

IN THE MATTER OF ARBITRATION

between

BOSTON AND MAINE CORPORATION
MAINE CENTRAL RAILROAD COMPANY
DELAWARE AND HUDSON RAILWAY COMPANY

and

BROTHERHOOD RAILWAY CARMEN OF THE
UNITED STATES AND CANADA

Case Nos. 1 and 2

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)
) Pursuant to Section 4(a) of
) New York Dock Railway-Control
) Brooklyn Eastern District
) 369 ICC 60 (1979)
)

) ICC Finance Docket Nos.
) 29720 (Sub-No.1) and 29772
)
)

HEARING HELD AT BOSTON, MASS., January 8, 1987

HERBERT L. MARX, JR.
Referee

APPEARANCES

For the Organization:

William G. Fairchild, General Vice-President
Earl D. Jones, General Chairman

For the Carrier:

Byron E. Ricke, Jr., Vice-President, Human Resources
Guilford Transportation Industries Companies

Daniel J. Kozak, Assistant Vice-President, Labor Relations
Guilford Transportation Industries Companies

I S S U E

What shall be the Implementing Agreement between the parties in reference to the Carrier's proposed transfer of car repair operations from the Boston and Maine Corporation (B&M) shop at North Billerica, Mass and the Maine Central Railroad Company (MeC) shop at Waterville, Maine to the Delaware and Hudson Railway Company (D&H) shop at Oneonta, New York?

F I N D I N G S

On October 3, 1986, Carrier sent written notices to the Organization of its intent to transfer car repair operations from its B&M Billerica Shop and its MeC Waterville shop to the D&H shop at Oneonta. In such notice, the Carrier proposed to establish at Oneonta three positions to be offered to employees on the Billerica Carman roster, and five positions to be offered to employees on the Waterville Carman roster. The notices were pursuant to conditions imposed by New York Dock-Railway-Control-Brooklyn Eastern District, 360 ICC 60 (1979) ("New York Dock") in Interstate Commerce Commission Finance Docket Nos. 29720 (Sub.-No. 2) and No. 29772.

Thereafter, the parties conferred as to the conditions covering such transfers and eventually exchanged drafts of proposed Implementing Agreements. While most of the language of such agreements were agreed upon, several significant issues remain unresolved. The matter was then referred to final resolution by the Referee as provided in Section 4 of New York Dock.

The Referee conducted a hearing at Boston on January 8, 1987, at which time the parties provided written submissions and offered oral argument. By agreement of the parties, a further exchange of letters subsequent to the hearing was included in the record.

The unresolved issues as to transfer of car repair operations from Billerica and Waterville to Oneonta may be summarized as follows:

1. The appropriate number of new positions to be established at Oneonta which are to be offered to Carmen on the Billerica and Waterville Carmen rosters; and, related to this, whether the number of active Carmen at Oneonta should be increased to a previous level prior to any transfers.

2. Whether or not certain active junior employees at Oneonta should be considered as "displaced employees" under Section 5 of New York Dock, the number of such employees to be equal to the number of employees transferring to Oneonta.

Number of Positions at Oneonta

The Organization proposes that six (instead of three) Carmen be transferred from Billerica and that 13 (instead of five) Carmen be transferred from Waterville. Prior to this, however, the Organization seeks to have the Oneonta Carmen active force restored to the level which existed prior to a 1986 Brotherhood of Maintenance of Way Employees strike, which affected all three railroads (D&H, B&M, MeC). The basis for the Organization's position and the Carrier's opposition thereto requires review of events over the past two years.

Beginning in 1985, the Carrier's three railroads experienced a general decline in carloadings. According to the Carrier, this was due in substantial part to the downturn in the Maine paper industry, which represents more than one-third of the railroads' business. In each month, carloadings in 1985 were lower than in comparable months in 1984. This led, as reported by the Carrier, to a "series of cost reduction moves including curtailment of various capital programs and across the board job abolishments". Of greatest significance here was the elimination, presumably for a temporary period, of all car shop operations in Billerica and Waterville, beginning in October 1985.

On January 3, 1986, the Carrier initiated steps to make the same car repair transfers from Billerica and Waterville to Oneonta as here under review. At that time the Carrier proposed to transfer 19 positions from the two locations, a number equal to level of Carmen employment prior to the October 1985 curtailment. Negotiations on this proposal occurred in January and February 1986, but were not completed.

On March 3, 1986, a strike by the BMWE on the MeC, also affecting the other two railroads, commenced and continued until May 10, 1986. This resulted in a severe downturn in carloadings, particularly during April and May.

As a result both of the strike and general business conditions, the Carrier reported net income losses each month from

November 1985 through July 1986 for the B&M, and losses for the MeC for five months during the same period. As to the D&H, monthly net income losses were experienced in most months from November 1985 through November 1986, with an overall loss of more than \$5,600,000 for the first 11 months of 1986, compared to a loss of \$2,200,000 for all of 1985.

In response, the Organization argues that the effects of the 1986 strike are now over, and that carloadings are recovering to near past levels. For all three railroads, the latest reported figures show declines of monthly carloadings from 1985 to 1986 at much more modest levels. As a result, the Organization argues that the Carrier should be willing to transfer the same number of positions (19) as it had proposed in January 1986, prior to the strike and prior to some apparent improvement in business levels. As a further protection to employees at Oneonta, the Organization seeks to have the number of Carmen at Oneonta restored to pre-strike levels prior to such transfers.

The position of the Organization is fully understandable. It seeks simply to have the Carrier do what it had proposed at an earlier date. The Organization further relies on anticipated improved operational levels as further justification. Both the Organization and the Carrier agree, however, that programs for car repair need not necessarily match closely the level of actual operations (represented by carloadings). Car repair can be accelerated or minimized, depending on Carrier determination as to use of its rolling stock.

While the arguments outlined above represent rational bases for the two parties' positions, there is, however, another factor which, in the Referee's view, must receive even greater attention. The Implementing Agreement for the transfer of positions is governed by New York Dock conditions. Section 4 of New York Dock calls for Carrier notice of "full and adequate statement of the proposed changes . . . including an estimate of the number of employees". Section 4 further provides:

Each transaction which may result in a dismissal or displacement of employees 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.

These provisions insure protection of employees adversely affected as well as for mutual agreement as to the "rearrangement" or "assignment" of forces. There is, however, no specified limit on a carrier's pre-existing rights (as may be limited by other agreements) to determine the number of employees required for its operation. On this basis, the Referee finds that the Organization's insistence on a larger number of transfers and as the re-establishment of forces at Oneonta, are beyond the scope of this proceeding.

Previous awards concerning New York Dock conditions, cited by the Carrier, support this view. Carmen and B&O and L&N (Fredenberger, January 12, 1983) states the following:

The Carriers maintain that a Neutral acting under Article I. Section 4 of the New York Dock Conditions has no jurisdiction to review a Carrier's determination

as to the size of its work force. The Organization disagrees contending that the creating of the two positions at the South Louisville Shops is at the heart of this proceeding.

The Carriers' jurisdictional argument is well founded. While it is the duty of a Neutral acting under Article I, Section 4 of the New York Dock Conditions to resolve all questions which the parties could have settled through negotiations but failed to do so, this duty does not extend to matters beyond the Neutral's jurisdiction. By its Decision in Finance Docket No. 28905 (Sub. No. 1) the ICC granted the Carriers the authority to engage in the transaction which was the subject of the Carriers' September 2, 1982, notice. Creation of two carmen positions at the South Louisville Shops is an integral part of that transaction. The authority of a Neutral acting under Article I, Section 4 extends to the selection of forces to fill the two positions to be created at the South Louisville Shops, but it does not extend to review of the Carriers' decision to create such positions.

Carmen and UP and MP (Fredenberger, December 6, 1983)

follows the same reasoning in stating that "the size of the work force is not a matter for review in an Article I, Section 4 proceeding". Finally, in an award on May 30, 1984 involving the Organization and the B&M and MeC, Referee Cushman stated:

There seems little doubt on the basis of the various arbitral decision and on this Referee's reading of the New York Dock Conditions that . . . the Carrier does have sole discretion to determine the size of the work force. . .

The Organization suggests that the consolidation of car repair work at Oneonta might better be delayed until hopefully anticipated rising activity levels are reached. This, however, is not required of the Carrier. The resulting "rearrangement of forces" is an integral part of the Implementing Agreement, and the parties have reached accord on this. The Referee finds it significant that the proposed transfer requires the creation

of new positions not presently active. Thus, no reduction of the active work force is involved. The Organization's proposal that an even larger work force be established is simply beyond the purview of this proceeding. Thus, the Implementing Agreement will provide for the number of positions proposed by the Carrier.

Junior Oneonta Employee Status

The Organization seeks to provide protection through the Implementing Agreement for a number of active employees at the bottom of the appropriate Oneonta seniority rosters, based on the fact that Billerica and Waterville employees will be transferred to Oneonta. The Organization seeks to have these employees classified as "displaced employees" under Section 5 of New York Dock, since they will be junior to the transferred employees. Such junior employees, according to the Organization's argument, "will be placed in a worse position with respect to their compensation and rules governing working conditions Such junior employees will have a lesser opportunity for overtime work and will be adversely affected in the assignment of positions and scheduling of vacations."

Section 1(b) of New York Dock defines a "displaced employee" as "an employee . . . who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions." Section 5 provides for protective displacement allowances for such employees.

The Organization suggests that, in addition to more limited work opportunities, such junior Oneonta employees may be subject to furlough by the Carrier after the transfer of Billerica and Waterville employees and that, at such time, the Organization might have difficulty in demonstrating that such furloughs are a result of the transaction covered by the Implementing Agreement.

The Carrier opposes such "advance certification" on two grounds. First, the Carrier argues that "active employees working a facility to which work is being transferred are not adversely affected by the transfer". Second, the Carrier contends that disputes as to adverse effect are properly resolved by arbitration under Section 11 of New York Dock, rather than in an Implementing Agreement under Section 4.

Section 11 provides in pertinent part:

(a) In the event that railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

Thus, a dispute as to the application of Section 5 to any employee may be resolved under Section 11.

The Referee finds the Organization's proposal to be speculative in nature and thus not pertinent to the Implementing Agreement. The transaction here concerns work which has been and/or may be performed at Billerica and Waterville and its transfer

to Oneonta. The additional range of work, covering the three railroads, to be performed at Oneonta cannot be projected to mean that present Oneonta employees will be adversely affected. In sum, there is no showing now that the junior active Oneonta employees meet the definition of "displaced employees".

Relevant to this conclusion is the finding in UTU and N&W, August 29, 1986, although this award was a Section 11 rather than a Section 4 proceeding. That award states:

As has been held in decisions of past boards of arbitration, the New York Dock Conditions neither contemplate nor extend blanket certification to employees as being adversely affected or entitled to a "displacement" or "dismissal" allowance merely because they are on a roster in either an active or inactive status on the date of a consolidation or transaction. Entitlement to such protective benefit status flows from each transaction as authorized by the ICC, not, as here, from an implementing agreement or the consolidation of rosters.

The Referee supports the Carrier's view that it is inappropriate to classify any active Oneonta employees as "displaced employees" in the Implementing Agreement. However, in view of the Organization's concern for what may occur in the future, it will serve the parties to record here, for later review if necessary, the Carrier's view in its submission, as follows:

Active employees working in a facility to which work is being transferred are not adversely affected by the transfer. On the contrary, such employees are placed in a potentially better situation because work opportunities likely will expand at the newly consolidated facility.

Further, in its January 5, 1987 letter to the Organization, the Carrier stated:

This request [to consider certain Oneonta employees as "displaced"] is unacceptable for the simple reason that work opportunities at Oneonta will be expanding, not contracting, as a result of these transactions.

The Referee concludes that the Organization's proposal is not appropriate, since New York Dock provides no basis for granting of rights to "displaced employees" solely on the basis of speculation as to the possible future consequences of a transaction.

* * * * *

During the hearing in this matter, the parties reached agreement concerning an addition to the Implementing Agreement. This refers to details of seniority rights of employees in furlough status at Oneonta at the time of the effectuation of the Implementing Agreement. This language has been included in the Implementing Agreement.

The attached Implementing Agreements are made part of this Award and constitute the Referee's determination under Section 4 of the New York Dock conditions as to the appropriate basis for selection and rearrangement of forces pursuant to the notices of transaction which gave rise to this proceeding.

A W A R D

The parties are directed to execute the attached Implementing Agreement promptly.



HERBERT L. MARX, JR., Referee

DATED: January 26, 1987

IMPLEMENTING AGREEMENT
BETWEEN
BOSTON AND MAINE CORPORATION
DELAWARE AND HUDSON RAILWAY COMPANY
AND
BROTHERHOOD RAILWAY CARMEN OF THE U.S. AND CANADA

WHEREAS, this transaction is made pursuant to Interstate Commerce Commission Decision in Finance Docket No. 29720 (Sub-No.1), No. 29772, and

WHEREAS, the Boston and Maine Corporation and the Delaware and Hudson Railway Company, hereinafter designated respectively as "B&M" and "D&H," gave notice on October 3, 1986 in accordance with Article I, Section 4(a) of the conditions for the protection of employees enunciated in New York Dock Railway-Control-Brooklyn Eastern District, 360 ICC 60 (1979), hereinafter designated as "New York Dock Conditions," of the intent of the B&M and D&H to transfer car repair operations from the B&M car shop in Billerica, Massachusetts to the D&H shop located at Oneonta, New York.

NOW, THEREFORE, it is determined:

1. The labor protective conditions as set forth in the New York Dock Conditions which, by reference hereto, are incorporated herein and made a part hereof, shall be applicable to this transaction.

2. As a result of this transaction, all B&M car repair operations at Billerica car shop will be transferred to and consolidated at the D&H shop in Oneonta, New York. Billerica shop will perform joint B&M and D&H heavy repair operations. Billerica car shop will be closed.
3. On or about February 9, 1987 three (3) carman positions will be established at Oneonta shop. Ten (10) days prior to this date these positions will be bulletined on the B&M and will accrue in seniority order to employees on the B&M carman system seniority roster. If a B&M employee fails to bid on said positions, these positions will be offered to furloughed or unassigned employees on the D&H carman's roster at Oneonta. If the positions still remain unfilled, they will be filled by a new hire.
4. Future carman positions to be filled at Oneonta will be offered in seniority order to employees on a combined carman's seniority roster composed of carmen in furlough status at Waterville, Oneonta and on the B&M system seniority rosters who were in furlough status as of the date of this transaction. If future positions remain unfilled after complying with the previous sentence, they will then be filled by new hires.

5. Employees electing to transfer to Oneonta will become D&H employees and work under the terms and conditions of the applicable working agreement between the Brotherhood Railway Carmen of the U.S. and Canada and the D&H. B&M or MeC employees transferring to Oneonta will have their carman seniority date dovetailed into the D&H seniority roster. B&M or MeC employees who transfer to Oneonta will retain seniority on any B&M or MeC seniority roster on which they hold seniority, will retain service rights existing at the time of transaction, and will be given one opportunity to return to any B&M or MeC roster on which they hold seniority rights. In the event B&M or MeC employees change their residence and claim moving expenses under Section 7 of this agreement, the Carrier will not again compensate such employees for moving expenses involving exercise of seniority under the schedule agreement except as specified in Section 9 of the New York Dock Conditions where an employee is furloughed within three (3) years after changing his point of employment as a result of a transaction and elects to move his place of residence back to his original point of employment.
6. Employees rostered at the time of transaction returning from authorized leaves of absence, returning to service from suspension/dismissal, or management officials

returning to agreement positions will have ten (10) calendar days from date of return to exercise any rights he would have had if he had been working at the time of the transaction to obtain any of the newly established positions at Oneonta, New York.

7. Employees who change their residence as a result of this transaction will be afforded moving benefits provided by the New York Dock Labor Protective Conditions in Section 9 and 12. In addition, the Carrier will provide the employee five (5) days under pay for the purpose of moving himself and members of his family and to secure a place of residence in his new location. This provision is in lieu of any such provision in the New York Dock Conditions. The Carrier will also provide to each employee who changes his residence a sum of \$800.00 for such costs as telephone, water and electrical hookups, appliance installation, cleaning and other such miscellaneous costs related to moving to the new location.

For the purpose of application of the above, it is understood that the benefits of Section 9 and 12 of the New York Dock Conditions and other moving benefits detailed above apply only in those cases where an

employee actually moves his residence to a location closer to Oneonta than his former residence.

Employees will be granted the option of electing a flat \$2,800 in lieu of all moving and real estate provisions contained in this Section 7.

8. In the application of the seniority rights of those employees who will be in a furlough status as of the effective date of this agreement and whose dovetailed seniority will be greater than junior employees who hold a regular assignment at that time it is understood that such employees will not be subject to recall to service until such time as a permanent position becomes vacant which is not filled by an employee in service holding a regular assignment as of the effective date of this agreement. Upon assignment to a permanent position and thereafter such employees exercise of seniority rights shall be governed by the applicable provisions of the schedule agreement between Delaware & Hudson Railway Company and BRC of US&C.

9. This agreement will become effective upon ten (10) calendar days advance written notification to the General Chairman by the Carrier.