Before The Arbitration Committee

Established Pursuant To Section 11 of Appendix III

ICC Finance Docket 28250 (New York Dock)

In the Matter of Arbitration	*	
between	*	
J. D. Anders et. al. (36 employees)	*	ICC Finance Docket
and	*	No. 28583
Burlington Northern Railroad Company	*	

OPINION AND AWARD

This case involves claims by the following 36 individuals, all present or former employees of Burlington Northern (Carrier or BN) and present or former members of the Brotherhood of Railway Carmen (Carmen's Union), represented in this matter by private counsel, for merger protective benefits allegedly due them under the ICC order approving the merger of the Carrier and the St.Louis-San Francisco Railway Company (Frisco), which was

consummated in November, 1980:

Anders, Jerry

Anderson, H. M.

Bailey, J.R.

Bradford, K. R.

Burks, L. J.

Bush, D. M.

Cheatum, J. B.

Cornett, J. H.

Cummings, B. R.

Eaton, C. E.

Espeland, C. A.

Farris, J. A.

Fink, J. R.

Gering, R. W.

Henninger, J. R.

Hollingsworth, R. P.

Kitchen, W. T.

Koziega, R. A.

Larmore, J. W.

Malkames, R. B. III

Mautino, D. L.

McIntosh, D. A.

Moore, R. L.

Newton, R. E. L.

Osbern, T. M.

Peek, S. R.

Railey, M. W.

Ryan, J. M.

Sevedge, Douglas

Shipman, L. E.

Sprague, D. A.

Steele, G. J.

Toth, E. S.

Toth, F. J.

Travis, J. E.

Utter, R. J.

Willcot, E.K. Jr.

All of the Claimants were carmen employed by BN or Frisco at the time of the merger, whose positions were subsequently abolished and who, as a result of those abolishments, were eventually dismissed or displaced. The individual Claimants assert that they were respectively first adversely affected on various dates: September, 1981 (3); October, 1981 (1); December, 1981 (1); June, 1982 (10); July, 1982 (3); August, 1982 (1); September, 1982 (1); December, 1982 (5); January, 1983 (1); May, 1983 (1); June, 1983 (1); August, 1983 (1); September, 1983 (1); January, 1984 (5); August, 1986 (1). (No date is given for the claim of R. L. Moore, the 36th Claimant).

In its order approving the BN-Frisco merger, the ICC imposed the so-called New York Dock protective conditions, which provide certain benefits for employees displaced or dismissed as a result of a "transaction"; "transaction" is defined as any action taken pursuant to the ICC authorization on which the conditions are imposed. Section 11 of the conditions provides for arbitration of disputes which arise thereunder and paragraph 11(e) states that "(i)n the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall

be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee." Although the parties argued at some length the question of what constitutes a "transaction", we see no need to discuss that general question here; courts, arbitrators and the ICC have spoken to the question, and on the basis of the teachings of those various awards and decisions, we are satisfied that in the dispute before us, the definitive issue may be stated as whether the abolishment of Claimants' positions was the result of consolidation and other changes in Carrier's facilities at St. Louis and Kansas City which were planned, made possible and accomplished by Carrier as part of the BN-Frisco merger, as contended by Claimants, or was the result of a decline in business and other factors totally separate from and unrelated to the merger, as contended by Carrier.

The basic background facts are relatively clear and undisputed. Prior to the merger, Frisco and BN each operated major facilities at St. Louis and Kansas City at which carmen were employed. At St. Louis, BN operated North St. Louis Yard and Frisco operated Lindenwood Yard; at Kansas City, BN operated

Murray Yard and Frisco operated Rosedale Yard. Smaller facilities were operated by BN at Centralia and by Frisco at Valley Park and 19th Street. The merger was actually consummated on November 21, 1980. Before that date, the two Carriers served notices on the Carmen's Union of their intent to consolidate BN and Frisco car repair facilities and functions in the Kansas City terminal and to transfer certain carmen assignments from the Frisco Rosedale and 19th Street facilities to the BN Murray Yard facilities; and to consolidate the repair facilities and functions in the St. Louis terminal and transfer certain carmen assignments from the BN North St. Louis Yard facilities to the Frisco Lindenwood Yard facilities.

On January 29, 1981, BN and Carmen entered into an Implementing Agreement, which, after referring to the aforesaid notices, provided that all Frisco carmen would be dovetailed into the BN Hannibal Seniority district seniority roster. The Agreement went on to note that certain Frisco carman assignments at Rosedale would be abolished and consolidated with BN work at Murray, and that certain BN carman assignments at North St. Louis would be abolished and consolidated with Frisco work at Lindenwood, and further provided procedures as to the exercise of

seniority to the various newly-created and realigned positions. Finally, the Agreement provided that nothing therein expanded or contracted the protective benefits provided in the New York Dock Conditions which had been imposed by the ICC.

As a result of the consolidations, transfers, job abolishments, dovetailing and initial exercising of seniority referred to and provided for by the Implementing Agreement, six employees at Kansas City, according to Carrier, were furloughed and were paid New York Dock benefits. It does not appear that any other jobs were abolished at Kansas City until September, 1981. On various dates between September, 1981, and July, 1982, Carrier abolished carman jobs at Rosedale; on July 20, 1982,the last nine carman jobs were abolished and not long thereafter, Rosedale Yard was completely closed. At St. Louis, immediately after the merger, Carrier closed the repair facility at North St. Louis and transferred all carmen who had been doing repair work at North St. Louis to Lindenwood. By July, 1981, there were no longer any carman jobs at North St.Louis. Beginning in June, 1982, carman jobs at Lindenwood decreased until by late 1982 or early 1983, there remained just one carman shift at the repair yard and one at the train yard. In January, 1984, all remaining carman work

at Lindenwood was ended. Thus, of the four major yards where carmen had been employed at the time of merger, by January, 1984, carmen were employed only at Murray yard.

In terms of number of carmen employed, at the time of merger, the two railroads employed 163 carmen at Kansas City and 90 carmen at St. Louis. The number of carmen at Kansas City declined to 129 in 1981, 86 in 1982, 76 in 1983, 70 in 1984, 64 in 1985, 58 in 1986, 64 in 1987, 70 in 1988 and 82 as of May 1, 1989. Similar figures were not made available for every year at St. Louis, but from the testimony of Carrier witness Zeilmann, it appears that total carman employment did not change at St. Louis from the time of merger until June, 1982. At that time, 18 carman jobs were abolished; more were later abolished and by January, 1984, the total number of carmen employed in the St. Louis area had been reduced from 90 to 12.

In the course of these reductions, on various dates from 1981 to 1986 (as earlier indicated), Claimants were displaced or dismissed with consequent loss of earnings.

Claimants' major arguments in support of their contention

that their displacements or dismissals were the result of the merger may be summarized as follows. There is a long-standing policy, expressed legislatively, judicially and administratively, that employees should not be adversely affected when their employer railroads are permitted to merge, but should be granted a measure of protection against loss in those circumstances. The current expression of that policy is found in the New York Dock Conditions, imposed on the Carrier by the ICC in this case. In the application to the ICC for permission to merge, BN stated that the cost savings from the consolidation of rail yards at St. Louis and Kansas City in wages and fringe benefits alone would exceed $3.5 million per year, and further represented that any employees adversely affected at St. Louis and Kansas City would be paid merger protective benefits. BN carried out its intended consolidation and cost savings plans by gradually transferring work from Rosedale to Murray Yard at Kansas City and from North St. Louis to Lindenwood Yard at St. Louis. Eventually, Carrier consolidated all functions of the former four yards at Murray Yard. In the course of the consolidation, and because of it, the amount of carman work and the number of carmen employed was drastically reduced, and Claimants, as well as others, were consequently displaced or dismissed. The only and obvious reason

for the decline in the total number of carmen and the Claimants' loss of jobs is the consolidation of yards permitted by the merger. Carrier's contention that the loss of jobs was caused by a decline in business and other factors unrelated to the merger is not supported by the evidence, but is merely a device employed by Carrier to avoid its responsibility to pay protective benefits to employees adversely affected by the merger. In order to make it appear that it had satisfied that responsibility, Carrier paid merger protective benefits to a selective few dismissed or displaced employees on an inconsistent, random and unexplained basis but has refused to pay Claimants, who also lost their jobs because of the consolidation of the yards permitted by the merger and are clearly entitled to New York Dock protection.

Carrier's case is that the only carmen who were displaced or dismissed due to a merger-related transaction were those who were affected by the original consolidation moves and consequent exercises in seniority, which were referred to in the Implementing Agreement and occurred directly thereafter. Carrier's presentation to the ICC anticipated an increase in business because of the merger and a net increase system-wide in the number of carmen, although it did project the loss of 10

carmen positions at Kansas City and 14 at St. Louis (23 including carman apprentices and car inspectors). The reality turned out differently - a substantial decline in business beginning in September, 1981. It was this decline and measures taken by Carrier to deal with it, not the planned consolidation of facilities made possible by the merger, which caused the extensive layoffs of carmen at St. Louis and Kansas City.

Carrier submitted evidence in support of its claim of decline in business, both system-wide and in the Kansas City-St.Louis area, relating to carloadings, train miles, train hours, loaded car miles, ton miles, etc. Carrier also submitted evidence of a 100% increase in cars in storage in 1981, evidence as to changes in types of cars used, increased intermodal traffic, new motorized equipment used by carmen, and lessened federal inspection requirements - all going to show less need for carmen. Finally, Carrier submitted evidence to show that the reduction in the number of carmen at Kansas City and St. Louis was essentially the same as the reduction in the number of carmen system-wide for the same period.

Claimants offered in rebuttal their own statistics as to

the number of cars actually handled at Murray Yard showing only a minimal decline, and figures to show that revenue ton miles, revenue tons per carload, revenue tons per train, freight train miles, gross revenues and net income increased during the years covered.

Prior to any consideration of the substantive arguments of the parties, as outlined above, it must be noted, as Carrier forcefully points out, that the issue of whether the displacement and dismissal of carmen at Kansas City and St. Louis beginning in September, 1981, and continuing thereafter, was caused by a merger-related transaction or by the "other factor" of decline in business, has already been submitted to Section 11 arbitration committees on the property, which have agreed with Carrier's contention that those displacements and dismissals were caused by a decline in business, and have denied claims of carmen for protective benefits. In fact, 26 of the 35 present Claimants have already had their same claims denied in those arbitrations, at which they were represented by the Carmen's Union.

The first arbitration decision, (so-called "Manley Decision"), dated January 17, 1983, arose from Carrier's

abolishment of carman positions at Rosedale in September, 1981, the first such abolishments subsequent to the abolishments caused by the original consolidations following the Implementing Agreement of January 29, 1981. The Carmen's Union progressed the claims of 19 employees (including present Claimants Bailey, Cheatum, Cummings, Peek and Utter) for protective benefits because of being displaced or dismissed as a result of those abolishments. Arbitrator Herbert L. Marx, Jr. concluded that the reduction in force was caused by a decline in business, and denied the claims.

A second arbitation award, (so-called "Anders Decision"), also by Arbitrator Marx, dated August 30, 1984, concerned the claims for protective benefits by 28 employees displaced or dismissed at Kansas City on dates between September, 1981 and July, 1982. These claims were also progressed by the Carmen's Union, and included 15 of the present claimants - Anders, Burks, Bush, Espeland, Farris, Fink, Gering, Henninger, Malkames, Osbern, Railey, Ryan, Shipman, Sevedge, F.J.Toth. The claims were denied on the same basis - that the reductions in force were caused not by the merger but by a decline in business.

Two other arbitrations arose from the layoff of the last remaining carmen at Lindenwood in January of 1984. Ten of those carmen exercised seniority to positions in Murray Yard, as a result of which ten carmen at Murray Yard were eventually dismissed or displaced. Those carmen filed claims for protective benefits; among them were six of the Claimants in the present case - Cornett, Eaton, Sprague, Steele, E. S. Toth, Travis. The Carmen's Union, representing the ten claimants, argued that the abolition of the jobs at Lindenwood was a step in the Carrier's premeditated merger plan to consolidate all car repair work to Murray Yard and that Carrier's asserted decline in business was a pretext for eliminating duplicate car repair operations at St. Louis and Kansas City. Arbitrator John B. LaRocco, in his decision issued on May 20, 1987, found that no Lindenwood work was transferred or otherwise coordinated into Murray Yard, and that the displacement of the ten claimants was independent of any New York Dock transaction; he therefore denied their claims. In so finding, he followed the earlier award of Arbitrator Gil Vernon, issued January 3, 1986, which denied the claim of a carman-painter whose position at Lindenwood was also abolished as the result of the closing of the Lindenwood repair facility.

Carrier argues that since those awards have already decided 26 of the 36 actual claims before this Committee, and have decided the identical issue involved in all of the 36 claims, they are dispositive of the instant claims as res judicata and/or stare decisis; and that the Committee should therefore deny the claims entirely on the basis of the prior awards without independent consideration of their merits.

Claimants contend that the Committee need not be bound by those prior decisions for a number of reasons, chief among them that the decisions have been superseded by a federal court decision, Cosby, et al. v. ICC, 741 F2d 1077 (8th Cir. 1984); that none of the Claimants were called as witnesses in the prior arbitrations and some of them had no knowledge of those proceedings; that under New York Dock Conditions, each month constitutes a separate claim, so that claims for months subsequent to those decisions have not been ruled upon; that the only evidence relied on in those decisions relating to "decline in business" was evidence as to carloadings in the former Springfield Region, whereas in this proceeding the Claimants produced much other and different relevant testimony; and that there is another arbitration decision rendered by Arbitrator Marx

on August 30, 1984, (the same date as the so-called "Anders Decision"), which upheld the claim for protective benefits of Carman Kevin Byers, who was furloughed at St.Louis in August, 1981, and thus supports the claims in this case.

Claimants' arguments do not persuade us that the four arbitration awards previously cited should not have precedential effect in this case. In neither the Cosby or Byers case was the question of "transaction" at issue as it is in this case. In Cosby, the significant issue was whether the New York Dock Conditions applied to employees of a motor carrier subsidiary of Frisco or only to direct employees of the railroad. In Byers, the claimant carman-apprentice was on injury leave of absence when his position at St. Louis, along with other similar positions, was abolished in August, 1981, and the other employees who lost their jobs were paid protective benefits; the Carrier did not dispute that Byers would have been affected by the transaction and thus entitled to benefits had he been working in August, 1981, but argued essentially that he was not entitled to benefits because of his injury leave-of-absence status at the time his job was abolished. The arbitrator

rejected that position and sustained the claim.(1) Both Cosby and Byers were decided on narrow grounds not related to the four arbitration decisions which ruled on the issue of "transaction" versus "decline in business."

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(1) There is no doubt that Carrier was inconsistent in its earlier and later interpretations of what was a "transaction" under New York Dock. Carmen at St. Louis who were displaced by employees from Centralia whose jobs were abolished between January 1 and July 7, 1981, because of decline in business at Centralia, were originally considered eligible for protective benefits by Carrier and paid such benefits; later Carrier changed its position. Such inconsistency was to say the least unfortunate, and certainly muddied the waters as to the proper application of the New York Dock Conditions to carmen at the Carrier's St.Louis-Kansas City facilities. Undoubtedly, those apparently discriminatory payments to other employees similarly situated contributed to the present Claimants' strong feelings that they are similarly entitled to payment. However, we are not called upon in this case to judge the Carrier's inconsistent actions in respect to other employees. The issue before us is limited to whether these claimants qualify for protective benefits as having been displaced or dismissed by virtue of a "transaction" under New York Dock Conditions.

As to the evidence relating to business decline, we are satisfied that with the exception of the testimony of Claimants Bailey, Bradford and Ryan, who testified in this case, the same evidence was presented to the "Manley" and "Anders" Committees as was presented to this Committee. Claimants' witness Ranes, and Carrier's witness Boyer, who presented the bulk of their respective party's evidence on the business decline issue, both testified that they had presented similar evidence at the "Anders" arbitration hearing. Contrary to Claimants' assertion, the Committee in that case did not rely solely upon evidence as to carloadings at Springfield, although the award did refer specifically to that evidence. The award also states, for instance, that the Carrier presented conclusive evidence of a substantial decline in business and resulting need to reduce its force levels, and goes on to say that "most significant to this dispute, those changes occurred not only at the Rosedale-Murray facilities but generally throughout the Carrier's operations." The testimony of the three Claimants here, whose testimony was offered as representative of the whole group, while demonstrating a sincere belief on their part that their jobs were lost as a result of Carrier's planned consolidations of the terminals at Kansas City and St. Louis, simply did not amount to sufficient

evidence to support that conclusion; and thus represents no significant difference in the evidence before this Committee and the previous ones.

In view of the above discussion, it is the Committee's view that it would have been justified in denying the claims herein based simply upon the precedential effect of the prior awards cited; indeed, respecting such precedents involving essentially the same parties and issues on the same property is, as Arbitrator LaRocco stated in the award earlier cited, "required to insure stability and predictability in the labor-management relationship." However, in this case, in deference to the apparent belief of some of the Claimants, whether or not justified, that their interests were not fully represented and their stories not fully told in the earlier arbitrations, and the exhaustive and painstaking presentation of their case to this Committee by Claimants and their counsel, we have undertaken to consider the evidence presented to us in this proceeding separately and independently from the prior arbitration awards. Our conclusion based upon this separate consideration, however, is the same as the conclusion reached by former Committees. We are entirely convinced after thorough consideration of all the

evidence submitted to us that the Claimants herein were not dismissed or displaced because of a merger-related "transaction", but on the contrary, they were dismissed or displaced because of "other factors", chiefly a decline in Carrier's business and money-saving steps taken by Carrier because of that decline.

There must be a reasonable limit to the number of times this issue is litigated. While it is clear that Claimants hold strongly to their position and it is unlikely that they will agree with the Committee's conclusion, it is to be hoped that they now agree that their arguments on the issue have been fully heard and considered; and that they will reconcile themselves to the fact that since arbitration committees chaired by four separate neutral arbitrators have ruled against them, they must bow to those decisions.

AWARD

The claims herein for protective benefits under the New York Dock Conditions are denied.

Alex M. Lewandowski
Employee Member

Under Dissent Nov 9, 1989

Wendell Bell
Carrier Member

H. Raymond Cluster
Neutral Member

October 17, 1989