IN THE MATTER OF ARBITRATION BETWEEN

GERALD J. HUGGINS,
LINDELL B. RUDLOFF,
ERVIN J. KLOESS and
EUGENE F. MOORE

and

NORFOLK AND WESTERN RAILWAY CO.

Pursuant to New York Dock II Conditions

DECISION

Background

On June 28, 1985, Robert O. Harris was nominated by the National Mediation Board to serve as the neutral member of a New York Dock arbitration committee to resolve a dispute involving the Norfolk and Western Railway Company and four former non-union employees of the recently merged Illinois Terminal Railroad, pursuant to Section 11(a) of the New York Dock II conditions. Mr. George C. Ripplinger, Jr. was designated as the representative of the claimant employees and Mr. Marcellus C. Kirchner was designated by the Norfolk and Western Railroad as its committeee member

A hearing was held on September 4, 1985, in Chicago, IL, at which each of the claimants as well as the Carrier had an opportunity to present oral testimony as well as documentary evidence and briefs to support their respective positions. Thereafter, on October 21, 1985, the parties submitted additional

written comments.

The matter is now ready for resolution.

Background Facts

On June 19, 1981, the Interstate Commerce Commission (ICC) authorized the Norfolk and Western Railroad (N & W) to acquire substantially all of the assets of the Illinois Terminal Railway Company (IT) in Finance Docket No. 29455. The purchase was consummated on September 1, 1981. The ICC, as part of its approval, imposed certain labor protection provisions which are commonly referred to as New York Dock II conditions (360 ICC 60). Under these conditions employees affected by a transaction are guaranteed certain compensation for a period of up to six years as well as other benefits.

As will be discussed more fully below, Claimants herein were management officials of the IT and were notified by letter, dated August 14, 1981, and signed by John R. Turbyfill, Chairman - Board of Managers of the N & W, that their service with the IT would no longer be required after September 1, 1981. The letter went on to say:

> In recognition of your service to Illinois Terminal and in order to aid you in making a transition to another situation, we will provide you with one year's salary with appropriate deductions on September 1, 1981, as a separation allowance.

On November 10, 1983, Claimants' attorney notified the N & W that, "As the ICC has declined to intercede in this matter and has directed us to undertake arbitration, I am hereby making

demand upon the N & W to arbitrate the disputes..."

Issues Presented

A. Are Claimants Gerald J. Huggins, Lindell B. Rudloff, Ervin J. Kloess, and Eugene F. Moore "employees" within the meaning of the New York Dock Conditions and therefore entitled to protective benefits under the Conditions?

B. If the Arbtrator finds that any of the Claimants is entitled to protective benefits under the Conditions, what is the nature and extent of such benefits?

Applicable Statutory and Administrative Provisions

49 United States Code Section 11347.
Employee protective arrangements in transactions involving rail carriers.

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

In accordance with this statutory directive, the ICC set forth the protective conditions required in its decision in New York Dock II, Appendix III (360 ICC 60) and defined covered employees as follows:

Article I

1. - Definitions...
   (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
   (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad

because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

* * *

7. Separation allowance.--A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

* * *

Article IV of the same Appendix states:

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organzation with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

Facts

Each of the four Claimants was employed by the IT in a

position which was listed in the annual report of the IT as "Management" and one, Mr. Rudloff, was appointed by the Board of Directors rather than by the President of the IT. They were also listed as the head of their respective departments on a list of "All Appointed Non-Contract Positions". Their duties and job histories may be summarized as follows:

Mr. Lindell B. Rudloff was first employed by the IT in 1941 as a clerk and was a member of the Brotherhood of Railroad and Airline Clerks. In 1962 he was appointed Assistant to the General Auditor and left the bargaining unit, although he retained seniority until his final separation in 1981. In 1965 he was appointed Assistant Controller; in 1966 he was elected Treasurer; in 1970 he was appointed Controller; in 1978 he was elected Chief Financial Officer; in 1979 he was elected Vice President - Finance and later Vice President - Finance and Treasurer. At the time of his separation he was paid $43,600 per annum. Mr. Rudloff testified that when he received his separation notice he did not attempt to exercise his clerk seniority and did not know that he could do so. He indicated that he thought that the N & W would notify him if he had any rights other than the receipt of one year's termination pay. The job description for the job of Vice President - Finance and Treasurer lists the major function of that office as, "supervises and directs all finance, accounting and data processing functions of the Company." He was responsible to the Board of Directors and reported directly to the President of the IT. Eight individuals reported to him.

Mr. Eugene F. Moore was first employed by the IT as Chief, Special Agent in 1968. He had previously been employed by the Terminal Railroad of St. Louis, beginning as a patrolman. When employed by the Terminal Railroad he had been a member of a bargaining unit; however, as an employee of the IT he had never been in a bargaining unit. Mr. Moore was promoted to Director - Security & Special Services; and in 1977 became Chief Security Officer; in 1978 he became Director - Special Services; in 1979 he became General Superintendent which was his first job outside of police work. In that capacity he was responsible for the "direction, execution and management of the Transportation, Mechanical and Engineering Departments." While one of his listed job duties was being responsible for the budget for the activities under his jurisdiction, he testified that he never performed this function. At the time of his separation he was being paid $38,000 per annum. He reported to the Vice President - General Manager and in turn fourteen individuals, including the General Superintendent Motive Power and Equipment, reported to him.

Mr. Gerald J. Huggins was hired in 1975 as Trainmaster. He had previously been employed by the Rock Island Railroad and had begun work as a switchman within a bargaining unit. He had worked his way up to fireman, engineer, and then became acting roadman of engines for the Rock Island. In 1976 he became General Road Foreman of Engines for the IT; in 1977 Superintendent of Motive Power; and in 1978 he was appointed

General Superintendent - Motive Power and Equipment. At the time of his separation he was being paid $33,900 per annum. His major duties were supervision of repair and maintenance of locomotive power as well as all lighting, electrical and heating systems in all shops and repair and maintenance of all shop machinery. He reported to the Vice President & General Manager; three individuals reported to him.

Mr. Ervin J. Kloess was first hired by the IT in 1946 as a Clerk - Accounting and was at that time a member of a bargaining unit represented by the Brotherhood of Railroad and Airline Clerks. In 1949 he was promoted to Chief Clerk Purchasing; in 1959 he was promoted to Purchasing Agent; in 1973 he became Director of Purchasing & Materials; in 1978 he was appointed Director Materials Management. At the time of his separation he was being paid $37,945 per annum. He was in charge of procurement for the IT, including the leasing of both the automotive fleet and the rolling stock for the railroad. When notified of his termination he did not attempt to use his seniority to go back into the bargaining unit from which he had been promoted in 1949. He reported directly to the President; three individuals reported to him.

Contentions of the Parties

Claimants contend that they are employees of IT; that they owned no stock in the IT; that they did not sit on the Board of Directors of IT; that they did not negotiate their own salary,

benefits, or conditions of separation and that they are accordingly entitled to the protection afforded to all other IT employees by the ICC as part of its order in Finance Docket No.29455, granting New York Dock II conditions.

The Carrier contends that the historical development of protective benefits in the railroad industry, the legislative history of the federal government's regulation of such benefits through Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C. 11347), the development and application of protective benefits by the ICC and the courts, and railway industry practice all lead to the inescapable conclusion that Claimants, as former top officials of the IT, were not "employees" within the coverage of the New York Dock II conditions at the time of their terminations. The Carrier further contends that the New York Dock II conditions developed out of an historic legislative compromise jointly proposed by railroad management and labor to protect the rank and file members of railway labor from the adverse effects of mergers and consolidations in exchange for an agreement by railway labor not to oppose such transactions by strike or other forms of self-help and that a review of the only two arbitration awards that have addressed this issue shows that carrier "officials" are not entitled to the benefits of the New York Dock II conditions.

Discussion

The definition of "employee" was assumed without discussion

by all Carriers and their employees for many years. The first arbitral decision occurred in April, 1968, and the second this year. There have, however, been several court decisions attempting to define "employee" for the purpose of ICC-imposed labor protection. Furthermore, although the term "employee" is used in the Interstate Commerce Act, it is never defined in that Act. Simply studying the entimology of the word "employee" will not suffice; rather it will be necessary to review the specific use of that word by the ICC and the courts in the context of job protection.

The history of the use of the term "employee" apparently goes back to Title III of the Transportation Act of 1920, which dealt with disputes between carriers and their employees and subordinate officials. The definition of subordinate official was delegated to the ICC which was to make the definition by regulation. The ICC in Ex Parte 72, on February 5, 1924, listed the various positions which it considered to be subordinate officials. It indicated that it would upon request attempt, in subsequent proceedings, on a case-by-case basis, to add to the definition of who was a subordinate official. It should be noted that none of the Claimants were subordinate officials under the ICC definition. Subsequently, in 1926, Congress, in an attempt to further regulate the relations between carriers and employees, passed the Railway Labor Act. Congress again made reference to employee or subordinate official as defined by the orders of the ICC. Because of the unrest in the railroad industry, in 1936 the

carriers and the representatives of the organized employees entered into an agreement which has become known as the Washington Job Protection Agreement. That agreement is the direct linear predecessor of the New York Dock II conditions under which Claimants seek protection. However, notwithstanding that Agreement, an attempt was made to get further legislation from Congress, which would allow greater flexibility on the part of the ICC in allowing consolidations and mergers. The hearings which formed the basis for the subsequent legislation included testimony by George M. Harrison, the President of the Clerks Union, recommending that there be "fair and reasonable protection for the rights and interests of the workers that may be adversely affected" by any merger. In response to a question regarding the possibility of protection for management itself, since they might also be affected, Mr. Harrison noted:

> Most of our supervisory and management staff members have been promoted from the ranks. They retain their rights to the classified service while they are so occupied, and, should they discontinue a position of one of those persons, they would then slide back or go back, I should say, to the classified service. (Report of the Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Congress, 1st Session, at page 245 (1939).

In other words, union labor was suggesting to Congress that management at a level above subordinate officials was not in need of the type of job protection that was suggested by Section 5(2)(f) of the Interstate Commerce Act, as amended (49 U.S.C. 11347).

There was the additional implication that the Washington Job

Protection Agreement was not intended to cover management at a level above subordinate officials since such management officials would most probably have the ability to bump down to lower level jobs if need be.

Claimants have indicated that whatever the narrow interpretation of the word "employee" may have been in the minds of Congress prior to 1940, the Staggers Rail Act of 1980, by extending protection to employees of rate bureaus and then stating that "the term 'employees' does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions" must have been intended to clarify 49 U.S.C. 11347.

Unfortunately for Claimants the ICC has not taken the view they espouse. In describing the employee protection which they ordered in this very case, the ICC noted, "Yet NW plans only seven transfers of 'agreement employees'..." Apparently, in 1984 when this merger case was decided, the ICC still was differentiating between types of employees based upon their right to secure collective bargaining representation, whether or not they in fact had such representation.

II

Claimants have not contended that they are "employees" or "subordinate officials" as those words are used in the Railway Labor Act. In fact, Claimants contend that it is wrong to

consider the definition of employee under the Railway Labor Act in judging the correctness of their claim to be "employees" for purposes of job protection.

While the courts may not be in agreement, the ICC's view is contained in its decision in Haskell H. Bell v. Western Maryland Railroad, 366 I.C.C. 64 (1981). In that case an employee of the Western Maryland Railroad had appealed to the ICC complaining that the employee protection provisions which it had imposed had not been observed in his case. A review board of the Comission found "that because he was a management-level employee ... he was apparently not subject to the Commission's protection." Mr. Bell subsequently appealed this decision to the full Commission. In its decision which found that the matter should be handled by arbitration, the Commission made several significant comments on the contentions raised by the parties to the instant case. Mr. Bell had contended that his status should be determined by the ICC definition of the word "employee" under the Railway Labor Act. In its decision the ICC responded to this contention:

> We are required to classify employees under this act for purposes related to employee representation, collective bargaining and jurisdiction of the National Mediation Board. Our power to classify employees under this act is limited and does not extend to the classification of employees for the purpose of employee protection.

The Commission then went on,

> Where we have specifically prescribed arbitration as the remedy for employee complaints, we no longer have authority to become involved in disputes between a railroad and individual parties arising out of the protective conditions.

Finally, the Commission noted that "...the question of whether Mr. Ball's position was labor or management is a proper matter to be resolved at arbitration..." thereby clearly implying there were different employee groups and that an arbitrator should differentiate between various groups of employees in applying the labor protective provisions enunciated in New York Dock II.

III

Claimants really are contending that they are entitled to job protection regardless of what they are called. Claimants believe that the word "employee" should be given its broadest meaning for purposes of job protection. In support of their claim they cite the decision in Newborne v. Grand Truck Western Railroad Company, 758 F. 2d 193 (6th Cir. 1985).. Claimants indicate that since they do not meet all of the tests set forth in Newborne, they, unlike Newborne himself, should be covered by the labor protective provisions. The Newborne case involved an appeal from a finding by a district court that claimant was part of management at the time of his termination and therefore not protected by New York Dock. In affirming the lack of protection the Court listed seven factors: (1) appellant was a supervisor, (2) his salary was $43,200 a year, (3) he clearly would not have been eligible to be part of the railroad bargaining unit representing "employees", (4) the record strongly suggests that plaintiff's skills were transferable, (5) he did acquire a new job shortly after being terminated by Grand Truck Western as an

administrative vice-president at a salary of $45,000 a year, (6) he was one of only 17 executives with his former employer who were protected under a Salary Continuation Plan, and finally, (7) Newborne, under the Continuation Plan, continued to receive his previous salary for six months after his dismissal. The Court further set forth the weight to be given to these factors:

> Facts 1, 2, and 3 numbered above are not dispositive of this appeal. When, however, facts 4, 5, 6 and 7 are added, they appear to tip the balance in favor of affirmance of the District Court's judgement.

Claimants maintain that since they have been unable to obtain equivalent jobs and were not protected under any type of salary continuation plan, the final four criteria enunciated by the Circuit Court have not been met. Accordingly, Claimants believe that if all of the facts cited by the Court have not been met, they will be considered to be protected.

It is clear, however, that criteria (6) and (7) were met even though there was no formal salary continuation plan. Claimants received salary continuation for an entire year. It is true Claimants, for whatever reason, have not been able to obtain equivalent employment. Whether that factor alone would be enough to carry the day for Claimants is subject to some question. There is no indication on the record whether or not Claimants' skills were transferable. In theory one could conclude that they were, but in practice apparently they were not.

Another court case, which was cited by both Claimants and the Carrier is Edwards v. Southern Railway, 376 F.2d 665 (4th Cir.

1967). In that case the son of the former General Manager and a stockholder in the company was the Chief Engineer and he claimed protective benefits. The Court found that:

> ..."employee" as used in the present context by Congress and the ICC surely does not include the principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of consolidation.

The Court then footnoted two cases. In one, the court had followed the definition of "employee" as contained in the Railway Labor Act. In the other, the court concluded that the legislative history of Section 5(2)(f) of the Interstate Commerce Act "leaves no doubt that the term 'employee' as used therein does not include the vice-president and general manager of a railroad."

IV

There have been two arbitration decisions involving the definition of "employee" for purposes of labor protection. In the first, Award No. 51 of the Arbitration Committee, ICC F.D. No. 23011, Referee David R. Douglas held:

> The Record in this case shows that the claimant was not employed in any craft or class covered by the bargaining unit during the period from February 1, 1964, until September 20, 1966. During said period of time the claimant was an official of this carrier and, as such, had voluntarily placed himself in a position beyond the coverage of the protective features as prescribed by the ICC in Fiance Docket 23011. The claimant was not an employee, with the comtemplation of the protective features, at the time of the merger or at the time yardmaster positions were abolished.

In the second case, Bond and Union Pacific Railroad, decided September 25, 1985, Lamont E. Stallworth, the neutral member of an arbitration committee appointed pursuant to New York Dock conditions found that neither the Assistant Controller-Accounting Operations nor the Manager Personnel Accounting were "an 'employee' subject to the protection of the New York Dock conditions." Arbitrator Stallworth reviewed the cases which Claimants have cited in this case and especially distinguished the Newbourne decision, cited above, noting:

> ...that the court in Newbourne did distinguish the claimant as being a part of management at the time of his termination. This distinction apparently in the Court's view brought the claimant outside the definition of employee.

It was further noted in the decision that the use of the term "non-agreement employee" was not intended, in normal usage, to extend to encompass "officials" or "principal managers".

Conclusion

This Committee is not persuaded that the generic definition of employee is the one intended by Congress or by the ICC.

Despite the very able presentation by counsel for the Claimants, the Committee is of the view that the Staggers Rail Act of 1980, by amending the coverage of the labor protective provisions to include employees of rate bureaus, clearly indicated that it was not Congress' intent to include within the protections, either of the positions of "treasurer" or "comptroller". Accordingly, whatever argument could have been

made prior to 1980, since that date, Mr. Rudloff as Vice President - Finance and Treasurer of IT clearly was not included within the labor protections afforded by the ICC to former employees of the IT.

The decision regarding the other three Claimants must be made on the basis of logic, reasoning, and the general history of the railroad industry usage of the word "employee". As noted in the discussion above, the ICC has never taken a broad view of the term "employee".

While labor protective provisons were created because of the insistence of organized labor, the ICC realized that if organized labor was to be protected, at least the unorganized worker in equivalent jobs must also be protected. But the ICC clearly differentiated between "labor" and "management" in Bell v. Western Maryland RR, supra. It has regularly differentiated between "management", "subordinate officials", and "employees". It has, furthermore, left to arbitration the exact line to be drawn between these categories.

The Claimants contend that if there is a group called management, it includes only the members of the board of directors, the president of the railroad, and, where appropriate, stockholders. This restrictive view, while superficially appealing, belies the traditional usage of the term in the railroad industry. In the Annual Report of the IT all of the Claimants (and six other individuals) were listed as Management. Claimants clearly held jobs of great responsibility

on this small railroad and effectively controlled its ability to operate on a day-to-day basis. The fact that the IT was a small terminal railroad, which did not pay high salaries, in no way diminishes Claimants functions or responsibilities in relation to the other employees of the IT.

This Committee is not persuaded that merely being unable to find suitable employment subsequent to termination by a railroad is sufficient grounds for finding coverage under New York Dock II conditions. It does not believe that the Court in Newburgh was implying so simple a test. For the same reasons, it is not persuaded that the controlling fact in Edwards was the fact that the individual was the son of the chief stockholder of a small railroad. Rather it is the level of responsibility that is inherent in the position that a particular individual holds. This is true even where, as here, the salary of the individual is not comparable to that paid to individuals who hold similar positions on larger railraods.

Accordingly, it is this Committee's conclusion that, based on all of the facts present in this case, the Claimants, Huggins, Kloess, and Moore are not "employees" for purposes of the protections afforded by the New York Dock II conditions. It is, therefore, unnecessary to reach Question B. raised by the parties.

Neither the Carrier nor the Claimants have raised before the Committee the effect of Section 7 of Appendix III. This Committee, therefore, has not ruled on whether the acceptance of

one year's salary as a lump-sum payment by Claimants has waived any other rights which they might have had under other sections of the New York Dock II conditions.

During the course of the hearing a question was raised regarding the "bumping rights" of Messers Rudloff and Kloess, who had been prior to their promotions covered under the IT agreement with the Brotherhood of Railway and Airline Clerks and apparently had retained seniority in that union. Since that question was not briefed by the parties, no ruling will be made on the obligations of the various parties or the procedures which are appropriate in order for an individual to exercise such "bumping rights".

Award

The Committee finds that none of the Claimants was an "employee" protected by the imposition of the standard New York Dock conditions by the ICC in its decision approving transfer of assets of the IT to the N & W in Finance Docket No. 29455 on June 19, 1981.

Robert O. Harris
Chairman

George R. Ripplinger, Jr.
For the Claimants
(Concur/Dissent)

Marcellus C. Kirchner
For the Norfolk & Western
(Concur/~~Dissent~~)

November 26, 1985.