SPECIAL BOARD OF ADJUSTMENT
UNDER THE
NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS
(IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
FINANCE DOCKET NO.30004)

UNITED TRANSPORTATION UNION )
)
vs. ) FINDINGS & AWARD
)
NORFOLK & WESTERN RAILWAY COMPANY )

QUESTION AT ISSUE (UNITED TRANSPORTATION UNION):

"Does Montpelier Roadman T. R. Jones meet the requirements for certification and is he entitled to protective benefits under the June 22, 1982 Agreement and New York Dock Protective Conditions?"

QUESTION AT ISSUE (NORFOLK & WESTERN RAILWAY COMPANY):

"Did Fort Wayne Division Brakeman T. R. Jones meet the criteria of either a displaced or a dismissed employee as set forth in Section 1 (b) or (c) of the New York Dock II Conditions, due to the Norfolk and Western's acquisition of the New Jersey, Indiana and Illinois Railroad Company effective December 15, 1982?"

BACKGROUND:

By application filed July 30, 1982 with the Interstate Commerce Commission (the "ICC"), the Norfolk & Western Railway Company (the "N&W") sought authority under 49 U.S.C. 11343-11345 to acquire all the assets of its wholly owned subsidiary, the New Jersey, Indiana and Illinois Railroad Company (the "NJI&I"), which operated 11.38 miles of main line and 19.70 miles of side track in St. Joseph County, IN.

In its Decision of January 17, 1983 (Finance Docket No. 30004), the ICC, among other things, stated:

"We cannot find that this proposal would adversely affect competition in freight surface transportation. NJI&I cannot continue indefinitely as a separate operating entity in view of its increasing losses. Thus, integration of NJI&I into N&W will benefit the public by enabling continuance of the transportation services of NJI&I. NJI&I interchanges with N&W at Pine, IN. In order for freight shipments to reach the NJI&I, they must

be routed over N&W. (The Official Railway Guide, November/December 1982, pg. 306.) Further, the operational changes proposed by N&W only involve changing the crew handling the traffic and increasing service from 3 times per week to 5 times per week. These actions will not adversely affect competition since N&W and NJI&I do not currently compete. Indeed, the enhanced financial strength of NJI&I and improved and less costly operations should foster competition. Additionally, there will be no impact on continuance of essential transportation services by other carriers. Hence there will be no harm to competition nor anticompetitive effects arising from N&W's acquisition of NJI&I.

* * * * * * *

There will be adverse effects upon employees as a result of this transaction. It is equally true, however, that there could be a worse effect upon NJI&I employees if it remained a separate entity and ultimately was forces to cease operations altogether as a result of the increasing losses. The interests of employees will be fairly protected by imposition here of the New York Dock conditions alone, Cf. Norfolk & Western Ry. Co. -- Pur. -- Illinois Term. R. Co., 363 I.C.C. 882, 888-90 (1981)."

Accordingly, the ICC Order imposed the employee protective conditions set forth in New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 354 I.C.C. 399 (1978) as modified at 360 I.C.C. 60 (1969) (the "New York Dock II Conditions").

In anticipation that the ICC Order would impose the employee protective conditions set forth in said New York Dock conditions, the N&W served Notice to the various labor organizations, including the United Transportation Union (the "UTU"), party to this dispute, pursuant to Article 1, Section 4, of the New York Dock II Conditions, setting forth its intentions relative to acquisition of the NJI&I.

The result of subsequent meetings with the labor organizations was negotiation of an Implementing Agreement on December 9, 1982, to be effective on December 15, 1982.

The preamble to the above mentioned Implementing Agreement described the intent of the N&W notice to be as follows:

". . . modify, coordinate, and/or consolidate road and

yard operations and services formerly conducted separately by New Jersey, Indiana and Illinois Railroad Company between Pine, Indiana and South Bend, Indiana, including all trackage and appurtenances in and between such locations, and Norfolk and Western Railway Company between Argos, Indiana and Pine, Indiana, and as further described under Statement of Proposed Changes attached to the notice;"

Article I, Section 1, of the December 9, 1982 Agreement stated:

"All positions and crew(s) heretofore maintained on the New Jersey, Indiana and Illinois Railroad Company between South Bend, Indiana, and Pine, Indiana, will be abolished."

Section 2 of Article 1 of the December 9, 1982 Agreement stated:

"A working roster will be established for the purpose of manning the regularly assigned road switch local(s), referred to in Articles II and III of this Agreement, by integrating the respective seniority rosters of conductors, brakemen, and firemen of the NJI&I into the corresponding NW Gary District prior rights seniority rosters and Huntington-Maumee-Delta District seniority rosters on the following basis:

(a) The percentage of the work the employees on each roster referred to in the paragraph, above, are entitled to will be determined by determining the total engine hours worked during the 12-month period, November 1981, through October 1982. Such engine hours are as follows:

| | |
|---|---|
| NJI&I assignment | 2,037 |
| NW Montp.-N. Liberty local assignment | 3,178 |

The preceding produces a ratio of:

61% NW Gary District prior rights rosters and Huntington-Maumee-Delta District rosters

39% NJI&I rosters.

(b) The working rosters established, using the

above percentages, are attached as Appendices C, D, and E. . .

Claimant Jones was among those employees listed on the working rosters attached as appendices to the Agreement.

Articles II and III of the December 9, 1982 Agreement provided as follows for revision of a June 22, 1982 Implementing Agreement which had been entered into between the parties here in dispute relative to another application which the Carrier had pending before the ICC (Docket No. AB-10 (Sub-No. 21F) for authority to abandon 71.89 miles of N&W's Gary District, Ft. Wayne Division:

ARTICLE II

The Agreement between Norfolk and Western Railway Company and the employees thereof on lines of the former New York, Chicago and St. Louis Railroad Company and Wabash Railroad Company, represented by United Transportation Union, signed at Cleveland, Ohio, on June 22, 1982, in connection with the proposed abandonment of 71.89 miles of Norfolk and Western's Gary District, Ft. Wayne Division branch line located between Mile Post 98 + 1,853 feet at Pergo (Montpelier), Ohio, and Mile Post 170 + 1,280 feet at Wakarusa, Indiana (Attachment 'B'), is made a part hereof and is extended to cover the former employees and territory of the New Jersey, Indiana and Illinois Railroad Company between Pine, Indiana, and South Bend, Indiana, with the following modifications and changes:

ARTICLE I - Section 1, changed to the following extent:

ARTICLE I - Argos-Dillon-Pine-South Bend-Pine-Wakarusa Service

1. Prior to the approval of the abandonment referred to in such agreement, the regularly assigned road switch local(s) manned by former Gary Seniority District (former Wabash), New Jersey, Indiana and Illinois Railroad Company Seniority District and/or Huntington - Maumee - Delta Seniority District (former Wabash) employees may, subject to the terms of this Agreement, operate a train in turnaround local freight service, Argos - Dillon - Pine - South Bend - Pine - Wakarusa, home terminal Argos,

over the Michigan City District in territory between Argos and Dillon, over former Gary District between Dillon and Wakarusa, and over former NJI&I between Pine and South Bend.

2. The conductor, brakemen and fireman employed on the regularly assigned road switch local(s) referred to in Paragraph 1., above, ~~will be paid the five-day yard rate from the~~ date the assignment is first established until the date the Gary District East abandonment is approved or until the expiration of six (6) years, whichever occurs first.

ARTICLE III

Any reference in the Agreement of June 22, 1982, to 'former Gary District' or 'Gary District prior rights employees' is understood to include former New Jersey, Indiana and Illinois Railroad Company employees which have been percentaged into the former Gary District work roster.

All other references in the Agreement to former Wabash employees or former NKP employees are understood to also refer to former NJI&I employees."

With assurance from the UTU that the Implementing Agreement would be signed on December 9, 1982, the N&W posted Notice No. 62, dated December 7, 1982, establishing, effective December 15, 1982, a new Local, F-21-A, to operate as a turnaround local, Argos - Dillon - Pine - South Bend - Pine - Wakarusa.

On December 8, 1982, the N&W issued Trainmaster Job Bulletin No. 22, abolishing the then existing Montpelier - Kingsbury Local, Local F-21-M, upon completion of its assignment on December 14, 1982.

On December 20, 1982, Claimant Jones submitted to the N&W a claim form, "REQUEST TO BE RECOGNIZED AS A PROTECTED EMPLOYEE UNDER OREGON SHORT LINE CONDITIONS (For Use by Train And Engine Service Employees) NORFOLK AND WESTERN RAILWAY COMPANY." In completing Item No. 1 on this form, which called for the employee to show the protective agreement under which he was claiming an adverse affect, Claimant Jones stated: "New York Dock II". As concerned the date he alleged he was adversely affected, Claimant Jones

showed the date to be December 15, 1982. In addition to other information provided on the form, principally indicating that he had been headman on a work train prior to being affected and was required to exercise seniority to the Montpelier Extra Board, Claimant Jones used the reverse side of the form to state: "I believe, I'll be displaced and dismissed due to F21M being abolished."

On April 6, 1983 the N&W wrote Claimant Jones as follows:

> "This refers to the Form 'A' which you completed on December 20, 1982, requesting to be recognized as a protected employe under the Oregon Short Line Conditions.
>
> Please be advised that your request is denied in view of the fact that you were displaced on December 15, 1982, as a result of a senior employe exercising his seniority under the rules agreement, after his job had been abolished in connection with a decline in business and as such you neither meet the criteria of a 'displaced' nor a 'dismissed' employe."

By letter dated May 2, 1983, the UTU appealed the claim, setting forth in its letter what it maintained was the chain of events or displacements which it contended affected Claimant Jones as being due to what it called a transaction or implementation of conditions applicable to the N&W-NJI&I merger.

When further correspondence and conferences between the parties were unable to resolve the dispute, it was agreed to place the claim before this board for final determination in accordance with Appendix III, Section 11 of the New York Dock Labor Protective Conditions.

POSITION OF THE UTU:

It is the position of the UTU that as a result of N&W acquiring the NJI&I that Claimant Jones sustained a loss of compensation when a chain of displacements forced him off a regular brakeman's position.

The UTU states that the abolishment of N&W Local F-21-M was made prior to and in anticipation of the consolidation of N&W and NJI&I operations and services, the UTU contending that N&W knew that the service which was performed by Local F-21-M would be abolished by the train operated on the consolidated territory,

namely Local F-21-A, effective December 15, 1982.

As concerns actions taken in anticipation of ICC authorization being subject to the protective conditions imposed by the ICC, the UTU directs attention to Appendix III, Section 10, of the New York Dock II conditions. This section states:

> "10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee."

In response to N&W arguments regarding its right to institute operational changes, the UTU states:

> "It is true that the Carrier did have the right to change operations on the N&W and on the NJI&I before December 15, 1982, but they could not operate over all the territory with employees other than those of the railroad on which they held seniority. The service to perform was there on both properties and could only be performed as it is now with an agreement."

As to the loss of compensation which it submits Claimant Jones had sustained, the UTU says it checked the Claimant's itemized earnings statements for the month before the transaction month (December 15, 1982) and the period after the transaction and that for the first full month after the transaction the Claimant had a loss of $496.53, and that the loss for the second month was about $400 greater than the first month.

The UTU therefore urges that the loss of compensation which Claimant Jones has experienced is sufficient and meets the requirements for him to be properly entitled to a displacement allowance under the terms of the New York Dock II labor protective conditions.

POSITION OF THE N&W:

It is the position of the N&W that neither Claimant Jones nor the UTU have shown that Claimant was affected by the NW/NJI&I consolidation or that he should, therefore, be entitled to coverage under the New York Dock II Conditions. It maintains that Claimant Jones does not meet the recognized definition of either a "Displaced" or "Dismissed" employee as those terms are defined under the New York Dock II Conditions, contending that Claimant

Jones was not placed in a worse position with respect to compensation of deprived of employment "as a direct result of the transaction."

The N&W submits, as it had informed the UTU in denial of the claim on the property, that for the 12 months prior to the abolishment of Gary Local F-21-M Claimant Jones' total compensation, including a retroactive wage increase, was $32,104.37, whereas, during the 12 months subsequent thereto he had total compensation of $34,809.50. Further, the Carrier argues, that in checking Claimant Jones' work record it determined that he had continually marked off and was therefore not available for service, and that such action on the part of Claimant Jones resulted in a loss of additional earnings that were available to him had he not elected to mark off.

In this latter regard, the N&W offers the following argument to the Board:

> "While the Organization would more than likely take exception to the use of these earnings since the Carrier did not check the number of days that Claimant might have marked off in the 'test period,' the Carrier claims that an employee cannot voluntary lay off in an attempt to create an 'artificial loss of earnings' so as to be eligible for entitlement to protective benefits. The definitions are quite clear that the 'loss of earnings' must be 'as a result of the transaction' and not from other causes.
>
> Throughout the progression of the instant claim, the Carrier has repeatedly emphasized the fact that employee protection agreements, such as the Washington Job Protection Agreement of 1936, Amtrak Protection Agreement (Appendix C-1), Article XIII of the January 27, 1972 UTU National Agreement, etc., were designed to provide protection to employees against adverse effects flowing from the specific transaction involved and not adverse effects arising from other unrelated causes. In support of this position the Board's attention is directed to the following excerpts extracted from a sampling of the awards rendered on this subject:
>
> * * * * * * *
>
> With the forgoing in mind, the Carrier submits that in order to be recognized as either a 'displaced' or a

'dismissed' employee one must be able to establish a direct causal relationship between the transaction and the alleged adverse effect. The accepted touchstone for determining whether an employee qualifies for either a displacement or a dismissal allowance, is the loss of a regular job, or the loss of earnings due to being involved in a chain of displacements that resulted from the transaction. However, in the instant claim we find that Mr. Jones could not provide any persuasive evidence that he had in fact incurred a loss of earnings 'as a result of the transaction.' The Carrier on the other hand has shown by evidence of record that Mr. Jones enjoyed an increase in his earnings subsequent to the 'transaction.'

In summary, the Carrier would remind the Board that:

1. The mere fact that Claimant was involved in a chain of displacements does not set automatic certification into motion. Both factors must exist (i.e., to be displaced and occur a loss of earnings, both as a result of a 'transaction.'

2. If through marking-off, thereby producing less earnings in order to establish a false 'loss of earnings;' an employee is allowed to obtain a protective status, then the true intent and meaning of the various protective agreements would be defeated. The intent of these protective agreements was to provide protection to employees against adverse effects flowing from the specific transaction involved and not from adverse effects arising from other unrelated causes."

Although the Carrier did not further develop such argument in its presentation to this Board, the record shows that in a letter to the UTU, dated July 27, 1983, the Carrier had stated the following relative to the basis for its abolishment of Local F-21-M:

"[The] abolishment of the F-21-M job on December 14, 1982 was in no way connected to the merger of the NJI&I into the NW. Rather, it was merely an operational change made by the Carrier in connection with the declining volume of traffic over the territory served by this crew. In support of this position your attention is directed to the charts attached hereto which clearly show that the crew in question only handled 1,529 cars in 1981, as opposed to 2,377 cars in 1978, which was the

year the Carrier experienced an 89-day strike on its property.

We would further point out that the work the crew of F-21-M performed is still being performed by the employes on the former Gary District seniority roster. The only difference is that the job is now run on an as-needed basis rather than as an assigned six-day local. As you know, the Carrier had the right to make this type of change prior to the NJI&I merger."

FINDINGS AND OPINION OF THE BOARD:

The Board is not persuaded by explanations offered by N&W as to the abolishment of Local F-21-M and establishment of Local F-21-A not being related to a coordination of operations in anticipation of ICC authorization involving the coordination of operational services and facilities between the N&W and the NJI&I.

While there is no question that N&W has shown there was a declining volume of traffic handled in the territory of the assignments as between the years 1978 and 1981, we do not find that this fact alone supports the conclusion that the operational change was instituted solely as the result of a decline in business.

We say this in the light of the UTU having offered the unrefuted argument that prior to December 15, 1982, the NJI&I received and interchanged cars with the N&W only at Pine, Indiana, located on the Gary District, and that Local F-21-M was the only N&W assignment effecting this interchange or working in the Pine location, and that due to the Implementing Agreement allowing other assignments to perform work at Pine, Local F-21-M was no longer needed and thus, the reason for its abolishment.

Moreover, it would seem to the Board that if N&W believed it had the unilateral right to make the operational change absent the December 9, 1982 Implementing Agreement, that stated declines in traffic in 1978 and other preceding years would have dictated a change in operations years before the the Implementing Agreement became effective.

Thus, the Board believes it may properly be held that the record is supportive of the conclusion that the operational change was directly related to the consolidation of the separate operating services and facilities of the N&W and the NJI&I.

The action of the N&W may therefore be held to have brought the

operational changes within the purview of the New York Dock Conditions.

In this latter regard, we think the record as presented and developed clearly shows that Claimant Jones was displaced off a regular assignment, albeit it was classified a work assignment, as the result of more senior employees exercising seniority to other assignments following abolishment of Local F-21-M on December 14, 1982.

As to whether Claimant Jones was placed in a worse position as a result of the chain of displacements, it is evident that he had in fact sustained a loss of compensation immediately following abolishment of Local F-21-M, and subsequent displacement from his own assignment. Therefore, the Board believes that it may be properly concluded that except for abolishment of the Local that Claimant Jones would not have experienced this reported initial and drastic reduction in compensation.

The fact that Claimant Jones was able at a later date to exercise seniority to assignments which increased his compensation did not serve to alter the fact that he was initially placed in a worse position with respect to his compensation as a result of the consolidation of operations. It is not whether a protected employee has compensation that is more or less following a transaction on an annual basis which determines whether that employee is entitled to a displacement allowance. Rather, as set forth in Section 5 of Appendix III of the New York Dock Conditions, entitlement to a displacement allowance is determined on a monthly basis and a protected employee "shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced."

The record here shows that using N&W supplied earnings figures for the 12-month period, December 1981 through November 1982, it could be assumed that Claimant Jones' test period average monthly compensation would be about $2,675.36. Thus, if, as the record also shows, Claimant Jones had earnings of only $1,982.97 in January 1983, $1,585.57 in February 1983, and $2,632.17 in April 1983, it is evident, absent any mitigating factors, that he was placed in a worse position in respect to his compensation in each of these initial months of his protective period.

As to any mitigating factors which impacted upon Claimant Jones' earnings, although N&W states that he had continually marked off

and was therefore unavailable for service, N&W offers nothing to substantiate such a determination.

Accordingly, since there is substantial reason to conclude that the action taken by N&W was triggered by an intent to proceed with a transaction within the purview of the New York Dock Conditions, and as Section 10, supra, of such protective conditions has been interpreted to protect employees whose assignments or jobs are shown to have been affected by actions taken in anticipation of a transaction, it will be this Board's decision that Claimant Jones is entitled to full protection from the adverse affects of N&W's abolishment of Local F-21-M.

In the circumstances of record, the Board will hold there was a direct causal nexus between the ICC authorized consolidation of operations and services of the N&W and NJI&I and abolishment of Local F-21-M and the subsequent chain of displacements which caused Claimant Jones to be placed in a worse position with respect to compensation and rules governing his working conditions. Claimant Jones is, therefore, held to be entitled to a protective allowance as a displaced employee from the date he was first adversely affected following abolishment of Local F-21-M on December 14, 1982.

AWARD:

The Questions at Issue are answered in the affirmative. For those reasons set forth in the above Findings and Opinion, Claimant Jones is entitled to benefit of a displacement allowance under the provisions of the New York Dock II Conditions.

Robert E. Peterson, Chairman
and Neutral Member

G. C. Edwards
Greg C. Edwards
Carrier Member

Lloyd W. Swert
Lloyd W. Swert
Employee Member

St. Louis, MO
November 28, 1986

Claimant entitled to be certified under the provisions of the New York Dock II Conditions.