective conditions protect employees, not equipment. Thus, according to Carrier, the protective conditions do not apply to the cross-utilization of equipment even among sister railroads. In this instance, the Organization has failed to distinguish between transferring equipment and transferring work, according to Carrier. In this particular dispute, according to Carrier, there was no transfer of work whatever and thus there could not have been a transaction requiring protective benefits.

Carrier notes that the Organization attempted to elaborate and enlarge upon its original claim indicating that "many more pieces of equipment" were also transferred. According to Carrier, this belated attempt by the Organization was improper, particularly under the provisions of Section 11(e) of the New York Dock Conditions. In that section, according to Carrier, it is clear that the Organization, as the petitioner, had the obligation to identify the transaction and specify the pertinent facts which are relied upon. In this instance, there was nothing specific but rather a broad allegation with respect to any equipment other than the four pieces specified initially by petitioner. Specifically, the Carrier again reiterates the position that the work of the Maine Central work equipment maintainers was never transferred or consolidated with the work of

Boston and Maine or Delaware and Hudson work equipment maintainers.

Carrier acknowledges that it attempted to reach an implementing agreement with various crafts, including the Organization herein, with respect to establishing a system maintenance of way shop located in Colonie, New York. Following negotiations in which among others the maintenance of way organization objected to the proposed consolidation in various ways, Carrier decided that the negotiations were fruitless. Therefore, the notice was cancelled on November 14, 1984, and Carrier is currently exploring other options for the purpose of consolidating work equipment repair functions. Carrier then states that the Maine Central work equipment repair activity continued to be performed by Maine Central work equipment maintainers (including one of the claimants herein).

Carrier summarizes its position with respect to the issue herein in that there was no justification for the Organization's position requesting a dismissal allowance. This is for the reason that:

1. only a transaction can trigger New York Dock protective benefits.
2. the claimants herein were not furloughed because of a transaction but as a result of the Carrier's business problems and their seniority status and, finally,
3. Carrier insists that furloughs resulting from a business decline do not trigger New York Dock protective benefits.

DISCUSSION AND OPINION

The central issue in this dispute is whether or not the furloughing was a result of a "transaction" as defined as defined by Section 1(a) of the New York Dock Conditions. In making this determination, this Arbitration Committee is obliged to support the principles which have been long established by other Arbitration Committees, including those on this Carrier, with respect to the same or a similar issue. It is clear from these prior awards that protective agreements and protective conditions are intended to provide protection for employees from decisions for which the ICC approval is required, in this instance, the consolidation of the two carriers. The causal nexus theory, which has been the subject

of much discussion in prior awards, is applicable to this situation as well. Thus, it is apparent that for the claimants herein to obtain the protective benefits requested by the Organization, their furlough must have been the result of a transaction authorized by the ICC. The fact that the positions were abolished and the employees were furloughed does not in itself establish that a transaction took place.

In the instant situation the Board is persuaded that the triggering mechanism for the furloughing of the two claimants was the business decline which Carrier has set forth in its presentation. As part of that presentation, it is apparent that, for example, from 1980 until 1983 the decline in total revenue cars handled was from approximately 10,000 to 12,000 per month to 7,000 to 8,000 per month in 1983. There were similar declines in the net ton miles and in gross ton miles during the same period of time. Furthermore, the average monthly employment in January of 1980 was 1,494 employees and in December of 1983 was 1,075 employees. This significant decline in employment obviously could not be attributed to anything further than a concomitant decline in business. Thus, on a positive note, the Committee must conclude that Carrier has presented a rationale for the furloughing of the two employees based on business conditions.

On the other side of the scale, the contentions of the Organization must be evaluated in terms of the reasons set forth that a transaction did, indeed, take place. Unfortunately, the Organization has presented no evidence whatever that any work was transferred from the Waterville facility. The transferring of equipment is not equivalent to the transfer of work. The only exception to that hypothesis is when it can be shown that the transfer of equipment is a subterfuge in an effort to remove work. In this instance, there is no indication of improper motivation on the part of the Carrier and no evidence whatever to support the fact that work was indeed involved. In fact, on the two pieces of equipment retained by Carrier, the work was ultimately performed at the Waterville facility when the equipment was brought back to that location.

The question of intent is relevant in this dispute but only to a point. It is clear that Carrier intended to consolidate its equipment repair activities at a location in New York. This is evident by the notice filed. However, the

implementing agreement was not achieved and no consummation of this intended move ever took place. The Organization is not entitled to relief based on a prospective move which is not consummated.

The conclusion, therefore, must be that the Organization has not submitted evidence that there had been a transfer of work which constituted the transaction triggering protective benefits. At the same time, Carrier has presented evidence indicating that the furloughs which did, indeed, take place were caused by the decline in business, rather than by a transaction requiring protection under New York Dock Conditions. For those reasons, and based on the well-established principles alluded to above, the claims must be denied.

AWARD

Claimants McCaw and Sabins were not entitled to dismissal allowances under the New York Dock protective provisions.

I. M. Lieberman, Neutral-Chairman

D. J. Kozak, Carrier Member

W. E. LaRue, Organization Member

I Dissent

Portland, Maine
February 26, 1985