Arbitration Pursuant to Appendix III, Article I, Section 11
(Finance Docket No. 28250)
Involving the
"New York Dock Conditions"
Imposed by the
Interstate Commerce Commission
on the
San Diego & Arizona Eastern Railway

Parties to Dispute: United Transportation Union

and

San Diego & Arizona Eastern Railway
Transportation Company

Statement of Claim: Claim of Trainman William L. Carlton, II, for additional compensation in the amount of employment protection benefits applicable to those adversely affected by the transfer of ownership rights of the San Diego & Arizona Eastern Railway, commencing April 1, 1980.

Committee Members: Chairman and Neutral Member: Gil Vernon

Labor Member: Glynn Gallagher, General Chairman
United Transportation Union

Carrier Member: Rick Cecil, General Manager
San Diego & Arizona Eastern Railway

BACKGROUND

On October 15, 1979, the parties entered into an Agreement for the purpose of implementing certain transactions approved by the Interstate Commerce Commission. The Agreement described the transactions as follows:

> "Acquisition by Southern Pacific Transportation Company of the line segment and operations of the San Diego and Arizona Eastern Railway Company from Milepost 148.1, El Centro, west to Milepost 129.61, at or near Plaster City, as described in the application dated March 15, 1979, filed with the Interstate Commerce Commission.

> Transfer of ownership rights for the San Diego and Arizona Eastern Railway Company to the San Diego Metropolitan Transit Development Board and the installation of Kyle Railways as the operator for freight services on the San Diego and Arizona Eastern Railway Company, as described in the application dated March 15, 19, filed with the Interstate Commerce Commission."

The Agreement also provided:

> "Employes holding positions on the San Diego and Arizona Eastern Railway Company on the date of implementation and who become adversely affected as a result of the implementation of the transactions listed in this Agreement will be afforded the applicable protective benefits set forth in Attachment "A" hereto pursuant to the terms and conditions therein."

Attachment "A" to the Agreement is Appendix III to ICC Finance Docket No. 28250 commonly known as "the New York Dock" protective provisions.

The new operator was installed November 1, 1979. On April 17, 1980, the Brakeman Extra Board was reduced by one position. Employe Bobrowski who occupied a position on the Brakeman's Extra Board was removed therefrom and displaced the Claimant, Mr. Carlton, who then placed himself on the Yardman's Non-Guaranteed Extra Board. Mr. Carlton, on April 30, 1980, filed a claim for "New York Dock Guarantee" for the month of April, 1980. On September 18, 1980, the denial of his claim was appealed to the next level. The appeal was based on the contention that the Claimant had been adversely affected by the transfer of ownership and therefore was entitled to protective benefits. The claim cited paragraph 2 of the Implementing Agreement as support. On July 20, 1981, the Union notified the Carrier that, in view of their inability to agree on protective benefits for the Claimant, they would refer the dispute to an Arbitration Committee as set forth in Section 11 of the New York Dock Conditions.

The undersigned was mutually selected to serve as a Chairman and Neutral Member of the Committee. A hearing was held in the matter on

January 27, 1984, in San Francisco. At the hearing the parties were given full opportunity to present arguments and evidence in support of their position. Based on the arguments, the evidence, the provisions of Appendix III, Article I, Section 11 - Finance Docket No. 28250, and the Implementing Agreement dated October 15, 1979, the Neutral renders the following award.

FINDINGS

Section 11 (e) of the New York Dock Conditions requires that, in the event of a dispute as to whether an employe was affected by a transaction, the employe identify the transaction and specify the facts of the transaction. Section 11 (e) then goes on to say that it is then the Carrier's burden to prove that factors other than a transaction affected the employe. Section 1 (b) and (c) also defined a "displaced employe" and a "dismissed employe" as someone who "as a result of a transaction" is either placed in a worse position with respect to compensation, etc. or deprived of employment. (Emphasis added)

The Union basically contends that the Claimant, and other trainmen similarly situated, suffered adverse affect from the sale of the property owing primarily from the new owner's and lessee's methods of operating the railroad, different from those under ownership by the Southern Pacific Transportation Company. These changed methods are detailed in the Union's submission by reference to a letter submitted by Local Chairman Bobrowski. The letter is dated May 13, 1981. No real purpose would be served in reiterating the letter in detail, but in summary the letter cited the following factors as the cause of adverse affect on the Claimant: (1) the decision to embargo freight traffic on the main line from San Diego Yard to San Ysidro between the hours of 7 a.m. and 7 p.m. which the Union claims

resulted in reduced shipper interest; (2) relocation and the inoperative condition of weigh scales; (3) elimination of team tracks; (4) annexation of the Plaster City job to the Southern Pacific; (5) poor utilization, maintenance, and insufficient provision of locomotive power; and (6) general inability of management to live up to shipper obligations.

The Carrier makes a variety of arguments, however, two should be noted at the outset. First, they argue that the appeal of the claim to an Arbitration Committee is untimely, and second, that the Union has failed to specifically identify the transaction giving rise to the alleged adverse impact on the Claimant.

On the Carrier's first point, the Committee finds it would be improper under the circumstances to hold the Union's appeal as fatally barred from consideration. This is primarily a result of the Carrier's failure to register any objections--as evidenced by this record--prior to the hearing to the timeliness of any aspects of the original claim or its subsequent appeals.

With respect to the Carrier's second threshold argument, it can be stated--assuming for the sake of discussion the Union has identified the transaction and the facts on which they rely--that after a careful review of the evidence as a whole the Carrier has put forth enough evidence to convince the Committee that the Claimant was not adversely affected "as a result of a transaction." On the contrary the Carrier has shown instead that the Claimant was adversely affected primarily for reasons other than a transaction.

The Carrier contended that several factors, including a decline in business adversely affected the Claimant. Before discussing how these and

other factors affected the Claimant, a major argument by the Union must be addressed. They contend that a decline in business defense is not available or valid in arbitrations under the "New York Dock" conditions. They point out that under other protective provisions such as the Washington Job Protection Agreement and the Amtrak C-1 conditions, the language specifically mentions fluctuations and changes in the volume of employment. They submit that in the absence of such language in the "New York Dock" conditions is significant. Being aware of such provisions, if the framers of the language intended to make such a defense available, the organization suggests they would have included them in the instant conditions.

The Neutral does not find the absence of specific references to changes in the volume of employment sufficiently significant to conclude that a reduction in business defense is not available. This is so because the language of the conditions clearly sets forth that, to be considered protected, an employe must be adversely affected as a "result" of a transaction. Thus, it is clearly implied that factors other than a transaction which may adversely affect an employe do not turn on the protective provisions. Only adverse effect as a "result" of a transaction qualifies an employe for protective benefits and no benefits flow from adverse impact due to other causes. Certainly the Neutral cannot ignore that the use of the word "result" requires a causal relationship between the transaction and the adverse impact. Therefore, on the other hand, the Neutral cannot ignore any evidence which suggests that the adverse situation was a result of other causes. One must draw the inference from the language that any causes of adverse impact other than a transaction must be weighed and considered by the Arbitrator.

The fact that the writers of the language failed to enumerate any specific examples of other possible causes, such as a decline in business or fluctuations in employment, does not overcome the implied requirement to show, to the exclusion of other reasons, a causal nexus between the transaction and the employe's adverse employment situation. Contrary to the Union's argument, it seems that in view of the unqualified requirement for a causal nexus between a transaction and adverse impact, that if the writers wished to preclude certain defenses, they would have explicitly stated so. It is noted that other Arbitrators have held the reduction in business volume is a legitimate defense under New York Dock conditions. For instance see SBA No. 915 - New York Dock Railway v. Brotherhood of Railway, Airline and Steamship Clerks (Arbitrator Zumas). The following comments from this Award are indicative that the decline in business defense was considered:

> "The Organization is correct in its view that the coverage of the protective benefits of Appendix III extends past the date of the transaction to apply to losses suffered by a later displacement or dismissal. In order for the protective benefits to apply, however, the displacement or dismissal must be caused by the transaction authorized by the I.C.C. The question here is whether the action taken by the Carrier on April 1981 was the result of the 1980 coordination or whether the elimination of the positions in question was the result of some other force or factor.
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> Given the relative proximity of the dates--April 1980 and April 1981--there is some rationale for the supposition that the two occurrences were related. The Carrier has made a convincing case, however, that a number of external factors led to a drastic drop in business between those dates. These factors affected both the BEDT operation and, perhaps to a lesser extent, the NYDR operation. The statistics in the record demonstrate that there was a decline in business of both companies despite the acquisition of BEDT by NYDR.
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> The Organization suggests that any efficiency realized by the elimination of the positions in question could have been made at the time of coordination. The Organization contends that the Carrier would have been liable for Appendix III benefits had the positions been

abolished at that time and that the Carrier waited a year merely in an attempt to avoid those obligations. While that suspicion itself is not wholly implausible, there is no probative evidence in the record to support the contention. As noted above, the Companies' operations were not merged nor were their terminals interconnnected. The coordination itself does not suggest that management sought extensive changes in manning. In sum, there is no evidence that the Carrier effectively eliminated work in April 1980 nd (sic) delayed notice for a year merely to avoid Appendix III benefits. Rather, the evidence supports the Carrier's claim that a decline in business during the year caused the elimination of the positions." (Empnasis added)

In this case the Neutral finds that the decline in business defense is not only available but a plausible explanation--in combination with the return of Bobrowski to active service a short time before--for any adverse impact the Claimant may have experienced in the time period immediately subsequent to his initial claim. When Bobrowski returned to service, the Claimant, because of his lesser seniority, was one more "notch" closer to displacement in the event that any situation occurred which limited or diminished work opportunities. This enhanced the adverse effect on the Claimant of the decline in business which occurred at approximately the same time.

Based on the credited evidence, it is apparent that such a decline in business did in fact occur. At the time of the change in ownership (November), the Carrier handled 546 cars during that month. In the subsequent three months (December, January, and February) they handled 608, 523, and 626 cars respectively. However, in March the level fell dramatically to 458 and 425 in April. This amounted to approximately a 22 percent decrease in car loadings between November and April. Given this fact and the fact that Bobrowski was on vacation from March 24 to April 6 and another Guaranteed Extra Board was on vacation from April 6 to April 13, it is difficult to embrace the idea that the subsequent reduction of Bobrowski from the

Guaranteed Extra Board and Mr. Carlton's subsequent displacement was the result of any action taken by the Carrier pursuant to a transaction identified in the Implementing Agreement. It is, on the other hand, more apparent and acceptable to conclude that the reduction of the Extra Board and the subsequent displacement of Claimant was a result of normal fluctuations in employment. In fact the Carrier claims without rebuttal that the Extra Board was even increased at times between November and April and Bobrowski's reduction brought it down to the same level it was in November. Moreover, there is no basis to believe that the decline in business was caused by decisions made in connection with the transfer of ownership. Based on the evidence we must conclude the factors which lead to the reduction of the Guaranteed Extra Board (which caused Bobrowski to displace the Claimant) would have occurred regardless of the change in ownership status or acquisition of the line segment from Milepost 148.1 to Milepost 129.61 by the Southern Pacific Transportation Company.

We note that many of the events presented by the Union in the Local Chairman's letter as a basis for their claim of protected status for Mr. Carlton occurred much later than the initial claim date of April, 1980. Accordingly, it is difficult to conclude that events subsequent to the initial claim date adversely affected his status in April, 1980. However, even if we look beyond the time period covered by the local Chairman's letter, it is equally difficult, based on this record, to find a nexus sufficient enough to justify holding that the Claimant is a displaced or dismissed employe. There were simply too many other events beyond the control of the Carrier which affected their ability to operate at full employment as opposed to actions taken pursuant to an Implementing Agreement.

For instance, in January, 1980, a trestle of a key bridge washed-out, severing the railway into two parts. This forced the preponderance of the Carrier's traffic to be routed over a foreign road, thus, increasing mileage and Carrier cost and adversely affecting the Carrier's ability to compete and provide service. Replacement of the bridge was not completed until December, 1982. Also in March of 1981 other bridges suffered fires which hampered the Carrier's ability to operate.

In summary, these event and other events, in addition to the events immediately preceeding the reduction of the Extra Board in April, 1980, leave us unable to conclude that any reduction in employment experienced by the Claimant was the result of a transaction. On the other hand, there is more evidence to show that factors other than a transaction were the cause of any adverse impact that the Claimant may have experienced. It is well established in such matters that a causal nexus must be apparent between the transaction and the employe's employment situation. This causal nexus must be direct and more than speculative or merely proximate. Based on this record we are unable to find the necessary causal connection between the transactions referred to in the Implementing Agreement and the Claimant's employment situation.

AWARD

The Claim is denied.

Gil Vernon, Chairman and Neutral Member

R. D. Cecil, Carrier Member

Glynn Gallagher, Labor Member

Dated this 20th day of July, 1984