ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	OPINION AND AWARD
BROTHERHOOD RAILWAY CARMEN - A DIVISION OF BRAC, Organization, and CSX TRANSPORTATION, INC. and THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Carriers.	Pursuant to Article I, Section 4 of the New York Dock Conditions and Section 4 of the November 3, 1966 Merger Protective Agreement I.C.C. Finance Docket No. 28905

Hearing Date: December 18, 1986
Hearing Location: Jacksonville, Florida

MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz
Carriers' Member: J. T. Williams
Neutral Member: John B. LaRocco

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OPINION OF THE COMMITTEE

I. INTRODUCTION

On September 23, 1980, the Interstate Commerce Commission (ICC) approved CSX, Inc.'s petition to control two non-carrier holding companies: Chessie System, Inc. and Seaboard Coast Line Industries, Inc. ICC Finance Docket No. 28905 (Sub-No. 1). 363 I.C.C. 521 (1980). The Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company (B&O) are the major railroad subsidiaries of Chessie System, Inc. In 1980, Seaboard Coast Line Industries, Inc. was the parent of the Family Lines which included the Seaboard Coast Line Railroad (SCL). The successor enterprises of the Family Lines were Seaboard System Railroad and currently CSX Transportation, Inc. (CSX). The end to end consolidation produced a large single system serving the northeast, southeast and midwest. Id. at 553. The railroad subsidiaries remained separate entities. Id. at 575. To compensate and protect employees adversely affected by the control case and related proceedings, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on all of the involved railroads pursuant to the relevant enabling statute. 49 U.S.C. 11343, 11347; 363 I.C.C. 521, 588.

In 1966, the ICC approved the merger of the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL). The merged carrier became the SCL.

On November 3, 1966, the Brotherhood Railway Carmen (BRC) and sixteen other rail labor organizations entered into an Agreement with the SAL and ACL for the Protection of Employees in the Event of the SAL-ACL Merger. The Agreement, commonly referred to as the Orange Book, was effective August 1, 1966. The parties negotiated the Orange Book pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act. In 1978, Congress enacted 49 U.S.C. 11347 and repealed Section 5(2)(f).

II. BACKGROUND AND SUMMARY OF THE FACTS

CSX and C&O (collectively "the Carriers") issued written notice, dated August 29, 1986, of their intent to close CSX's freight car heavy repair shop at Waycross, Georgia and to simultaneously transfer "...freight car heavy repair work and certain storeroom work at Waycross..." to the C&O's Raceland, Kentucky freight car heavy repair facility. The work moved from Waycross would be "...coordinated with such work presently being performed at Raceland under the C&O Agreement." The repair work and Waycross employees are presently subject to the SCL Schedule Agreement. Approximately fifty percent of the employees currently occupying positions at the Waycross repair shop are present employees within the definition set forth in Orange Book Section 2(a).

In their notice, the Carriers informed the Organization of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. The Organization represents 121 of the incumbents holding positions slated for abolition. By class, the incumbents are 99 Carmen, 4 Carman Helpers, 13 Painters and 5 Painter Helpers. At the coordinated Raceland facility, the Carriers estimated that they would create 86 Carmen, 3 Carman Helper, 6 Painter and 4 Painter Helper positions to perform the work transferred from Waycross. Except as described above, the notice was silent concerning the 22 workers whose positions would be abolished but would be unable to either obtain an equivalent, newly established Raceland position or exercise their seniority to claim a remaining position at Waycross. The Carriers anticipated that they would close the Waycross freight car heavy repair shop on or about December 31, 1986.

The notice also indicated that CSX would abolish 3 clerical positions, 11 jobs in the blacksmith's craft, 6 laborer positions, 3 Machinist positions, 4 jobs held by sheet metal workers and 1 electric crane operator position. At Raceland, the Carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions.

After the Carriers served the August 29, 1986 notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful primarily because irreconcilable disagreements developed over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a New York Dock

implementing agreement and the Carriers' right to implement the transaction without first complying with the Railway Labor Act. 45 U.S.C. 51 et seq. Thereafter, the Organization, and later the Carriers, invoked arbitration in accord with Section 4(a) of the New York Dock Conditions.[1] Even though Section 4 contemplates arbitration by a single, neutral arbiter, the parties formed this Committee to resolve all outstanding disputes under the New York Dock Conditions and the Orange Book. Thus, we derive dual authority from Section 4 of the New York Dock Conditions and Section 4 of the Orange Book.

Beginning on November 4, 1986, the Organization challenged the jurisdiction of this Committee to fashion an implementing agreement. Despite its prior invocation of arbitration, the Organization may nonetheless contest our fundamental power to adjudicate this dispute. A lack of jurisdiction allegation may be raised at any time. Therefore, the Organization is not estopped from urging this Committee to dismiss all the substantive matters which the parties previously agreed to submit to us.

The Organization and the Carriers filed prehearing submissions and extensively argued their respective contentions at the December 18, 1986 hearing. Also, they filed post-hearing briefs which the Neutral Member received on January 2, 1987.

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[1]All sections pertinent to this case are found in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

This decision was issued within the thirty day limitation period found in Section 4(a)(3) of the New York Dock Conditions.

III. STATEMENT OF THE ISSUES

The Carriers pose the following question to this Committee:

> "Shall the terms of the attached agreement, proposed by the Carriers, apply to the implementation of the Carriers' August 29, 1986 notice to transfer all freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky and to coordinate such work with that presently being performed at Raceland under the C&O Agreement?"

The "attached agreement" referred to in the Carriers' question at issue is a proposed implementing agreement which it sent to the Organization on October 15, 1986. The Carriers withdrew all their prior proposals.

In its opening submission, the Organization proffered four issues which read:

> "ISSUE NO. 1:
>
> "Is the CSX's notice dated August 29, 1986 (attached as Exhibit No. 1), concerning transfer of freight car heavy repair work from Waycross, Ga. on the SCL to Raceland, Ky. on the C&O adequate and specific enough notice under the New York Dock conditions?
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> "ISSUE NO. 2:
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> "If this arbitrator has jurisdiction of this dispute, can the affected employees who have lifetime guaranteed jobs on the SSR under the Orange Book agreement--which gives the SSR the right to transfer work and employees only from their home point to other points on the former SAL-ACL railroads--be compelled to transfer to another point on another railroad which is not on the property of the former SCL and ACL railroads without unilaterally effecting a change in their wages, rules or working conditions as set forth in the Orange Book?

"ISSUE NO. 3:

"Can CSX move the work which is subject to the SCL(SSR) Working Agreement and restricted to the SCL employees, out from under the SCL agreement and place it under another contract (Working Agreement) on another railroad?

"ISSUE NO. 4:

"If the above issues each are answered in the affirmative, what should be the terms of an implementing agreement under Article I, Section 4 of New York Dock?"

In addition, the Organization's General Chairman on the C&O raised another issue although the question is actually a subset of the above stated fourth issue. The C&O General Chairman presented the following question:

"Shall the C&O employes, junior in seniority to employes transferring from Waycross, Georgia, cooresponding [sic] to the number of senior employes transferring to the coordinated operations, be subject to the protective benefits set forth in Article 5 and 6 of the New York Dock Conditions?"

IV. RELEVANT STATUTES, ORANGE BOOK PROVISIONS, EXCERPTS FROM NEW YORK DOCK CONDITIONS AND RECENT COURT DECISIONS

To fully understand the parties' contentions, we must first relate the relevant statutes, contract provisions and legal authority.

The ICC promulgated and imposed the New York Dock Conditions pursuant to the Congressional mandate in Section 11347 of the Interstate Commerce Act. 45 U.S.C. 11347. Starting with Section 1(a), a transaction is "...any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." Section 4(a) states that "...any assignment of employees made necessary by the transaction shall be made on the

basis of an agreement or [arbitrator's] decision under this section 4." [Brackets added for clarification.] 360 I.C.C. 85. Assuming we have jurisdiction, Section 4 empowers this Committee to write an implementing agreement providing "...the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case..." Id. Also, Section 4 requires the Carriers contemplating a transaction to issue a notice containing "...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." With regard to its jurisdictional challenge, the Organization relies heavily on Sections 2 and 3 of the New York Dock Conditions. These two sections state:

> "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.
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> "3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the

conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement."

Section 3(a) of the Orange Book reads:

"In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided and the employees, their organizations and the Carriers will cooperate to that end." [Emphasis added.]

The pertinent portion of Section 11341(a) of the Interstate Commerce Act provides that a carrier or person participating in an approved transaction "...is exempt from the antitrust laws and from all other law ... as necessary to let that person carry out the transaction..." 45 U.S.C. 11341(a). In Denver and Rio Grande Western Railroad Co. - Trackage Rights - Missouri Pacific Railroad Co., Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (unreported) ("the DRGW Case"), the ICC interpreted the scope of its Congressionally delegated authority pursuant to Section 11341(a). The Commission asserted: "Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the..." Railway Labor Act. DRGW at 5. The ICC observed that if its approval of

a transaction "...did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring a change in working conditions of any employees would be substantially nullified." DRGW at 6. The ICC ruled that a duly approved trackage rights agreement containing crew assignments was paramount to conflicting terms in the schedule labor agreements.

The District of Columbia Circuit Court of Appeals reversed the ICC's decision. Brotherhood of Locomotive Engineers v. Interstate Commerce Commission, 761 F.2d 714 (D.C. Cir. 1985); cert. granted __ U.S. __ (1986). While recognizing that Congress granted the ICC broad powers to exempt transactions from legal obstacles, the Court ruled that the ICC must justify the exercise of its statutory authority. The case is currently pending before the United States Supreme Court.

V. THE POSITIONS OF THE PARTIES

A. The Organization's Position on Jurisdiction

The Organization strenuously argues that we lack jurisdiction to fashion an implementing agreement which changes the rules and working conditions in existing collective bargaining and job security agreements. Section 2 of the New York Dock Conditions bars the Carriers from utilizing the compulsory interest arbitration mechanism in Section 4 to remove either employees or work from the SCL Agreement and place the work or workers under the C&O Agreement without exhausting the notice and collective bargaining requirements in the Railway

Labor Act. 45 U.S.C. 151, 156. Neither the ICC nor a Section 4 arbitrator can bind the Organization absent its consent.

The Organization reviewed the history of employee protection in the railroad industry. The historical record evinces a consistently strong public policy favoring employee protection as the consequence of streamlining the national rail transportation network The Organization emphasizes that the New York Dock Conditions, like all employee protective arrangements, are imposed on carriers for the sole benefit of their workers. If Section 4 of the New York Dock Conditions becomes a subterfuge for inflicting mandatory, binding interest arbitration on employees and their representatives contrary to Sections 6 and 7 of the Railway Labor Act, the employee protection is irrationally twisted into a formidable weapon for, instead of an obligation on, rail carriers. Railroads will routinely resort to Section 4 to unilaterally fix rates of pay, rules and working conditions. Needless to say, such a result completely undermines collective bargaining. Pursuant to express statutory provisions, interest arbitration in the railroads has always been voluntary. 45 U.S.C. 157, First. Arbitrators acting under the ICC's New York Dock Conditions lack the power to change or vitiate existing labor contracts.

Before and immediately after the formulation of the New York Dock Conditions, the ICC and arbitrators uniformly ruled that they lacked jurisdiction to alter the terms of collective bargaining agreements within the context of promulgating an implementing agreement to govern the effectuation of an ICC

approved transaction. NW/IT v. RYA/UTU, NYD § 4 Arb. (Sickles, 1981); NW/IT v. BLE/UTU, NYD § 4 Arb. (Zumas, 1982); NW/IT v. UTU, NYD § 4 Arb. (Edwards, 1981); and B&O v. BMWE, NYD § 4 Arb. (Seidenberg, 1983). Any other outcome would render Section 2 of the New York Dock Conditions meaningless. More particularly, the ICC never claimed authority to indefinitely supersede the Railway Labor Act far into the future merely because it, at one time, imposed employee protective conditions on a railroad. Southern Railway Co. - Control - Central of Georgia Railway Co., 331 I.C.C. 151, 169-170 (1967); and Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1962). After the ICC's decision in the DRGW case, arbitrators overruled the prior line of decisions and held that they had authority to amend or nullify collective bargaining agreements and, in the extreme, to change representation. The issue is before the Supreme Court. At the specific request of the carrier-applicants in the DRGW case, the ICC expressly approved a trackage rights agreement containing crew assignment provisions at odds with existing collective bargaining agreements. In its brief to the Court, which is the ICC's latest pronouncement on its exemption authority, the ICC limited its claimed preemption over the Railway Labor Act. In footnote 17 on page 25 of its opening brief, the Commission wrote, "The Section 11341(a) exemption applies, of course, to terms comprehended by the Commission's approval order." So, the ICC has now informed the Supreme Court that it seeks to supersede the Railway Labor Act only to the extent that it approved specific, future projects

which the carrier-applicants presented to it during the course of the administrative proceeding. The transfer of work and workers from Waycross to Raceland was not placed before the ICC as part of the control application. On the contrary, the ICC, relying on the Carriers' representations, opined that the merger of the two holding companies would cause only short-lived employee displacements. 363 I.C.C. 521, 589. The ICC observed that, "It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications." Id. Again, the Carriers led the ICC to believe that "perceptible dislocations" will be necessary only "...at points where the ... end-to-end systems meet..." Waycross is approximately 600 miles from Raceland and almost 500 miles from the nearest C&O point. Without doubt, the ICC did not foresee the Carriers' misguided attempt to coordinate work at two distant shops on two separately operated rail subsidiaries. The Carriers conveniently ignore the differences between the merger of two holding companies and full scale merger of the subsidiaries. Since the subsidiaries are separate companies, the Carriers may only effect their proposed coordination pursuant to the terms of the Washington Job Protection Agreement. Inasmuch as the Carriers did not present the instant coordination to the ICC, jurisdiction accrues to this Committee only after the Carriers fully comply with the Railway Labor Act.

Similarly, this Committee may not entertain any changes in the Orange Book inasmuch as that merger protective agreement vests covered employees with lifetime employment on the former

SCL property. Section 3 of the New York Dock Conditions absolutely preserves workers' rights and benefits under existing protective agreements. The ICC has never even hinted that its approval of a transaction abrogates prior employee protective contracts especially when those agreements, like the Orange Book, were negotiated in conjunction with the ICC's imposition of employee protection as a condition precedent to consummating an earlier merger. Since the ICC has never ruled that its orders prevail over the types of contracts listed in Section 3 of the New York Dock Conditions, the Carriers cannot use Section 4 to compel the BRC to surrender Orange Book benefits.

Finally, the Organization may, at its discretion, negotiate implementing agreements which modify existing agreements. The Carriers cannot force the Organization to change the existing collective bargaining agreements in this case merely because, a few times in the past, the Organization voluntarily reached implementing agreements with the Carriers.

Raising an alternative jurisdictional consideration, the Organization avers that the Carriers' August 29, 1986 correspondence failed to satisfy the Section 4 notice requirements for two reasons. First, the notice was vague as to both employees and work. The notice failed to describe exactly what freight car heavy repair work was going to Raceland. Although the Carriers were creating 22 fewer positions at Raceland than they were eliminating at Waycross, they did not give any indication as to the status of the 22 employees who would be detrimentally affected by the transaction. Second,

BRC's C&O General Chairman was skeptical of the Carriers' estimated need for 99 Raceland positions to perform the work moved from Waycross. Furthermore, he was particularly wary of the Carriers' intent to bring more employees into Raceland inasmuch as the C&O furloughed more than 200 Raceland Carmen on November 28, 1986. An improper Section 4 notice deprives this Committee of jurisdiction and the case must be dismissed. The Carriers must initiate the Section 4 process de novo, by tendering a new notice which fully and adequately describes their proposed changes including an accurate estimate of workers needed to perform the transferred work.

B. The Carriers' Position on Jurisdiction

At the onset, the Carriers underscore the rational business purpose of the coordination. Shippers' demand for conventional type freight cars is diminishing. They are opting for privately owned cars or intermodal equipment. While Raceland Shop is plagued with excess capacity, the Waycross facility lacks the space to assume repair work from Raceland unless CSX expends enormous sums to expand and renovate the plant. Since both shops will not be needed in the future, the Carriers chose to close the Waycross repair facility and transfer the work to Raceland.

During oral argument, the Organization conceded that the planned Waycross-Raceland coordination was a transaction within the ambit of the New York Dock Conditions. Admittedly, the Carriers did not specifically present the instant coordination to the ICC but all parties as well as the ICC realized that the railroads might engage in transactions other than those alluded

to in their initial operating scheme long after the ICC's omnibus approval of the control application. The Commission remarked that it is "...possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. 521, 589 (1980). In his affidavit, the General Counsel of the Brotherhood of Maintenance of Way Employes realized that approval would eventually permit extensive future changes not needing ICC approval. The Commission responded to labor's concerns by imposing the New York Dock Conditions on each and every transaction. As the ICC found, the "...conditions will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." Id. Most importantly, the ICC concluded that the operation of a single system would permit the Carriers to reap operating and cost efficiencies including the alleviation of excess capacity at the C&O's Raceland facility. Id. at 538 and 561.

The Organization's position that this Committee lacks jurisdiction to formulate an implementing agreement covering the coordination of work between Waycross and Raceland is inconsistent with its past participation in consolidations which the Carriers undertook pursuant to the control case and in accord with arbitrated implementing agreements. See BRC v. B&O, NYD § 4 Arb. (Fredenberger, 1984); C&O v. BRC, NYD § 4 Arb. (Marx, 1984); and BRC v. B&O, NYD § 4 Arb. (Fredenberger, 1983). Jurisdiction was not an issue in any of these three prior Section 4

arbitrations manifesting the Organization's recognition that the sole purpose of Section 4 is to procure an implementing agreement covering the transaction.

The jurisdictional issue presented to this Committee is not a question of first impression. Many respected neutrals have ruled that, under Section 4 of the New York Dock Conditions, an arbitrator has the power to issue an implementing agreement governing a work transfer even though the transaction had not been anticipated during the ICC proceedings and implementation would override terms of existing collective bargaining agreements. UP v. ATDA, NYD § 4 Arb. (Fredenberger, 1984); UP v. UTU, NYD § 4 Arb. (Brown, 1985); BLE v. UP/MP, NYD § 4 Arb. (Seidenberg, 1985); and UTU v. NW/SR, NYD § 4 Arb. (Ables, 1985). In UP v. ATDA, supra at 12, Arbitrator Fredenberger relied on the DRGW case and concluded that "...the ICC ... determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the Commission may be effectuated." When it approved the CSX control application, the ICC necessarily authorized the transfer of work from one carrier to another as the inevitable consequence of implementing a transaction. If the Organization prevails, it would achieve its objective of thwarting all transactions. Such an outcome effectively cancels the ICC's approval in the control case. The Carriers would be precluded from ever obtaining the savings and benefits of operating a single rail system. In the DRGW case at page 5, the ICC emphasized that its "...approval exempts a

transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption..." from the Railway Labor Act. See also, Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co., 314 F.2d 424 (8th Circ. 1963), cert. den., 375 U.S. 819 (1963). Continuing on the next page of its decision, the ICC squarely rejected the Organization's inference that its ruling conflicted with Section 2 of the New York Dock Conditions when it declared:

> "The terms of those conditions, however, must read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

The Organization employs wishful thinking when it asserts that the ICC subsequently modified its view of its own authority when the DRGW case reached the Supreme Court. The footnote which the Organization cites from the ICC's brief is attached to an unequivocal sentence reading: "The scope of the exemption is defined by the terms of the approved transaction." The ICC's brief provides little solace for the Organization. In its Reply Brief filed with the Court, the ICC vigorously asserted that provisions of the Railway Labor Act and collective bargaining contracts are automatically superseded to the extent necessary to carry out approved transactions. The ICC knew, as stated in its brief, that if the Carriers first had to endure the protracted negotiating procedures, with the right of economic self-help, contained in the Railway Labor Act, the transaction would be

indefinitely delayed and most probably nullified. Thus, mandatory arbitration under Section 4 of the New York Dock Conditions insures that the parties will arrive, through either negotiation or arbitration, at an implementing agreement. Section 4 obviates the "...risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement these transactions..." Maine Central Railroad Co., Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Co. - Exemption From 49 U.S.C. 11342 and 11343, I.C.C. Fin. Docket No. 30532 (August 22, 1985); appeal pending No. 85-1636 (D.C. Cir.).

All Carmen, who transfer from Waycross to Raceland, must be placed under the C&O Agreement to necessarily effectuate the coordination. And, the transaction cannot be consummated unless the Waycross freight car heavy repair work is shifted to the coordinated facility.

On December 30, 1980, the Organization entered into an implementing agreement providing for the transfer of SCL Carmen's work to the C&O. To reiterate, the Organization acknowledged that, as a consequence of accomplishing the transaction, Carmen may be removed from the SCL Agreement and placed under the C&O Agreement. In addition, the Carriers stress that they successfully negotiated implementing agreements covering this particular transaction with four of the six other labor unions representing affected Waycross employees. As to the two unions which have not signed implementing agreements, the unresolved

issues are unrelated to the Carriers' right to transfer workers from Waycross to Raceland.

The Organization has the misplaced notion that the Carriers desire, through this Section 4 arbitration, to vitiate the Orange Book and schedule Agreements. After implementation, the SCL working Agreement and the Orange Book will remain viable and unaltered. Orange Book protected employees moving to Raceland will retain the full spectrum of benefits in the Orange Book.

In summary, this Committee has the jurisdiction to prepare an implementing agreement so that the Carriers may consolidate the work at Raceland. The exemption from the Railway Labor Act is coextensive with the ICC's approval in the control case.

With regard to the sufficiency of the Carriers' August 29, 1986 notice, the document disclosed exactly what changes were forthcoming and included an estimate of the number of employees, in each class, affected by the planned changes. The notice described the relevant Waycross work, noted the Waycross positions to be abolished and the Raceland positions to be established, and informed the Organization of CSX's intent to close the Waycross facility. The plain, obvious fact was that the 22 employees (directly affected by the coordination) would be protected under the New York Dock Conditions. The notice contained sufficient details to permit the Organization to discuss the impending changes. None of the other labor organizations (which represent members affected by the transaction) challenged the adequacy of the notice. The Neutral Member of this Committee has previously ruled that the adequacy

of Section 4 notices must be adjudged on a case by case basis. C&O/L&N v. BRS, NYD § 4 Arb. (LaRocco, 1985). The notice in this case is even more specific and informative than the notice tendered in the above case and thus, it conformed to Section 4 of the New York Dock Conditions.

C. The Carriers' Position on the Contents of an Implementing Agreement

During negotiations, the Carriers offered the BRC more generous terms than the minimum level of benefits contained in the New York Dock Conditions. However, the Carriers' offer was conditioned on expeditiously consummating an agreement without resorting to arbitration. When negotiation reached impasse, the Carriers withdrew their offer and substituted the proposed October 15, 1986 implementing agreement. This Committee should disregard the Carriers' withdrawn proposals to encourage the Organization to reach negotiated settlements on future transactions. In addition, a Section 4 Arbitrator lacks the authority to write an implementing agreement which grants workers benefits greater than those specified in the New York Dock Conditions.

Immediately upon notification of the impending transaction, the Organization took the novel position that Orange Book protected workers could not be transferred to Raceland. Contrary to the Organization's bold assertion, there is no language in the Orange Book prohibiting the Carriers from moving Orange Book protected employees to points beyond the boundaries of the former SCL property. Since 1966, none of the labor organizations which

are parties to the Orange Book, including the BRC, have even suggested that the Carriers may only transfer Orange Book covered employees to other SCL locations. If any labor organization had taken such an untenable position, the issue would certainly have been adjudicated long ago. Orange Book Section 3(a) permitted the Carriers to transfer Orange Book employees throughout the former SCL system and concomitantly required the Organization to negotiate implementing agreements governing the force rearrangements. The Organization cannot, twenty years later, convert an affirmative right flowing to the SCL into a restriction on the Carriers' right to move Orange Book employees beyond the former SCL property.

By already signing implementing agreements, other labor organizations involved in this coordination recognize the Carriers' right to require Orange Book protected employees to transfer to Raceland with their work. Moreover, the current BRC General Chairman was not in office when the Orange Book was signed. His predecessor was privy to Orange Book negotiations. The former General Chairman implicitly acknowledged that Orange Book protected employees could be transferred to other than SCL points because he entered into implementing agreements providing for such transfers. The Seaboard System Railroad's former Executive President, who is also familiar with both negotiating and applying Orange Book provisions, confirmed that the parties never intended to grant Orange Book protected workers insulation from transfers to locations other than those on the former SCL

property. The retired Executive Vice President further attested in Paragraph 12 of his December 8, 1986 affidavit:

> "12. From my familiarity with the negotiations leading to the agreement known as the Orange Book, there was a 'give and take' whereby certain working life income guarantees were granted by the merging railroads in exchange for the right of the merged carrier, SCL, to transfer work, consolidate facilities, and thereby transfer employees pursuant to implementing agreements to be negotiated thereunder."

The Orange Book was negotiated in an atmosphere replete with railroad mergers. The Orange Book drafters could easily foresee that there would be additional mergers necessitating SCL employees to relocate on the expanded property of a successor employer.

The parties have never accorded Orange Book covered employees the absolute right to remain on the SCL property. Pursuant to a December 30, 1980 implementing agreement, SCL Carmen, including Orange Book employees, transferred to the C&O. Six SCL Carmen, three of whom came under the Orange Book, shifted to the C&O and continued to enjoy Orange Book protection. In 1967, shortly after the Orange Book was signed, the Organization was a party to an implementing agreement providing for the transfer of SCL Carmen to the Richmond, Fredericksburg and Potomac Railroad. In 1973, the BRC along with other shop craft unions entered into an implementing agreement covering the coordination of SCL and Louisville & Nashville Railroad (L&N) shop facilities in Alabama. Other labor unions have also entered into implementing agreements requiring Orange Book protected workers to transfer off the SCL. Some Orange Book

employees opted for a separation allowance per Orange Book Appendix G.

The Organization is again attempting to forever block the transaction by arguing that the transfer would place workers in a worse position, as specified in Orange Book Section 2(b), due to weather differences between Raceland ("harsh") and Waycross ("mild"). The contention is ludicrous. Greater weather variations can be expected vis-a-vis Miami, Florida and Richmond, Virginia yet, even the Organization concedes that the Orange Book allows transfers between these two SCL points.

The Organization's proposed implementing agreement terms go far afield of the New York Dock Conditions and would render the transaction so expensive as to effectively prevent implementation. The Organization proposes that all Carmen may decline Raceland positions and, upon their voluntary furlough, still collect Orange Book benefits or New York Dock dismissal allowances. The Carrier would not only be burdened with paying expensive protection benefits but also would have to pay Raceland employees to perform Waycross work. The BRC General Chairman on the C&O seeks to automatically certify an unspecified number of Raceland employees even though dovetailing seniority does not constitute a per se adverse effect on junior Raceland Carmen. Whether or not any Raceland workers are eligible for New York Dock payments is best left to a Section 11 proceeding. In the control case, the ICC rejected labor's requests to prohibit residence changes and to enact a conclusive presumption as to adverse effect. 363 I.C.C. 589-590. Another Organization

proposal might be inequitably construed to allow senior, furloughed Raceland Carmen to immediately displace junior workers who just followed their work from Raceland. Finally, the SCL General Chairman inappropriately urges utilization of furloughed Waycross Carmen ahead of Raceland employees. Not surprisingly, both the Carriers and the Organization's C&O General Chairman oppose this proposal.

On the other hand, the Carriers' proposed implementing agreement follows the New York Dock Conditions. Forced assignments at Raceland should be made in seniority order consistent with an employee's duty to exercise seniority over his work to the fullest extent. Once the transaction is implemented, there is no reason for the transferred workers to retain seniority at Waycross. The Carriers request the Committee to adopt their October 15, 1986 proposed implementing agreement.

D. <u>The Organization's Position on the Contents of an Implementing Agreement</u>

The Orange Book clearly and unambiguously affords covered workers lifetime job protection on the SCL. The only exceptions are found in Orange Book Section 2(e). Section 3(a) permits work transfers on the ACL-SAL consolidated system but no further. Transferring Orange Book employees beyond the SCL property places them in a worse position with respect to their working conditions. See Orange Book Section 2(b). The intent and language of the Orange Book demonstrates that covered employees received guaranteed jobs on the former SCL property throughout their worklife. The Orange Book protection is shielded by

Section 3 of the New York Dock Conditions and Orange Book protected employees have the right to elect Orange Book benefits as soon as they are affected by a New York Dock transaction. SSR v. BRAC, NYD § 4 Arb. (Zumas, 1983). Thus, they are entitled to opt for protective benefits and decline to transfer to Raceland.

The Carriers are unable to point to any Orange Book provision giving the Carriers the unilateral right to move Orange Book employees to the C&O property. On the contrary, Section 3(a) sets the limits of the Carriers' right. Moreover, the terminology regarding seniority in Section 2(e) refers to "...existing rules or agreements." Those rules, which are found in the agreements in effect at the time of the merger, provide for point seniority. For the same reasons, the classification of work rule in the January 1, 1968 schedule Agreement preserves the Waycross freight car heavy repair work to the Carmen's craft on the SCL. The Carriers' proposed implementing agreement would abrogate the Orange Book and the then existing working agreement.

At one time (in 1980), the Organization voluntarily entered into an implementing agreement allowing the Carriers to transfer SCL employees, including some Orange Book protected workers, from the SCL property at Richmond to a C&O facility in the same city. The Organization's voluntarism is not precedent for the wholesale removal of all Orange Book protected employees from the SCL. In contrast to the instant transaction, the Orange Book employees were not required to change their residence. The Carriers cannot compel the Organization to execute a similar implementing agreement under the guise of the New York Dock

Conditions. The Organization's voluntary action was non-precedential. Other labor unions, representing workers involved in this transaction do not represent any (or at most one) Orange Book protected workers.

The Raceland weather is much more severe than at Waycross. Many of the Waycross Carmen work outdoors. Moving to a harsher working environment constitutes a change in working conditions which is prohibited by Section 2 of the New York Dock Conditions.

Besides provisions keeping Orange Book protected employees on the former SCL property and guaranteeing these workers an election of benefits at the time this transaction is effectuated, the implementing agreement should contain terms close to the implementing agreement originally proposed by the Carriers. The Carriers' October 15, 1986 proposal is grossly inferior to their prior offer. The Carriers are improperly penalizing the Organization for sincerely raising other issues, such as Orange Book interpretation, which directly impacted on the negotiations over an implementing agreement.

The BRC advocates the following changes to the Carriers' October 15, 1986 proposal. First, forced assignments to unfilled Raceland positions should be accomplished in reverse seniority order. Since there will be fewer positions established at Raceland, it is more logical to start with junior affected employees allowing the senior workers, as opposed to junior workers, to remain in Waycross and draw protective benefits. Second, since the work being transferred to Waycross would have

accrued to furloughed Waycross Carmen upon the retirement, resignation or death of active Waycross employees, the furloughed Waycross Carmen should have superior rights over Raceland employees to the transferred work. However, the BRC General Chairman on the C&O takes exception to this particular proposal. Third, workers who transfer should retain dual seniority at Raceland and Waycross. If a position (other than one of temporary duration) becomes vacant at Waycross, these workers will have a one time opportunity to return to Waycross and depending on their election, they will forfeit either their Raceland or Waycross seniority. Fourth, the Organization proposes the following language for inclusion in the implementing agreement:

> "When the transfers from Waycross to Raceland take place, a like number of the C&O employees at Raceland will be provided with New York Dock protective conditions starting with the oldest Raceland employee that falls below the youngest employee transferring in from Waycross; i.e., if 86 Waycross carmen are dovetailed into the Raceland seniority roster, then 86 Raceland Carmen-starting with the oldest Raceland carmen in seniority- who falls below the youngest carmen in seniority from Waycross will be protected by the New York Dock protective conditions."

The C&O General Chairman asserted that Raceland has already absorbed several consolidations involving incoming workers over the last several years. While dovetailing is the fairest method of combining seniority rosters, each added coordination has detrimentally affected the relative seniority standing of Raceland Carmen. The constant influx of more senior workers cancels the benefits derived from the accumulation of

seniority. Subsequent to the transfer of work from Waycross, it becomes more likely that some presently employed Raceland Carmen will be furloughed. Protecting Raceland workers would give them more job security and compensate them for the loss of relative seniority. If the Carriers have correctly estimated that there will be sufficient work to occupy 99 additional Carmen, it should not object to protecting an equivalent number of Raceland Carmen because presumably the latter will continue in active employment.

VI. DISCUSSION

A. Jurisdiction

1. The Notice. The threshold issue before this Committee is whether the Carriers' August 29, 1986 notice conforms to the minimum requirements of Section 4 of the New York Dock Conditions. The pertinent portion of Section 4 provides: "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."

The Neutral Member of this Committee commented on the purpose and meaning of the above language in another Section 4 case, as follows:

> "The purpose of the advance notice is twofold: the notice triggers the Section 4 procedures which contain tight time deadlines for obtaining an implementing agreement; and, it informs the Organization (as well as all interested employees) of the impending, authorized New York Dock transaction so that the Organization and the Carriers may bargain, in good faith, over the terms of an implementing agreement. 360 I.C.C. 71. The notice must contain a full and adequate statement of the intended transaction and include an estimate of the number of affected

> workers. Since the ICC, in Article 1, Section 4(a) did not enumerate the essential elements of a New York Dock notice (aside from the adjectives "full and adequate" and the mandatory estimate), whether a particular notice conforms to Section 4(a) must be decided on a case by case basis." C&O/L&N v. BRS, NYD § 4 Arb. (LaRocco, 1985).

Thus, the propriety of a Section 4 notice must be evaluated on a case by case basis taking into account the surrounding circumstances and peculiarities of each New York Dock transaction.

In this case, the notice satisfied Section 4. Since the Carriers intend to close the Waycross facility, all freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work. Also, the Carriers, in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining. The notice adequately apprised the Organization of the nature of the impending transaction because it easily ascertained that, from its perspective, the transaction would vitiate employee rights in the Orange Book and the SCL working Agreement.

2. Subject Matter Jurisdiction. In Section 1(a) of the New York Dock Conditions, the ICC broadly defines a transaction as "...any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." 360 I.C.C. 84. The parties concur that the transfer of freight car heavy repair work from Waycross to Raceland constitutes a New

York Dock transaction. It is also undisputed that the intended consolidation was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application.

Where a transaction may cause the dismissal or displacement of workers, an implementing agreement:

> "...shall provide for the selection of forces from all employees involved on 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." [Emphasis added.] 360 I.C.C. 85.

While the ICC clearly authorized the Carriers to undertake transactions, it also plainly provided for the plenary preservation of all existing collective bargaining rights, collective bargaining agreements and employee protection agreements. (See Sections 2 and 3 of the New York Dock Conditions.) When the Carriers' authorized transaction embraces components which could arguably conflict with the terms of one or more existing agreements, the issue becomes to what extent, if any, a New York Dock implementing agreement may properly preempt the agreements and the Railway Labor Act. The issue is an ongoing controversy in rail labor relations and is currently before the United States Supreme Court. Thus, any principles we espouse on this matter should be reevaluated based on the Supreme Court's decision in the DRGW case.

To resolve the issue in this case, we start by attempting to balance the competing policies of the Railway Labor Act and the ICC's New York Dock Conditions on the one side and the

Interstate Commerce Act on the other side. The New York Dock Conditions were imposed on railroads for the exclusive benefit of any employee affected by a transaction. However, the Conditions were imposed as part of the ICC's overall regulatory scheme which is designed to encourage merged rail carriers to augment their ability to compete in the transportation marketplace by consolidating operations. Transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining. Consolidations upset stable collective bargaining relationships. Thus, there is not just tension between the Railway Labor Act and the Interstate Commerce Act but a classic clash of two important Federal statutes. Compare: Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen, supra at 158-160, with Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co., supra. The conflict has been carried forward into the New York Dock Conditions.

As a quasi-judicial extension of the ICC, this Committee must strictly follow the ICC's interpretation of its own authority. In the DRGW case, the ICC decided that 49 U.S.C. 11341(a), the source of the exemption, granted the Commission expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction. According to the ICC, Section 11341(a) insulates a transaction from all legal

obstacles preventing or impeding effectuation. Subsequent to the ICC's ruling in the DRGW case, arbitrators who promulgated New York Dock implementing agreements pursuant to Section 4, have universally decided that implementation of a transaction prevails over conflicting terms in existing collective bargaining agreements. ATDA v. UP, NYD § 4 Arb. (Fredenberger, 1984); UTU v. MP/UP, NYD § 4 Arb. (Ables, 1985); and BLE v. UP/MP, NYD § 4 Arb. (Seidenberg, 1985). In an effort to distinguish those decisions, the Organization argues herein that the ICC recently tempered its perception of the outer limits of the Section 11341(a) exemption. Pointing to a footnote at page 25 of the ICC's Brief to the Supreme Court, the Organization submits that the ICC now asserts that the exemption applies "...only to terms comprehended by the Commission's approval order." The Organization concludes therefore, that the exemption is inapplicable to the Waycross-Raceland coordination. We disagree. The ICC's Opening and Reply Briefs do not include any definitive language demonstrating a modification in the ICC's broad determination that its orders supersede the Railway Labor Act. Indeed, the footnote relied on by the Organization is appended to a statement asserting that the exemption mirrors the scope of the approved transaction. Elsewhere in its briefs, the ICC reiterates that the exemption goes beyond the transactions specifically mentioned in the approval proceeding so that railroads do not have to constantly return to the ICC to receive approval for each and every change made pursuant to the ICC's original order. At page 26, the ICC emphasized that the

exemption arises automatically to cover "anything authorized or required" by an approval order. The last ICC pronouncement (more recent than the footnote cited by the Organization) is found at page 11 of its Reply Brief where the ICC declared:

> "The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction."

Although not expressed within the control application, the Raceland coordination is an approved transaction exempt from the Railway Labor Act.

However, the exemption is only triggered when necessary. The ICC has never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements. To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved. Therefore, there is some harmony between Section 11341(a) of the Interstate Commerce Act and Section 6 of the Railway Labor Act. 49 U.S.C. 11341(a); 45 U.S.C. 156. If feasible, the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights.

Next, the Organization urges us to draw a delicate distinction between Section 2 and Section 3 of the New York Dock Conditions. Prior merger protection agreements might be more

inviolable than existing collective bargaining agreements because the prior merger agreements, like the Orange Book, were formulated under the auspices of Section 5(2)(f) (now Section 11347) of the Interstate Commerce Act. If so, the Organization correctly argues that the ICC must expressly relieve the Carriers from Orange Book provisions when it engages in a New York Dock transaction pursuant to an approval order issued subsequent to the order approving the ACL-SAL merger. Given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts New York Dock transactions from conflicting terms in prior merger protective agreements. To our knowledge, the ICC has not addressed this dilemma. In the DRGW case, the ICC did not patently rule that the exemption abrogates prior employee protective agreements such as the Orange Book. We cannot speculate on exactly how the ICC would handle prior merger protection agreements. However, as we discussed above, the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation. Moreover, most rights and benefits preserved to employees under Section 3 of the New York Dock Conditions will be safeguarded through prudent applications of the reasonable accommodation standard.

Therefore, this Committee has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland.

B. The Contents of an Implementing Agreement

1. The Orange Book. Section 2(b) of the Orange Book provides that a covered employee will not be deprived of

employment or placed in a worse position with regard to his working conditions at any time during such employment with the SCL. In exchange for lifetime protection, the Carriers acquired the right to transfer work and workers throughout the merged (SAL-ACL) system. See Orange Book Section 3(a). To that end, Section 3(a) calls for the execution of mandatory implementing agreements. Without such a clause, the point seniority terms of the working agreement would have restricted the Carriers from moving employees. Since it was necessary for the SCL to obtain a provision allowing it to transfer Orange Book protected employees throughout the merged system, it logically follows that a similar term is essential to permit the Carriers to transfer Orange Book covered workers beyond the SCL property. Instead, the Carriers desire to translate a limited, affirmative right into the unfettered discretion to transfer Orange Book workers throughout any enlarged rail system. An affirmative right carries an inherent implication that the right is restricted to the express terms conferring the affirmative right. The affirmative right is capped. Under the Carriers' interpretation, the Section 3(a) language would be unnecessary since they ostensibly have the right to transfer Orange Book employees throughout the SCL, L&N, B&O and the C&O. The parties do not enter into solemnly negotiated agreements only to have the terms of their agreements rendered meaningless or superfluous. The ACL and SAL could have foreseen that they might later become the part of an even larger rail enterprise. Thus, drafters of the Orange Book could have

easily written terms providing for unrestricted transfers across any enlarged rail system.

Our decision that the Carriers may not transfer Orange Book protected employees beyond the former SCL property is premised on the clear and express language of Section 3(a). The Seaboard System's retired Vice President was noticeably vague in explaining the meaning of Section 3(a). While a past practice may not vary or alter the clear and unambiguous Orange Book language, the Carriers' reference to prior implementing agreements was insufficient to raise a consistent and genuine past practice even if Section 3(a) was susceptible to differing interpretations. The prior implementing agreements involved a modicum of Orange Book covered workers and under some of the agreements, the Orange Book employees could receive separation pay, an option they probably chose. The December 30, 1980 implementing agreement resulted in the transfer of Orange Book covered employees from the SCL to the C&O but only within the same city. In any event, the Organization voluntarily entered into the implementing agreement. Although other labor organizations have signed implementing agreements with the Carriers governing this transaction, at most there was only one Orange Book employee involved. Thus, these implementing agreements provide us with little guidance in interpreting the Orange Book.

Even though Orange Book Section 3(a) provides that the work of Orange Book protected employees may be transferred throughout the SCL property (but no further), the provision must be

subordinated to the Carriers' right to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland. Unlike the work, the Orange Book limitation on transferring covered employees throughout the SCL system can be reasonably accommodated with the transaction. Permitting Orange Book covered workers to be transferred only throughout the SCL (absent a voluntary agreement with the Organization) will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock Conditions. Even under the Carriers' proposed implementing agreement, some of the Orange Book employees would have exercised their seniority to remaining positions at Waycross in lieu of transferring to Raceland. In summary, this Committee emphasizes that whether or not Section 3(a) can be reasonably accommodated with a New York Dock transaction must be analyzed on a case by case basis. Enforcing the limit on transferring Orange Book protected employees might, under different facts, operate to completely bar the transaction. Then, the ICC's authorized transaction would be paramount to Orange Book Section 3(a). In this case, the Carriers may not compel Orange Book protected workers to accept Raceland positions.

This Committee realizes that its decision will create an anomaly. The more senior Orange Book workers will be able to obtain other positions at Waycross. The junior Orange Book protected workers, who will presumably decline Raceland positions

will collect Orange Book benefits. However, the Carriers have other alternatives under the Orange Book.

Despite the terminology in Orange Book Section 3(a), the New York Dock implementing agreement covering this transaction shall provide, without restriction, for the transfer of all freight car heavy repair work from Waycross to Raceland. As soon as the Carriers commence the transaction, incumbents of the abolished positions, who are Orange Book protected employees, will be affected by the transaction and thus, the implementing agreement must give them the immediate option to elect either New York Dock benefits or Orange Book protection. BRAC v. SSR, NYD S 4 Arb. (Zumas, 1983).

2. Other Issues. For the reasons discussed earlier in our opinion, the work and employees transferred from Waycross shall be placed under the C&O schedule Agreement. Maintaining the work or employees under the SCL working agreement would for all practical purposes, block the transaction. A reasonable accommodation is impossible.

Regardless of whether Raceland or Waycross has the more comfortable climate, the Carriers would be barred from effectuating any New York Dock transaction if workers could decline a transfer merely by asserting that the weather at their current point was more amenable than the meterological conditions at the coordinated location. Most importantly, the Organization is unable to cite any term in any existing agreement vesting Carmen with the right to perform work in a particular climate.

Most of the Organization's other proposals concern the inclusion of benefits more generous than the minimum level of benefits prescribed by the New York Dock Conditions. When fashioning an implementing agreement, a Section 4 arbitrator must adhere to the New York Dock Conditions. BRC v. C&O/SSR (L&N), NYD § 4 Arb. (Marx, 1984). The parties are, of course, free to incorporate benefits above and beyond those in the New York Dock Conditions. In addition, the Carriers cannot be bound to their earlier offers containing benefits greater than those in the New York Dock Conditions. No party would offer a compromise if the party could later be held to the offer. Conditioning an agreement on acceptance of a package deal is a common tactic in labor negotiations. Thus, the Carriers could properly withdraw their October 10, 1986 proposed implementing agreement without prejudice to their position before this Committee.

The BRC's General Chairman on the C&O petitions us to automatically certify (for New York Dock protection) an equivalent number of junior Raceland Carmen corresponding to the number of workers transferring into Raceland. Section 1 of the Carriers' proposal provides blanket New York Dock coverage for all workers (at any location) who are affected by the instant transaction. The Carriers' proposal is simple and straightforward. In the control case, the ICC rejected labor's position that any adverse employment effect should be conclusively presumed to be merger related. 363 I.C.C. 521, 589. Whether any Raceland worker is affected by this transaction and eligible for New York Dock protection must be referred to a

Section 11 arbitration committee. Waycross employees moving to Raceland shall be dovetailed into the appropriate roster under the C&O Agreement.

Section 4 of the New York Dock Conditions charges us with selecting forces on a basis appropriate for this transaction. The BRC proposes that Waycross Carmen, who transfer to Raceland, retain their Waycross seniority and have a one time right of first refusal to a permanent Waycross vacancy. The New York Dock Conditions contemplate an orderly and final adjustment of forces during implementation of the transaction. Maintenance of dual seniority defeats that objective. Next, we adopt the Organization's proposal to assign Waycross workers to Raceland positions in inverse seniority order. Starting with the most junior active employee is fair and equitable. The modification may have little practical significance in view of our decision regarding Orange Book protected workers. Finally, the parties should incorporate the Carriers' proposed preference tiers for filling Raceland positions. [See Section 3(f) of the Carriers' October 15, 1986 proposal.]

In summary, this Committee adopts the Carriers' proposed implementing agreement dated October 15, 1986 with the modifications relating to Orange Book protected employees and the right of Orange Book protected workers to elect benefits under the Orange Book as well as the proviso that forced assignments of Waycross workers to unfilled Raceland positions be accomplished in reverse seniority order.

AWARD AND ORDER

This Committee renders the following Award and Order:

1. The Committee has jurisdiction over the subject matter of this dispute;

2. Within thirty days of the date stated below, the parties shall adopt the Carriers' October 15, 1986 proposal, with modifications consistent with our Opinion, as the Implementing Agreement governing the Waycross-Raceland Coordination;

3. The Answer to the Organization's Issue No. 1 is "Yes";

4. The Answer to the Organization's Issue No. 2 is "No";

5. The Answer to the Organization's Issue No. 3 is "Yes";

6. The Answer to the Organization's Issue No. 4 is specified in (2) above;

7. The Answer to the Question at Issue presented by the BRC General Chairman on the C&O is "No."

Dated:_____, 1987

R. P. Wojtowicz
Employees' Member

J. T. Williams
Carriers' Member

John B. LaRocco
Neutral Member