ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN

THOMAS M. CURLEY, CHARLES D. ERNST, KENNETH GROH, MARTIN HOLLAND, TERRY MARTIN, WARREN RICHTER, ROBERT SANFORD, and BILL TRAUTMAN, Claimants

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Carrier

Pursuant to Article IV of the New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000.

ARBITRATOR: DAVID H. BROWN, selected by the Parties

APPEARANCES: For the Carrier -

RICHARD E. JAUDES, ESQ.
Peper, Martin, Jensen, Maichel & Hetlage
720 Olive Street, 24th Floor
St. Louis, MO 63101

For the Claimants -

PAUL C. HETTERMAN, ESQ.
Gray & Ritter
1015 Locust Street, Suite 900
St. Louis, MO 63101

THE ISSUES

ISSUE NO. 1 Did Claimants waive their right to arbitration?

ISSUE NO. 2 Are Claimants "employees" within the meaning of New York Dock Conditions?

ISSUE NO. 3 If Claimants are employees within the meaning of New York Dock, are they "dismissed employees" under the terms of New York Dock?

ISSUE NO. 4 If Claimants are employees under New York Dock, although neither "dismissed employees" nor "displaced employees" as defined therein, are they nevertheless entitled to substantially the same levels of protection as were afforded to members of a labor organization through implementing agreements negotiated pursuant to the provisions of New York Dock such as Implementing Agreement No. 1 effective June 1, 1983?

ISSUE NO. 5 Are Claimants entitled to additional vacation benefits?

ISSUE NO. 1 (Re-stated)

DID THE CLAIMANTS WAIVE THEIR RIGHT TO ARBITRATION?

THE EVIDENCE

Litigation of the instant dispute commenced on April 16, 1984, when Claimants filed suit against Carrier in the Missouri Circuit Court for the City of St. Louis. Carrier filed a timely motion for removal of the case to the United States District Court for the Eastern District of Missouri, requesting that such court assume jurisdiction of the matter because the claim was based on alleged violations of New York Dock Condiditons. Carrier also filed an answer in which it argued that the case should be barred because Claimants had failed to exhaust their administrative remedy of arbitration.

Claimants vigorously resisted Carrier's efforts to remove the case to the United States District Court, arguing that their claim was based upon "a simple action for breach of contract".

On November 1, 1984, United States District Judge Steven Limbaugh ruled that Carrier's removal of the lawsuit was proper, holding that the instant claims are based on protective conditions imposed by the Interstate Commerce Commission under Finance Docket 30,000.

In the course of time, fairly extensive discovery proceedings were had, and Carrier filed a Motion for Summary Judgment based upon its claim that the redress of the involved grievances can orly be had through arbitration. On November 21, 1984, Judge Limbaugh stayed the lawsuit pending arbitration, and on January 29, 1985, the parties entered into an Arbitration Procedure Agreement. The parties thereafter selected the undersigned as sole arbitrator of the dispute. Oral hearings before the undersigned were held in St. Louis on May 14, 1986, and February 12, 1987, and final briefs were submitted by both parties on April 6, 1987.

Article I, Section 11. Arbitration of disputes.--(a) of New York Dock protective conditions provides in pertinent part as follows:

> "In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix . . . within 20 days after the dispute arises, it may be referred by either party to an arbitration committee..."

POSITION OF THE CARRIER

Carrier argues that the arbitration remedy as just set out is compulsory and exclusive, citing Walsh v. United States, 723 F.2d 570 (7th Cir. 1983) and Swartz v. Norfolk & Western Railway Co., 589 F.Supp 743 (E.D. Mo. 1984). Language is quoted from the latter decision which, after referring to Eighth Circuit decisions involving similar

arbitration clauses to the "may" clause found in New York Dock Conditions, states as follows: "The chosen construction has been that the purpose of the 'may' language is to give the aggrieved party a choice--arbitration or abandonment of the claim."

Carrier relies heavily on the case of Reid Burton Construction, Inc. v. Carpenter's District Council of Southern Colorado, 614 F.2d 698 (10th Cir. 1980). Special references are made to the fact that Claimants "engaged in extensive pre-trial discovery" and persisted in pursuing their litigation in federal court after notice that the correct remedy is in arbitration.

POSITION OF THE CLAIMANTS

Claimants maintain that the filing of a breach of contract suit in state court could not waive any federal right. Claimants point out that at the time their suit was filed "no law, either federal or state, prohibited such action." They point out that Judge Limbaugh held, on November 1, 1984, that the action arose out of a railroad consolidation pursuant to the Interstate Commerce Act and therefore the federal court had original jurisdiction, that on November 8 Carrier filed its Motion for Summary Judgment based on the mandatory arbitration proceedings required under New York Dock and that on November 21, 1984, the parties entered into a consent order by which the lawsuit was stayed pending arbitration.

Claimants stressed the point that at the time they filed their lawsuit in the state court there was no federal law in the Eight Circuit establishing the mandatory nature of arbitration in cases such

as theirs and that it was not until July 17, 1984, that Judge Limbaugh handed down his decision in the Swartz case cited above.

Finally, Claimants emphasize the fact that prior to the entering of the consent order, Carrier had at no time sought arbitration on its own behalf.

ANALYSIS AND OPINION

We concur with Carrier's view that arbitration of this dispute is mandatory. However, we find no basis for holding that Claimants have waived their right to arbitrate the dispute.

The Reid Burton case cited above involved facts which are not remotely analogous to those before us. From the record before us there is no reason to question the good faith of Claimants in seeking to litigate the matter in state court at the time such action was taken. Indeed the law was not settled at the time. Contrary to the factual situation which obtained in Reid Burton, we see no evidence that Claimants, at any time, were less than forthright with Court and Carrier.

Counsel for Carrier complains that Claimants improperly took advantage of discovery procedures available in federal court but not available in arbitration, contending that such conduct should be held to constitute a waiver of the right to pursue arbitration. In connection with this argument counsel cites the Reid case. The court in Reid offers no rationale in support of its comment but does cite a case on the point which leads to two other cases. The case cited is Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2nd Cir. 1968). In such

case the appellant had sought a stay pending arbitration some two years after the suit was filed. The court held that mere delay in seeking a stay would not constitute waiver in the absence of a showing of prejudice to a party, citing Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2nd 978 (2nd Cir. 1942). Kulukundis involved arbitration under a contract to arbitrate pursuant to the United States Arbitration Act, Title 9, U.S.C., legislation which encouraged arbitration in the maritime and commercial field.

Under the Act the arbitrators were "commercial men" whom we doubt were capable of overseeing discovery procedures in aid of the arbitral process. The abuse of such procedures was not involved in Kulukundis. The court did state that it might consider it improper for a plaintiff "to avail himself of provisional (court) remedies not available in aid of the arbitration" and then, after a long delay, seek a stay of court proceedings in order to pursue arbitration of the dispute.

The other case cited in Carcich is Graig Shipping Co. v. Midland Overseas Shipping Corp., 259 F.Supp 929 (S.D.N.Y. 1966), in which the court denied a motion to stay the proceedings pending arbitration after the plaintiff had brought suit in two federal courts and conducted substantial discovery procedures.

Our examination of these and other cases reveals no case where a court has held that a plaintiff had waived arbitration at the expense of a trial on the merits in any forum.

We further find no case where a court has held that arbitration was waived under circumstances akin to those under review herein.

Furthermore, relative to the use or abuse of judicial discovery procedures, we are of the opinion that an arbitrator under New York Dock has inherent power to authorize discovery in aid of arbitration. Certainly there is nothing in the record which would justify the denial of Claimants' right to arbitration under Section 11.

DECISION

We hold that the dispute before us is arbitrable.

ISSUE NO. 2 (Re-stated)

ARE THE CLAIMANTS "EMPLOYEES" WITHIN THE MEANING OF NEW YORK DOCK CONDITIONS?

THE EVIDENCE

Martin Leonard Holland, at the time his employment with MoPac was terminated on June 17, 1983, held the position of Director of Marketing, Lumber, Forest Products and Paper, drawing a salary of $57,600.00 per year.

At the time of the severance of his employment relationship with the carrier, Mr. Holland was five levels on the organizational chart below MoPac President R. G. Flannery. Mr. Holland reported to General Manager Marketing--Commodities B. J. Maeser, who reported to Assistant Vice President Marketing J. R. Colvin, who reported to Vice President--Marketing J. M. Ostrow, who reported to Senior Vice President--Marketing G. A. Craig, who reported to President Flannery.

Mr. Holland had commenced his employment with MoPac in 1962, beginning as a mail clerk and working in a total of 27 different jobs during his railroad career. In his position as a director of

marketing, Mr. Holland had three people who reported to him directly and ten reporting to him indirectly, including a secretary who worked for the entire group. The principal function of the group was to "make rate adjustments that hopefully would get us some business that produced a profit".

Unlike some of his superiors, Mr. Holland received no special benefits such as bonuses, country club memberships, company automobile or use of a company plane or business car. Nevertheless, Mr. Holland was said to be "totally responsible for marketing and revenues associated with lumber, forest products, paper and consumer goods" amounting to over $184 million per annum. His written job description included the following: (1) directing the operation of the annual Lumber, Forest Products, Paper and Consumer Goods Commodity Module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on a course of action essential to the achievement of revenue and profitability of objectivities; and (3) establishing priorities and measuring the result of the productivity of subordinates.

Upon his leaving the carrier, Mr. Holland commenced working for an insurance agency owned by his family. Mr. Holland testified that in his new employment he received none of the fringe benefits which he received with the railroad, and that he is making substantially less money.

However, before he left the carrier, Mr. Holland was offered a job in Omaha comparable with the one which he had in St. Louis. He refused

such offer because of family considerations and was then offered a better job in Omaha, paying $80 thousand per year with the prospect of an annual bonus amounting to $20 thousand. Again he opted for personal considerations and refused the offer. Mr. Holland's expertise is, and his experience has been, in the establishment of freight rates. In his last position with the railroad he had no authority to hire or fire employees but could recommend disciplinary action.

Charles Ernst, at the time of his leaving the employment of Carrier, was Director of Marketing Coal, Ores, Aggregates and Metals, being paid a salary of $55,080 per year. Mr. Ernst began his employment with MoPac in 1955 as a messenger. Ten years later he was promoted to his first supervisory position. As of the date of the hearing herein Mr. Ernst was fifty-five years of age.

In his position as a director of marketing with MoPac Mr. Ernst was at the same organizational level as Mr. Holland and in the same chain of command. And although his salary was slightly less than Mr. Holland's, he supervised eighteen people and was said to be responsible for nearly 600 million in revenue per year.

Like Mr. Holland, his chief responsibility was working out rates with respect to the commodities under his jurisdiction. Responsibilities covered in his job description included the following: (1) directing the operation of the coal and coke, ores, aggregates, and metals commodities module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on courses of action essential to the achievement of revenues and profitability

objectivities; and (3) establishing priorities and measuring results of the productivity of subordinates.

Mr. Ernst's group of nineteen people shared one full-time secretary and another employee who worked as a secretary for the group part of her time. His fringe benefits and "perks" were identical with those of Mr. Holland. He had no authority to hire or fire employees.

Mr. Ernst was offered a position in Omaha as Market Manager, Energy, with salary and benefits commensurate with those received in St. Louis. He declined the employment and elected to take a job as director of maintenance with his church, with a pay cut in excess of 50% and benefits not comparable with those which he received while in the employment of MoPac.

Thomas Curley, at the time he left the service of Carrier, was serving as Director of Marketing Services at a salary of $61,000 per year. Mr. Curley was at the same organizational level as Messrs. Holland and Ernst; however, he was in a different chain of command. Mr. Curley commenced work for MoPac in 1949 as a messenger/mail clerk. In 1960, he became Chief Clerk, occupying his first supervisory position. He was assigned revenue accountability for approximately $199 million in revenue per annum. Among his responsibilities as detailed in his job description were the following: (1) supervising 84 employees, 10 reporting directly and 74 indirectly; (2) staying abreast of swiftly changing activities brought on by increased competition as a result of deregulation; (3) analyzing and making decisions concerning

competitive forces; and (4) analyzing and making decisions concerning the restrictions on anti-trust immunity.

Mr. Curley testified that his time "was taken up mostly by handling rate bureau mergers, rate bureau agreements, bureau allocations deregulations, and things of that sort." His office accommodations, secretarial help, benefit, perks and authority were comparable to those afforded Holland and Ernst.

Mr. Ernst was offered a position in Omaha comparable to that which he occupied in St. Louis. However, he had four children at home with two of them in school. Rather than dislocate his family under such circumstances he, being just fifty-five years of age, elected to take early retirement which he did, effective July 15, 1983. He swore that it was not his intention to take early retirement until he was faced with the sole option of moving his family to Omaha.

Kenneth Groh was Manager, Marketing Lumber and Forest Products at a salary of $50,760 per annum when he left the service of Carrier on June 13, 1983. Mr. Groh's direct supervisor was Martin Holland. He confirmed Mr. Holland's testimony as to responsibilities, office facilities and help, benefits etc.

Mr. Groh commenced work for the carrier on July 24, 1943, as a messenger. He advanced to a supervisory position in 1960. As Manager of Marketing, Lumber and Forest Products, he had five people under his supervision. He was assigned responsibility relative to $88 million in revenue. This was a part of the $184 million placed in Mr. Holland's area of responsibility.

Mr. Groh had no authority to hire or fire anyone. For some time prior to the announcement of merger plans he had expressed a tentative plan to retire at age 60. He declined transfer to a comparable job in Omaha. At the time he had a son in college who was living at home and there were other family considerations which made a move to Omaha undesirable. Mr. Groh did retire and remains in such status.

Terry Martin was Assistant Manager of Market Development for Chemicals and Petroleum Products at the time he left the employment of MoPac. Carrier offers no argument relative to the status of Messrs. Richter, Sanford and Trautman.

POSITION OF THE CARRIER

The position of the carrier may be summarized as follows:

Claimants Martin Holland, Charles Ernest, Thomas Curley, Kenneth Groh and Terry Martin are not employees within the meaning of New York Dock because they were MoPac officials as opposed to rank and file employees or subordinate officials. While the Interstate Commerce Commission (I.C.C.) has not undertaken a definition of the term "employee" as it is used in Dock, nevertheless an examination of relevant statues, railroad history, and case law establishes that such term includes rank and file employees and subordinate officials but excludes officials such as the five named claimants. It is the carrier's position that the Commission, when it used the phrase "employees of the railroad who are not represented by a labor organization", was only extending the protection of New York Dock to

those employees and subordinate officials who are entitled to union representation but who are not represented, the work of such employees and subordinate officials having been defined by the I.C.C. pursuant to Section 1, Fifth, of the Railway Labor Act. Previous to the enactment of such Act the Commission had also defined "subordinate official" under the mandate of Congress in its enactment of the Transportation Act of 1920.

The Commission, when it used the phrase "employees of the railroad who are not represented by a labor organization" in Article IV of New York Dock Conditions, was using the term "employee" in the accepted Railroad Industry manner--to include only those rank and file employees and subordinate officials who are subject to and entitled to unionization but were not unionized. Carrier's position is supported by the following court decisions:

McDow v. Louisiana Southern Ry. Co., 219 F.2d 650 (5th Cir. 1955)

Edwards v. Southern Ry. Co., 219 F.2d 650 (5th Cir. 1955)

Zinger v. Blanchett, 549 F.2d 901 (3rd Cir. 1977)

Carrier further relies on the following arbitration awards:

Brotherhood of Railway Trainman v. Southern Pacific Co., (David R. Douglas, Arbitrator) decided April 1, 1968.

In the Matter of Arbitration between Dana R. Bond and Michael J. Topolosky and Union Pacific Railroad Co. (Lamonte Stallworth, Arbitrator) decided September 25, 1985

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. (Robert O. Harris, Arbitrator) decided November 26, 1985.

POSITION OF THE UNION

Claimants argue that both the case law and prior administrative and arbitral decisions establish a fact-sensitive standard which demands a case-by-case analysis. When such standard is applied and a case-by-case analysis made herein, the facts will fully justify a finding that each of the claimants was an employee of Carrier within the meaning of the New York Dock Conditions imposed by the I.C.C.

ANALYSIS AND OPINION

In its ordinary sense, the word "employee" simply means a person who works for another person or entity for compensation in wages or salary. In its broadest sense, the term applies to the chief executive officer of the corporate entity. The resolution of the particular issue now under consideration turns on a determination of the sense in which the term was employed in the New York Dock Conditions imposed by the Commission pursuant to legislation now codified as 49 United States Code, Section 11347, which reads in pertinent part as follows:

> 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). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

The referenced section 11344 is entitled "Consolidation, merger*, and acquisition of control: general procedure and conditions of approval", and Section 11345 is entitled "Consolidation, merger, and acquisition of control: rail carrier procedure". No definition of "employee(s)" is found in sections 11344, 11345, 11347 or elsewhere in Chapter 113, Title 49, United States Code.

Section 405 of the Rail Passenger Service Act (45 U.S.C. 565) (Amtrak Act) contains the following language which we deem relevant:

> § 565. Protective arrangements for employees
>
> (a) Duty of railroads; discontinuance of intercity rail passenger service. A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by discontinuances of intercity rail passenger service whether occurring before, on, or after January 1, 1975.
>
> * * * *
>
> (b) Substantive requirements for protection. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise;
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> * * * *
>
> (3) the protection of such individual employees against a worsening of their positions with respect to their employment.
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> * * * *
>
> (f) "railroad employee" defined.
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> * * * *
>
> As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or

*For the sake of convenience we sometimes use this term in lieu of one or more of the three.

terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

We conclude that the definition of the term "railroad employee" pertains only to subsection (f) and therefore that it gives us no meaningful insight into the intent of Congress. No other definition of employee is set out in the Amtrak Act.

For those of us involved in railroad labor relations the homing beacon is generally the Railway Labor Act, 45 U.S.C. Chapter 8. Paragraph Fifth of Section 151 defines "employee" for the purposes of the Act, as follows:

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.
>
> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Our instinctive reliance on the Railway Labor Act is especially apparent in the arguments made herein on behalf of Carrier and in two of the three arbitral awards relied on by Carrier. We now consider all three of such awards.

Award No. 51 of Arbitration Committee, ICC F. D. NO. 23011, (David R. Douglass, Referee) predates New York Dock and contains insufficient explanation of its holding to provide meaningful precedent relative to the instant dispute.

Bond and Topolsky v. Union Pacific Railroad Company (hereinafter Bond) held that the U.P. Assistant Controller--Accounting Operations and its Manager Personnel Accounting were not "employees" subject to New York Dock at the time of their termination from service. We examine langage from the award which justifies its holding.

> In the Committee's opinion Section 1, Fifth offers guidance as to the scope of the unionization and the term "employee" as including rank and file employees and subordinate officials. It is worth noting that the framers of Section 1, Fifth used the term "subordinate official" but excluded the term "official" of the carrier. On this point, the Carrier contends that when the ICC used the phrase "employees of the railroad who are not represented by a labor organization" it was extending the protection of New York Dock conditions only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented. In the Committee's view a review of the industry use of the term "employee" supports this contention. See, e. g. Harry Lustgarten Principles of Railroad and Airline Labor Law (Omaha: Rail Publications) pp. 29-32 and Ernest Dale and Robert L. Raimon: Management Unionism and Public Policy on the Railroads and Airlines" (Industrial and Labor Relations Review, Vol. II, No. 4, July, 1985).

It should be remembered that in the Railway Labor Act the Congress did not in any way or manner address the subject of what protective conditions for employees would be appropriate to redress the adversity which would be imposed on some employees through the merger or consolidation of the operations of two or more rail carriers. Dictionaries present words in their multiple meanings. And so it is that Congress in its legislation uses a single word in multiple senses,

usually defining, in each piece of legislation, the word as it is to be understood therein. When no definition is given, it is generally taken to mean that the word is to be interpreted in its general sense. We think it significant that in searching many dictionaries we have discovered only one which offers more than one simple definition of the word "employee".

Railroads have played a most vital role in the development of the resources of our nation. Because of their importances to our economic growth and national defense they were granted subsidies and made subject to regulation. The same two factors have motivated Congress over a period of many years to pass legislation designed to promote harmony between railroad management and labor, thus avoiding crippling work stoppages and industrial strife. The goal was substantially achieved in 1926 with the adoption of the Railway Labor Act. The two forces of industry, labor and management, were harnessed.

For the purpose of this discourse we need give attention to only two of the stated purposes of the Railway Labor Act as found in its Section 151a: "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter". Only these two subsections (and the definition quoted above) mention "employees".

It is apparent that the intent of the Railway Labor Act was to draw a line of demarcation between management and labor so as to give full recognition to the right of employees to bargain collectively with their employer, while recognizing the right of proprietorship of the employer carrier to the extent necessary to preserve its fundamental right to manage its workforce. Such latter right cannot be maintained unless the managerial cadre is big enough to insure that the paramount interest of the proprietor will not be entrusted to people with divided loyalties.

The considerations bearing on the drawing of this line of demarcation are quite different from those relevant to the issue of which employees of a carrier should be protected from adverse effects on their employment status brought about by consolidation, merger, and/or acquisition of control of rail interests. The Congress that wrote the Railway Labor Act was a different Congress addressing totally different concerns from those addressed by the Congress which passed that legislation codified as 49 United States Code, Section 11347; and it should be kept in mind that the essence of our charge is to give effect to the will and intent of Congress in Section 11347, particularly as relayed to us by the Interstate Commerce Commission. This conviction is re-enforced by a diligent study of all I.C.C. decisions having any relevancy to the issue. Such decisions span a long period of time and reflect a consistent policy, of a Commission of changing membership, to faithfully carry out the will of Congress without legislative mutation.

We strongly disagree with the conclusion of the arbitral committee in Bond quoted above. Such paragraph is the basis of the committee's decision. Let us examine the language:

> "In the Committee's opinion Section 1 Fifth offers guidance as to the scope of unionization and the term 'employee' as including rank and file employees and subordinate officials."

Section 1 Fifth (codified in U.S.C.A. as Section 151, Fifth) of the Railway Labor Act was not intended to provide a generic definition of an employee in the railroad business or otherwise. Its purpose was simply to limit the class of employees subject to unionization, including, however, specifically such subordinate officials as should be declared eligible by definition of the Interstate Commerce Commission. It simply cannot be said that in either 1926 or 1934 or at any time since, Congress, in framing the Railway Labor Act, has attempted to "offer guidance" on the issue as to who are "employees" under New York Dock.

> "It is worth noting that the framers of Section 1, Fifth used the term 'subordinate official' but excluded the term 'official' of the carrier."

We do not deem the stated fact to be noteworthy. Had the framers provided for the unionization of officials then the Railway Labor Act would have been stillborn.

From this foundation of speciousness the committee proceeds:

> "On this point, the Carrier contends that when the ICC used the phrase 'employees of the railroad who are not represented by a labor organization' it was extending the protection of New York Dock conditions only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented. In the Committee's view a review of the industry use of the term 'employee' supports this contention."

At this point the arbitral committee cites the writings of Harry Lustgarten and Dale and Raimon cited above. We have searched the cited works in vain for support of the stated thesis. Industry use of the term "employee" relates in the main to the administration and effect of the Railway Labor Act. However, it is significant that industry discussions of protective conditions for redress of adverse effects of merger frequently use specific language to embrace consideration of "all employees". (Emphasis ours)

The reference to Harry Lustgarten's Principles of Railroad and Airline Labor Law cites pages 29 through 32. On such pages a single topic is discussed: "Employees Subject to Union Organization and Representation." The syllabus reads as follows:

> "As a result of the definition of the word 'employee' in Section 1, Fifth, union organization and representation rights include not only ordinary employees but also extends to 'subordinate officials'. The Interstate Commerce Commission, which is authorized to make the determination of what employees are included in these classifications, has been rather indefinite but has tended to draw a line between 'subordinate officials' and officers rather high into the supervisory levels."

Nowhere on the referenced pages does Mr. Lustgarten address the subject of the definition of "employees" as the term relates to employee protection.

Management Unionization and Public Policy on the Railroads and the Airlines by Ernest Dale and Robert L. Raimon is not remotely concerned with the definition of "employees" under New York Dock or other provisions for employee protection. The principal theses of the article are the voracious appetite of the National Mediation Board for expansion of the definition of subordinate officials, the continuing

tendency of the Interstate Commerce Commission to satisfy the Board's hunger, and the plight of the carriers in dealing with the trend. The cited commentary provides no help in the resolution of the instant dispute.

We now turn to the court decisions cited in the Bond opinion. McDow v. Louisiana Southern Railway Co., 219 F2d 650 (1955), decided by the Fifth Circuit Court of Appeals, held that the question of whether a former vice-president of the Louisiana Southern Railway Company was an "employee" entitled to employment protections afforded by I.C.C.-imposed employee protective conditions, should not have been decided by the district court, which had concluded that "a study of the legislative history of (Section 5 (2) 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." No specific reference is made relative to the legislative hearings. A specific reference to such hearings is made in the Huggins opinion hereafter discussed.

Edwards v. Southern Railway Co., 376 F2nd 665 (1967) involved the Oklahoma conditions for employee protection. Edwards was a stockholder, and an employee (Chief Engineer), of a small family-owned railroad of which his father was the chairman and chief executive officer. The Fourth Circuit Court of Appeals held that he was not an employee covered by the Oklahoma conditions. The most significant language in the opinion, we think, is the following:

> "We believe, however, that 'employees' as used in the present context by Congress and the I.C.C. surely does not include the

principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of consolidation." (emphasis supplied)

In this language, we believe, the court exposed what should be, at least, the justification for protective conditions: to protect railroad employees whose position with the company is such that it will not empower them to protect themselves. And we believe that such purpose should far transcend the issue of union membership. The Railway Labor Act is a stranger to this consideration.

This understanding of the purpose of employee protective conditions was endorsed to a degree in the case of Newbourne v. Grand Trunk Western Railroad Co., 758 F2nd 193 (1985) in which the Court of Appeals for the Sixth Circuit held that Newbourne, a former supervisor on the DT & I who reported directly to a vice-president, was not an employee under Section 11347. The court enumerated seven factors used by the district court in its arrival at the same conclusion. The judges were impressed by the fact that Newbourne possessed skills which were "transferable", citing the fact that during 21 of the 30 years of his career he had been employed outside of the railroad industry. Thus the court felt that Newbourne could "take care of himself". While we appreciate the court making a distinction between employees who can take care of themselves and those who cannot, we think that resort to "transferable skills" should not be required of a career railroad man, even one with only nine years of service. The elusive nature of such insurance is demonstrated by the fact that within two years after his

termination, Newbourne, who earned $43,220 with the railroad, was earning approximately $9,000 per year.

Zinger v. Blanchette, 549 F2nd 901 (1977) is not helpful because it provides no definitive ruling on the issue of whether or not Mr. Zinger was an employee eligible for protection, the case being decided on other grounds.

Strong reliance on federal court decisions in the Bond award is subject to serious question. Surely the Congress as well as the Supreme Court has made it plain that it is in the arbitral forum that these disputes should be resolved. It would therefore appear that knowledgeable railroad arbitrators should be able to adjudicate the disputes independent of putative precedential constraints of random fallout resulting from the straying by the disputants into the judicial arena. Yet, to be sure, some court decisions may be educational in providing us with ratiocination helpful in getting to the heart of the matter. The same applies to I.C.C. decisions.

Most instructive, we believe, is the following language of the Interstate Commerce Commission in its decision in Leavens v. Northern Burlington, 348 I.C.C. Reports 962, 975:

> "It is clear that we have jurisdiction over those labor matters which stem from the conditions we adopted at the time the merger was authorized. However, there would have been no conditions had there been no merger. The conditions were adopted to protect affected employees from harm that would be caused by the merger. Our review should be limited to those matters that either result from the merger or which claim violation of a specific condition that was intended to protect against a specific merger-related harm. Obviously, we would review such allegations only to determine whether or not the carrier has failed to implement the protections we required for adversely affected employees.

"However, in dealing with these protective conditions, the Commission is faced with a special problem--defining the extent of our ongoing responsibility to consider alleged breaches of the protective conditions for which an arbitration remedy is provided. In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. (Emphasis ours) This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations. Burlington Truck Lines v. U.S. 371 U.S. 156 (1962); Overnite Transp. Co.--Pur.--Rutherford Freight Lines."

The significance of the quoted language is quite obvious. Of singular interest and instructional benefit is the Commission's declaration that matters such as those before us are deferred to the jurisdiction of arbitrators in order that those "most familiar with the complexities of labor law and the peculiar problems associated with the railroad employees (may) determine disputes arising out of (protective) conditions." Obviously, those not familiar with the complexities of labor law and the peculiar problems associated with railroad employees are without that expert competence which the Interstate Commerce Commission itself disclaims. In our extensive study of I.C.C. opinions we are greatly impressed with the Commission's profound understanding of its charter and the careful restraint it has exercised in its avoidance of infringement on the province of Congress, courts, and arbitral forums, which it has referred to as "quasi- judicial." Thus, in Leavens, the Commission affirms its resolve not to "contravene" the national policy as to labor relations: that is, not to make decisions on matters which are within the realm of arbitral jurisdiction.

It is for this reason that we should not expect I.C.C. decisions to provide precedent for the resolution of the issues before us. And indeed the search for authoritative precedent in I.C.C. decisions is no more proper than looking to the courts to decide the issue for us. It is ironic that the pivotal consideration in the decision of the arbitral board in Huggins, et al v. Norfolk and Western Railway Co. (1985) is the case of Haskell H. Bell v. Western Maryland Railway Co., 366 I.C.C. Reports 64.

Mr. Bell, an employee of Western Maryland Railway Company, lost his job after the Chessie swallowed the WM. He filed a complaint with the I.C.C. alleging that the C&O had violated provisions of the so-called New Orleans conditions imposed by the Commission in WM Control. The matter was routinely referred to the Commission's Review Board Number 5. After hearing, the review board found that "because he was a management-level employee at the time the grounds for the complaint arose, he was apparently not subject to the Commission's protection." The board's decision was appealed to the Commission, and the Commission's decision is illuminative of several of the issues directly involved herein. Basically, Mr. Bell presented two arguments in support of his complaint. We shall discuss such arguments in reverse order to that followed in the I.C.C. opinion. We describe the arguments in the language of the Commission:

> "Mr. Bell argues that while the term "employee" is not expressly defined in the Interstate Commerce Act, its definition in the Railway Labor Act, 45 U.S.C. 151 et seq., compels the conclusion that he is covered by the employee protective conditions. Mr. Bell points to the series of Commission decisions in Ex Parte No.

72 (Sub-No. 1), Regulations Concerning Employees Under Ry. Labor Act."

While in its opinion the Commission does not reveal Mr. Bell's title or describe his duties and responsibilities, it is quite obvious that Bell and his attorneys believed that his position would fit the job description of one of the classes of subordinate officials which the Commission had declared eligible for union representation in one of its Ex Parte 72 decisions. This is most interesting, since in recent cases the carriers have usually taken the position that eligibility for coverage under New York Dock should be limited to employees (including subordinate officials) as defined by the Commission (in Ex Parte 72 proceedings) pursuant to the mandate found in the Railway Labor Act. And in Bell, the Western Maryland based its defense upon argument that Mr. Bell was improperly seeking to expand the group of protected employees and that such expansion could be accomplished "only after notice and hearing in a rule-making proceeding under Ex Parte No. 72 (Sub-No. 1)".

The Commission addressed this issue in succinct language which should serve to dispel the notion that definition of the term "employee" for the purposes of the Railway Labor Act is either controlling or significantly meaningful as relates to the determination of the meaning of the term under Section 11347. The Bell opinion states, page 66,

> "Our power to classify employees under (Railway Labor Act) is limited, and does not extend to the classification of employees for the purpose of employee protection. See Hudson & M. R. Co. Employees--Railway Labor Act, 245 I.C.C. 415, 417 (1941); National Mediation Board, The Railway Labor Act at Fifty, (1976).

Accordingly, none of the decisions in Ex Parte No. 72 (Sub-No. 1) relied upon by petitioner can be used to support a positive determination of his 'employee' status in this proceeding."

Again we advert to the Huggins--N&W arbitration award relied on by carrier, drawing attention to language found on page 17 of the opinion. It is stated: "The I.C.C. has never taken a broad view of the term 'employee'." The award goes on to state,: "But the I.C.C. clearly differentiated between 'labor' and 'management' in (Bell)." The decision refers to language from the review board's decision, using such language as authority in its determination of the issue of whether or not Bell was an employee covered by the New Orleans conditions. However, it is clear that the Commission in no way affirmed any language of the inferior board touching on the merits of the case. Having explained that its Ex Parte 72 decisions were strictly for purposes related to employee representation, collective bargaining and jurisdiction of the National Mediation Board and not intended for purposes of employee protection and having disavowed its intent, competence and jurisdiction to resolve issues such as that before us, the Commission made the following observations: "We believe that this is an arbitral decision, and consequently we may not take any action in the matter....Because the question of whether Mr. Bell's position was labor or management is a proper matter to be resolved at arbitration, and is therefore outside the scope of our jurisdiction, we will not consider the complaint."

The Interstate Commerce has clearly ruled, therefore, that it has no jurisdiction to decide whether or not the claimants in cases such as

that before us are employees covered by the protective conditions of New York Dock. It is patently not appropriate to determine their status on the basis of illusory definitions envisioned in I.C.C. decisions.

As aforenoted, the Interstate Commerce Commission has scrupulously observed the constraints of its organic legislation, recognizing that its duty is to enforce the will of the Congress. It behooves us to do exactly the same, for in spite of the fact that Section 11347 has its roots in the Washington Job Protection Agreement, the legislation must necessarily be viewed in light of the general welfare and not within the narrow interest of railroad owners and labor unions. We find no arcane language in Section 11347 or in New York Dock. Neither do we attach significance to legislative history exposing the presence of partisans at the creation. The following is abstracted from the opinion in Huggins et al v. Union Pacific:

> "(I)n 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 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."

We again stress that the federal legislation which brings us together in this case was by no means a mere ratification of the Washington Job Protection agreement. An-old adage is as follows: "Whose bread I eat, his song I sing." To be sure, President Harrison was singing the song of the Clerks' union when he gave the quoted testimony. And indeed it would be in the interest of the Clerks' union if the protective conditions were restricted to union members. Mention is made of the fact that management officials could "bump down" in order to avail themselves of protection. But if someone is forced to bump down because of a merger, has he not thereby been adversely affected by such merger?

In the final analysis our lengthy research has not revealed, in either legislation affecting railroads and their employees, or in decisions of the Interstate Commerce Commission, any language which would indicate that it was the intent of Congress to deny to claimants the benefit of New York Dock protective conditions. In 21 years as a railroad arbitrator the undersigned has been privileged to observe the

effects of numerous mergers. To contend that only subordinate officials and other employees eligible for unionization will suffer adverse effects from a merger is to ignore reality.

On three, and only three, occasions, the Congress of the United States has definitively addressed the question of what employees should be covered by protective conditions imposed for the purpose of minimizing the adverse effects resulting from reduction of jobs in the railroad industry. Actually, Congress has found it easier to simply exclude certain classes of employees while affording broad coverage for the remainder. Let us examine the legislation.

On November 4, 1979, Congress passed the Milwaukee Railroad Restructuring Act (now Title 45, Chapter 18, Sections 901 et seq). Section 908 made provision for negotiations between the Milwaukee Road and labor organizations representing the employees of such railroad who are adversely affected as a result of a reduction in service by such railroad or a restructuring transaction carried out by such railroad (conditions quite similar to those resulting from mergers, control or consoildations). Section 907 made provision for preferential hiring for all employees separated or furloughed from the Milwaukee (other than for cause) prior to April 1, 1984, and Section 909 provided for supplementary unemployment insurance for all employees affected by reduction in service. (all underlining supplied) And Section 902 (4) states:

"..the term 'employee' -

"(A) includes any employee of the Milwaukee Railroad who worked on a line of such railroad the sale of which became effective on October 1, 1979; but

"(B) 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;"

Pursuant to Section 908, negotiations between the Milwaukee and the labor representatives of its employees took place. The result was adoption of New York Dock Protective Conditions in an instrument identified as Appendix B. Most significantly, Milwaukee management then made the terms of Appendix B applicable to all non-agreement employees except those excluded by Section 902 (4)(A).

On May 30, 1980, the Congress passed the Rock Island Railroad Transition and Employee Assistance Act (now Title 45, Chapter 19, Sections 1001 et seq).

Section 1001 cited a need for adequate protection provisions to insure uninterrupted continuation of services over Rock Island lines and avoid serious repercussions on the economies of the states served by the railroad. Section 1002 included the following among its "Definitions":

"(4) 'employee' includes any employee of the Rock Island Railroad as of August 1, 1979, but 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;"

Section 1005 imposed on the Secretary of Transportation and "the representatives of the various classess and crafts of employees" (not "labor organizations" as in the Milwaukee conditions) responsibility for negotiating protective conditions, with proviso that if they were

unable to reach agreement, the Secretary would unilaterally prescribe such conditions.

On October 14, 1980, the Staggers Rail Act of 1980, Public Lae 96-448 was enacted. Section 219(g) states:

> "The Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendmentsmade by this section with fair arrangements no less protective of the interests of such employees than those established pursuant to Section 11347 of Title 49, United State Code. For purposes of this subsection, 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."

From the foregoing it is evident that each time the Congress has made provision for protective conditions for employees adversely affected by circumstances or events other than mergers, Congress has extended eligibility to all employees below the rank of vice president. The drawing of this line of demarcation is consistent with the philosophy that the protection is due only to those employees who have had little if any control over developments which precipitated the need for protection. It will be remembered that this thinking was advanced by the U. S. Circuit Court of Appeals in Edwards v. Southern Railway, supra.

This doctrine is also consistent with the definition of "employee" found in the unabridged Webster's Third New International Dictionary (G. & C. Merriam Co.), reading as follows: "One employed by another, usually in a position below the executive level and usually for wages". (Emphasis supplied)

SUMMARY OF RATIONALE

We summarize the reasons for our holding on this issue:

1. We believe that while all of the congressional legislation reflects an intent to cover a broad range of employees with protection against the adverse effect of mergers, none of such legislation indicates an intent to exclude from protection employees at the level of these claimants. None of the claimants had the power to affect the merger of MP-UP-WP nor the influence to cushion its impact. Claimants were not really executives of MoPac, and in spite of the large sums of income for which they were nominally responsible, we would venture to say that none of their names was ever mentioned in the company's annual report to its stockholders.

2. The use of the definition "employee" found in the Railway Labor Act is insupportable. Such act has no relevancy insofar as the scope of employee protective conditions is concerned. The fact that the Interstate Commerce Commission Act authorizes the NMB to appoint arbitrators is likewise not relevant to the issue before us.

3. The court cases and arbitral awards relied on by the carrier have been carefully considered. We are unable to recognize them as authoritative precedent.

4. We believe our decision is consistent with the authority delegated us by the Interstate Commerce Commission and with the Commission's consistent adherence to what it perceives to be the intent of Congress.

DECISION

We hold that each of the claimants was an employee of MoPac within the meaning of New York Dock conditions.

ISSUE NO. 3 (Re-stated)

IF THE CLAIMANTS ARE EMPLOYEES WITHIN THE MEANING OF NEW YORK DOCK, ARE THEY "DISMISSED EMPLOYEES" UNDER THE TERMS OF NEW YORK DOCK?

ANALYSIS AND OPINION

Since each of the claimants was offered a position in Omaha comparable to that which he occupied in St. Louis, none of the claimants is a dismissed employee under the definition set forth in New York Dock conditions.

DECISION

The claimants are not "dismissed employees" under the terms of New York Dock.

ISSUE NO. 4 (Re-stated)

IF CLAIMANTS ARE EMPLOYEES UNDER NEW YORK DOCK, ALTHOUGH NEITHER "DISMISSED EMPLOYEES" NOR "DISPLACED EMPLOYEES" AS DEFINED THEREIN, ARE THEY NEVERTHELESS ENTITLED TO SUBSTANTIALLY THE SAME LEVELS OF PROTECTION AS WERE AFFORDED TO MEMBERS OF A LABOR ORGANIZATION THROUGH IMPLEMENTING AGREEMENTS NEGOTIATED PURSUANT TO THE PROVISIONS OF NEW YORK DOCK SUCH AS IMPLEMENTING AGREEMENT NO. 1 EFFECTIVE JUNE 1, 1983?

BACKGROUND

This issue involves the interpretation of Article IV of New York Dock conditions which reads in pertinent part as follows:

> "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."

This would not appear to be an ambiguous provision. The aura of ambiguity is generated by arguments encouraged by arbitral awards which have held that a considerable number of railroad employees are simply not employees.

We have already concluded that claimants were indeed employees of MoPac subject to the protective conditions of New York Dock.

Pursuant to the provisions of New York Dock, the BRAC and carrier entered into Implementing Agreement No. 1 effective June 1, 1983. Upon termination, each of the claimants sought to take advantage of one of the provisions of such agreement. The issue is whether or not such agreement inured to the benefit of the claimants.

POSITION OF THE CARRIER

In support of its argument that claimants are not eligible for any of the benefits accruing to employees under Implementing Agreement No. 1, counsel for Carrier cites a recent arbitration award authored by Neutral Robert M. O'Brien and being styled Benham & Delaware & Hudson Ry. Co. It is the further position of the carrier that the position of the claimants is contrary to public policy. The adoption of such position, it is urged, would pose a serious threat to industrial peace in the railroad industry and create an administrative nightmare.

Carrier argues that the claimants cannot receive the benefits contained in Implementing Agreement No. 1 because they are neither "dismissed employees" nor "displaced employees" under New York Dock. It is argued that New York Dock is designed to "guarantee only minimal protection" to eligible employees. The company further cites

Burlington Northern-St.L. & S.F. Ry. Co.-Control, 360 I.C.C. Reports 788, as authority that "there is no requirement that all employees be treated substantially the same in the event of a merger or control".

Finally, counsel argues that Option 3 in Implementing Agreement No. 1 is not derived from New York Dock but from the February 7, 1965, National Agreement, an agreement having no application to non-agreement employees.

POSITION OF THE UNION

Claimants contest each of the points made by Carrier, pointing out that New York Dock simply establishes minimum protective benefits, that employees are entitled to negotiate more favorable conditions than those in Dock, and that the language of Article IV plainly says that non-agreement employees are to be treated substantially the same as agreement employees.

ANALYSIS AND OPINION

The crux of the holding in Benham is an affirmance of the arbitral awards rejected by us in our discussion under Issue No. 2. For the reasons set forth in such discussion we likewise reject Benham as authentic precedent.

Carrier's position that relief under Dock is limited to employees who are dismissed or displaced as contemplated by Dock Article I, Sections 1.(b) and 1.(c) ignores Article IV. It ignores the fact that the skeletal provisions of Dock constitute simply the minimum protections for employees adversely affected by a merger. It also ignores the effect of Article 1, Section 4, of Dock providing for

negotiation or settlement by arbitration of matter relating to displacement or dismissal of any employees, or re-arrangement of forces.

Adverting to the BN-Frisco-Control decision, we consider Carrier's argument that such holding is authority that "there is no requirement that all employees be treated substantially the same in the event of a merger". As background to consideration of BN-Frisco we quote the following language from the Interstate Commerce Commission in a prior case cited in BN-Frisco. The case is Norfolk & W. Ry. Co. and New York, C. & St.L. R. Co. Merger, 324 I.C.C. Reports 1, 50, and the relevant language reads as follows:

> "Employee conditions.-As previously stated herein and in appendix A, various agreements have been reached between employee representatives and the Norfolk & Western for the protection of employees adversely affected by these transactions. Our authorizations herein will, by reference, be made subject to such agreements. For the benefit of employees not covered by such agreements, the hearing examiner recommended the imposition of protective conditions similar to those imposed in Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177. However, it has been our experience in proceedings of this nature that more adequate protection is afforded by the conditions prescribed in Southern Ry. Co.-Control-Central of Georgia Ry. Co., 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees not covered by the agreements and adversely affected by the transactions."

Appendix A referred to in the foregoing quotation recited that prior to the I.C.C.'s decision the N & W had entered into an agreement with 19 of the principal labor organizations.

The relevant language from BN-Frisco-Control is as follows:

> "Employee protection.-Since we have decided to approve the merger, we must consider the interest of, and provide protection

for, carrier employees. We must determine first, what level of protection should be provided, and second, which employees should be protected.

"This merger will provide a long-term benefit to employees of BN and Frisco by increasing the number of positions on the merged system. The applicants acknowledge that there will be short-term dislocations on their system. We must protect employees from these dislocations. Three alternative protective conditions which we might impose are: the standard protective conditions; these minimum standards, with the amendments requested by RLEA (set out in appendix K); or the protection which BN and Frisco have negotiated with three other labor unions.

"In the past we have imposed differing levels of employee protection for employees who reached an agreement for protection and those who did not. We believe that this proceeding is also an appropriate place to bifurcate the levels of employee protection. Those parties who have negotiated agreements will be provided with that level of protection. Those who have not will be accorded the statutory standard....

"In this case there is no basis for us to exercise our discretion and require a greater degree of employee protection than the statutory minimum....

"The New York Dock conditions are significantly more protective of railroad labor than any previously imposed single set of employee protective conditions. The New York Dock conditions satisfy the employee protection mandated by the statute. They will be imposed for the protection of employees who do not enter into a protective agreement with BN and Frisco prior to consummation of the merger.

"We next turn to the agreements which were negotiated with the Brotherhood of Railroad Signalmen (BRS), Sheet Metal Workers International Association (SMWIA), International Association of Machinists and Aerospace Workers (IAMAW), and Brotherhood of Locomotive Engineers (BLE). These agreements are more protective than the New York Dock conditions and protect not only employees of BN and Frisco but also their wholly owned subsidiaries. The protective period is the same as in New York Dock or in the alternative, the period equal to length of service at the date of merger, with the protective period starting on the date of merger but no benefits to accrue until the employee is affected due to the merger. The displacement allowance is subject to a 6-year minimum.

"For BLE the displacement allowance is a monthly allowance computed by dividing earnings from the last 12 months by the

number of calendar days in the 12 months and multiplying that daily rate by the number of calendar days in the current month. These rates are to be adjusted for general wage increases, and reduced by any changes in laws or agreements which limit availability for work. Dismissal allowances are to be computed in the same manner. However, they are reduced by outside earnings, unemployment compensation, opportunities for available comparable work, and any period the employee would have been furloughed due to emergency conditions.

"The BRS, SMWIA, and IAMAW agreements also compute wages on the basis of the prior 12 months, unless the employee has worked for less than 12 months.

"The employee has the option of electing separation pay 30 days after furlough instead of 7 days provided in New York Dock.

"There are other modifications to the New York Dock conditions which we have reviewed and found to be fair and equitable to the employees and at least as protective as arrangements required by 49 U.S.C. 11347.

"After analyzing these agreements, we are convinced that the interest of carrier employees covered thereby will be adequately and fairly protected by the terms of the agreements, and we find that the agreements do not render the proposed transaction inconsistent with the public interest. When we adopt a labor agreement, we impose it as a condition to our approval of the transaction. We emphasize that these protective agreements shall apply only to those organizations which enter into such agreements with BN and Frisco prior to consummation of the merger...."

Section 11347 makes specific provision for the negotiation by a carrier and its unions of contracts for employee protection independent of I.C.C. control, subject, however, to the legislative mandate that the negotiated protective conditions shall not be below the level of New York Dock. It is noteworthy that the contracts negotiated by the four unions prior to the BN-Frisco merger were "more protective than the New York Dock conditions." For such reason, the agreements were virtually certain to be approved by the Commission, as they were. While the Commission invited other unions to negotiate similar

agreements with the carrier, it made it clear that those not doing so prior to merger would be "accorded the statutory standard", ie. New York Dock.

This bifurcation of the levels of employee protection does not impair the claimants' rights under Article IV. What it does is provide the reason for the use of the language "under these terms and conditions" in Article IV. The addition of "under these terms and conditions" denies to non-agreement employees consideration for protective conditions substantially similar to those negotiated by the unions prior to merger, yet entitles such non-agreement employees to substantially the same level of protection as is negotiated or imposed by arbitration under New York Dock.

If the intent of Article IV was simply to qualify non-agreement personnel of whatever stripe for protection under the strict terms of New York Dock there is no logic supporting protection at substantially the same level of benefits. The language which was employed comes into focus only when we consider the variances in implementing agreements which may be negotiated or imposed for the governance of conditions affecting members of the various bargaining units. Because of the variables involved it makes perfect sense to provide employees outside the bargaining units only substantially (not exactly) the same benefits.

Carrier introduced expert testimony to the effect that affording non-agreement employees such as claimants substantially the same level of protection as that given union members through negotiated accords or

arbitral fiats would be impossible to administer and produce a chaotic situation. We see no such problem, for the word "substantially" imposes a standard of practicality sufficient to quell the chaos feared by management. Common sense dictates that New York Dock implementing agreements affecting union members will (or should) have an identifiable thread of commonality reflecting a consistent carrier policy of fairness to all. It was the intent of Congress, we believe, to make non-agreement employees beneficiaries of that same policy. As surely as the difference in union crafts poses no insurmountable barrier to negotiating fair agreements for all such crafts, so it should be with non-union people who share the adversity brought about by merger.

The law frequently is satisfied with simply substantial compliance with its requirements. Indeed, arbitral law recognizes such principle along with that of equal justice under law. There is no good reason for not providing all classes of railroad employees substantially the same level of job protection when mergers are sanctioned by the I.C.C. Such, we believe, is and has been the will and intent of Congress.

What is the meaning of the language "the same levels as are afforded...under these terms and conditions"?

Counsel for Carrier argues that the underlined words limit protections afforded non-agreement employees to the bare-bones benefits extended to "displaced" and "dismissed" employees, in New York Dock provided such non-agreement employees qualify as being "displaced" or "dismissed" as defined in Dock. Obviously, such construction would

deny to employees like claimants the higher level of protection that was provided to senior clerks in the BRAC Implementing Agreement No. 1. If claimants are entitled to the same benefits they are entitled to collect significantly higher severance pay while refusing an assignment in Omaha. Implementing Agreement No. 1 contains the following language:

> "Employees offered the positions at Omaha must exercise one of the following options within 10 days:
>
> * * * *
>
> (3) Resign from all service and accept a lump sum computed as follows:
>
> * * * *
>
> "b) MP protected employees with 15 or more years service -- computed in accordance with Section 9 of the Washington Job Protection Agreement of May 9, 1936."

Most significantly, substantially the same language is found in Mediation Agreement, Case No. A-7128, dated February 7, 1965, with BRAC, U.P., M.P. and W.P. signatories thereto. We quote:

> "In the case of any transfers or rearrangements of forces for which an implementing agreement has been made, any protected employee who has 15 or more years of employment relationship with the carrier and who is requested by the carrier pursuant to said implementing agreement to transfer to a new point of employment requiring him to move his residence shall be given an election, which must be exercised within seven calendar days from the date of request, to make such transfer or to resign and accept a lump sum separation allowance in accordance with the following provisions:
>
> * * * *
>
> "If the employee elects to resign in lieu of making the requested transfer as aforesaid he shall do so as of the date the transfer would have been made and shall be given (in lieu of all other benefits and protections to which he may have been entitled under the Protective Agreement and Washington Agreement) a lump

sum separation allowance which shall be computed in accordance with the schedule set forth in Section 9 of the Washington Agreement; provided, however, that force reductions permitted to be made under this Agreement shall be in addition to the number of employees who resign to accept the separation allowance herein provided."

We hold that protections "under these terms and conditions contemplates protections provided in implementing agreements negotiated or imposed pursuant to New York Dock Conditions.

Stated another way, implementing agreements negotiated under mandate of New York Dock become an integral part of Dock, that is, a part of its "terms and conditions" mentioned in Article IV.

However, we cannot justify extending such protections to non-agreement employees where, as is here the case, the carrier's obligation long pre-dated the consolidation which created the need for protection.

In essence the quoted language from Implementing Agreement No. 1 was not born of New York Dock.

We think it most unlikely that this language would have appeared in the BRAC Implementing Agreement absent the existence of the 1965 Agreement. The fact that it was recited in the implementing agreement does not bring it within the purview of Article IV.

DECISION

For the foregoing reasons we hold that Claimants are entitled to substantially the same level of protection as that provided clerks under Implementing Agreement No. 1, but cannot exercise Option No. 3 under such agreement because it is merely a recitation of a right

available to clerks under the February 7, 1965 Mediation Agreement and independent of New York Dock.

ISSUE NO. 5 (Re-stated)

ARE CLAIMANTS ENTITLED TO ADDITIONAL VACATION BENEFITS?

THE EVIDENCE

The facts are not in dispute. Upon termination of their service with MoPac in June and July of 1983, each of the claimants was paid accrued vacation benefits under the UP formula. The benefits were less than they would have been under the MoPac formula.

However, in January of 1983, two different high UP officials assured MoPac employees that their MoPac vacation benefits would be "grandfathered" and under no circumstances would their MoPac benefits be reduced. In addition, Carrier circulated a Question and Answer sheet to the same effect. Then, in February, 1983, UP published a booklet outlining employee benefits. Included was the UP method of computing vacation time accrual.

Counsel for each side cite the case of Hinkeldey v. Cities Service Oil Co., 470 S.W.2d 494 (Mo. 1971). Counsel for Carrier cites the case as authority that notice of contract modification constitutes an offer, acceptance of which is found in continued employment. Claimants' counsel cites Hinkeldey for its holding that where an employer makes two different representations to employees, ambiguity must be construed against the employer. We are not at all sure that under the facts of record Claimants were properly charged with notice that the employee handbook contained a repudiation of the three prior representations

made by management. At the least, there is ambiguity which should be resolved in Claimants' favor.

DECISION

We hold that Claimants are entitled to benefits as thrice promised by carrier officers about six months before the benefits were claimed; that is, to computation of vacation pay in conformity with the old Morac method.

Rendered May 11, 1987.

David H Brown

DAVID H. BROWN, Arbitrator