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In the Matter of Arbitration Between:

Transportation-Communications International Union -- BRAC

and

Union Pacific Railroad Company.

Pursuant to Article I, Section 11 of the New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000.

Case Nos. 6 & 7

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Before Arbitration Committee Members:

James J. Shannon	Carrier Member
Richard D. Meredith	Carrier Member
William R. Miller	Employee Organization Member
Gary McCall	Employee Organization Member
Lamont E. Stallworth Labor Arbitrator	Neutral Member
Hearing Held:	Chicago, Illinois November 8, 1989

ISSUES IN DISPUTE:

The Parties have submitted the following issues to the Committee:

1. Are I&CS Department Employees E.D. Ehrlich and G.L. James entitled to New York Dock benefits as the result of being affected by a New York Dock transaction?

2. If Question No. 1 is answered affirmatively what is the level of New York Dock benefits to which each Claimant is entitled?

BACKGROUND:

In this case the Organization argues that two employees who were formerly employed as non-agreement personnel in the Carrier's Information and Communications Department (I&CS) in Omaha are entitled to New York Dock benefits as a result of the same company-wide force reduction addressed by the Arbitration Committee in P.J. Kelley and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees v. Union Pacific Railroad Company, (Neutral Member, Stallworth, 1987), hereinafter referred to as Kelley.

In September, 1982, the Interstate Commerce Commission (I.C.C.) approved the merger and consolidation of the Missouri Pacific Railroad Company (MP), the Western Pacific Railroad Company (WP) and the Union Pacific Railroad Company (UP). As a condition of that merger the I.C.C. imposed a set of labor protective conditions upon the railroads involved to afford some protection to the employees affected by the merger. This protection, known as the New York Dock Conditions, offers certain benefits and guarantees to employees who are affected by merger-related transactions. Article IV of that document states,

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

On May 1, 1986, the Carrier announced a company-wide force reduction for non-agreement employees. On this date the Carrier offered employees certain benefits under a voluntary force

reduction program. In the same announcement, the Carrier also described the terms of an involuntary force reduction program, which it said it would put into effect if it did not obtain enough volunteers for the voluntary program. The terms of this second program were not as generous as those of the voluntary program.

In June, 1987, in another case before an Arbitration Committee between the same Parties the Committee decided that the force reduction announced May 1, 1986, was related to the merger, at least as it affected the claimant, P. J. Kelley, who worked in the Accounting Department. Therefore, the Committee determined that Kelley was eligible for benefits under the New York Dock Conditions, which are more generous than the benefits and protection offered by the Carrier under its force reduction programs.

The instant dispute is a combination of two employees' claims, which have been consolidated because the factual situations and the issues involved in each case are very similar. Claimant E.D. Ehrlich (Case No. 6), was employed as one of two Senior Industrial Engineers in the Carrier's Information and Communication Systems Department (I&CS), Information Systems Organization until June of 1986. According to the Carrier, the Information Systems Organization is one of the five sub-departments in the Information and Communication Systems Department, which in turn is one of twelve departments into which the Carrier's functions and workforce are divided. According to the Organization, the computer services for the Union Pacific were historically based in Omaha, Nebraska,

while computer services for the Missouri Pacific Railroad were based in St. Louis, Missouri. Claimant G.L. James, (Case No. 7) was one of thirty-two Project Directors in the Development and Implementation Section of the I&CS Department until the events giving rise to this dispute occurred.

On May 9, 1986 Carrier's I&CS Vice President G.S. Sine issued a memorandum to non-agreement employees in his department, in conjunction with the force reduction program, which described the organizational structure of the department before and after the force reduction. The memo stated, in part,

> The absence or presence of a position title does not necessarily mean that the incumbent will not have a job, on the one hand, or is guaranteed a job, on the other. (Carrier Exhibit K).

The memo also stated that the changes in the organizational structure were being given to the employees in order to help them in their consideration of the Carrier's proposal regarding the voluntary force reduction program.

The May 9, 1986 memorandum included information showing that the Carrier intended to eliminate one of the 32 Project Director positions, (the position held by Claimant James), through the force reduction. The memo also showed that the Carrier intended to eliminate both of the Senior Industrial Engineer positions, the position held by Claimant Ehrlich, through the force reduction program. (TCU Exhibit G, p. 2).

On June 2, 1986 Claimant Ehrlich submitted a written application requesting that he be permitted to participate in the

Carrier's voluntary force reduction program. He accepted a lump sum "buy-down" allowance of $37,920 as a trade-off for relinquishing his position, with the understanding that he would also exercise his seniority rights to return to a position covered under the collective bargaining agreement.

The Carrier informed the Claimant by letter dated June 17, 1986, that his application to participate in the Voluntary Force Reduction Program had been accepted. (Carrier's Exhibit L-1). On July 1, 1986, Claimant exercised his seniority back to the clerical ranks.

On May 30, 1986, Claimant James submitted his application requesting that he be permitted to participate in the Voluntary Force Reduction program. His application included seven conditions, including that his rate of pay would be protected at his current level if he accepted an agreement position. The Carrier rejected all seven of the conditions and the Claimant eventually dropped them. The Carrier then accepted his application and he received a lump-sum buy-out of $32,112. He returned to the bargaining unit clerical ranks on July 16, 1986.

According to the Carrier, 677 non-agreement employees company-wide decided to take the voluntary force reduction option, with the Carrier accepting 573 of their applications and rejecting 104. Within the I&CS Department, 74 applications were received, 56 were approved, and 18 were rejected. Of the 56 approved applications, 38 involved positions in St. Louis and 18 in Omaha. (Carrier's Submission, Case No. 6, p. 20).

On November 24, 1987, Claimant Ehrlich filed a formal claim letter asserting his claim to New York Dock benefits. The Claimant stated that he was filing his claim "in light of the results of the arbitration between Mr. P.J. Kelley, BRAC, and the Union Pacific Railroad." In his claim, he contended that he had been displaced as a result of the merger, and "(t)he elimination of my position forced me to make a prudent decision to return to an agreement position, which I did not want to do, thus reducing my salary and benefits with complete disregard to the protective period provided in the New York Dock." (Carrier's Exhibit L-3).

Claimant James instituted his claim on March 6, 1987, contending that the Company had arbitrarily and capriciously denied his rights under the New York Dock when he became a displaced employee and voluntarily returned to an agreement position.

The Carrier denied the claims on the following grounds: (1) the Claimants had signed general releases as part of their acceptance of the lump-sum payments; (2)the Claimants were not "employees" as that term is used in the New York Dock Conditions; (3) the Claimants had participated in the voluntary force reduction program, while Mr. Kelley had not done so; (4) and there had been no consolidation of work or employees within the I&CS Department as a result of the force reduction program. The Carrier contended that the force reduction program was merely a company-wide effort to become more cost-effective and competitive. (Carriers Exhibit Nos. L-9, Case No. 6; L-4, L-5, Case No. 7).

Regarding Claimant Ehrlich, the Carrier also argued that the elimination of these jobs was the result of the elimination of the Interchange Bureau, "which effectively constituted nothing more than a check the checker system." The Carrier also asserted that the positions performing this same function were also abolished on the "MP side of the house." (Carrier's Exhibit L-9).

The Carrier rejected the claims, the Organization rejected the Carrier's rejection, and the claims proceeded to this forum for resolution.

THE ORGANIZATION'S POSITION

The Organization argues that the Claimants were affected by a New York Dock transaction and are entitled to benefits. According to the Organization, the Carrier's force reduction either was a New York Dock transaction or was taken in anticipation of one. Either way, the Claimants are entitled to benefits, the Organization asserts.

In support of this position, the Organization relies upon the Carrier's May 9, 1986 bulletin notice, which was issued in conjunction with the force reduction, and which stated that two Senior Industrial Engineers and one Project Director position were to be abolished. The Organization argues that this notice should be considered in conjunction with an earlier one, issued February 19, 1985, which shows the Carrier's plans for staffing the I&CS Department before and after consolidation. According to the Organization, these two memos, read together, indicate that the

Carrier attempted to use the force reduction to achieve employment reduction concurrent with and in anticipation of New York Dock transactions in the I&CS Department.

The actual transactions which the Carrier admits occurred in 1986, as evidenced by several Implementing Agreements, combined with the anticipated transactions affecting the I&CS Department was the causal nexus leading to the abolishment of Claimants' positions, the Organization asserts. According to the Organization, the Carrier has been involved in an active program of consolidating the I&CS Department in Omaha and St. Louis from 1986 and perhaps before, to the present. The Organization contends that the dwindling number of positions in the department is irrefutable evidence of this trend.

In further support of its argument, the Organization also relies upon letters received by three non-agreement employees in late 1987 and early 1988 regarding the elimination of their positions in the I&CS Department. According to the Organization, these documents indicate that the Carrier was engaging in consolidations of the Omaha and St. Louis I&CS Departments even after the Claimants here were reduced to agreement positions.

The Organization argues further that the nature of the work performed by the Claimants, i.e. computer work, makes it extremely easy for the Carrier to manipulate, transfer and consolidate job functions with other positions, even positions in distant locations. The new head of the department resides in St. Louis, the Organization notes, but supervises the Omaha operations as

well, thereby demonstrating that the consolidation of the department was taking place at the very highest levels.

The Organization also argues that the Carrier's organizational charts over the period from 1986 to 1988 plainly show that a consolidation has occurred. According to the Organization, this merging, consolidation of the computer work and the transfer of supervision is precisely the type of transactions intended to be covered by the New York Dock Conditions.

The Organization also relies upon Article I, Section 10 of the New York Dock Conditions which states that the Carrier must pay benefits if it rearranges or adjusts its forces in anticipation of a transaction "with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled." The Organization argues that this is just what has occurred in this case.

In addition, the Organization also argues that the Claimants are "employees," as that term is used by the New York Dock Conditions, and therefore are entitled to benefits. According to the Organization, the Claimants should be considered employees, no matter which definition of employee the Committee accepts. For example, even if the Committee were to accept the more restrictive definition that "employees" includes only those employees and subordinate officials subject to unionization, according to the Organization, those cases differ because the employees lost their employment with the Carrier because they did not have union seniority or because they declined offers of employment which would

require them to change locations. The same factors are not present here, as they were not present in Kelley, according to the Organization, and therefore these employees should be considered under the New York Dock coverage.

Furthermore, the Organization notes that the Claimants in these disputes held positions which were rated at 450 Hayes points, about 90 points more than Mr. Kelley, and much less than other Claimants who were not considered employees in another arbitration case involving this railroad. Therefore, the Organization asserts that they were employees, as that term is used by the New York Dock conditions, and that they were entitled to benefits, for the reasons stated above.

THE CARRIER'S POSITION

The Carrier acknowledges that it has consolidated some of the functions of the I&CS Department as a result of the merger. However, the post-merger effects on the I&CS Department have been very minimal, in comparison to the effects on other departments, notably the Finance and Accounting Departments involved in the Kelley case, according to the Carrier. (See list of Implementing Agreements regarding I&CS Department, Carrier's Submissions, pp. 7-9). Furthermore, during the same period that the merged system was undergoing several transactions, the effects of deregulation and a rapidly changing technology caused very significant reductions in forces for the Carrier in particular, and for the railroad industry as a whole, the Carrier asserts.

According to the Carrier's records presented at the hearing, the largest force reduction program it has implemented to date has been the May 1, 1986 company-wide program at issue in this dispute. The Carrier argues that this force reduction was not a merger-related transaction, and that even if it were, the Claimants are not entitled to New York Dock protection.

The Carrier notes that in the Kelley decision the Committee held that there can be factors other than a merger which cause an adverse action suffered by an employee. Here, the force reduction was a result of a decision made at the highest levels of the Carrier to reduce the non-agreement workforce by 15% across the board, the Carrier asserts, simply in an effort to cut overall costs.

The Carrier also argues that the Kelley case is distinguishable from the instant case because here the Organization has not established a sufficient relationship between the merger and the force reduction as it affected the Claimants to establish that the loss of their positions was merger-related. In Kelley the Committee found that there had been a substantial intermingling of work and employees in the Accounting Department, signalling a consolidation. According to the Carrier, there has been no substantial intermingling here.

This case also differs from the Kelley case in that the Claimants here voluntarily relinquished their positions, while Mr. Kelley never did. Under the circumstances of this case, there is no way of knowing for certain that the Claimants' positions would

have been eliminated. Therefore, if the Claimants are in a worse position, the Carrier argues, it is not because the Carrier has placed them in such a position, or deprived them of employment. Therefore, the Claimants do not qualify as dismissed or displaced employees, the Carrier argues.

According to the Carrier, the Claimants are not employees at all, as that term is used in the New York Dock conditions, and therefore are not entitled to protective benefits. According to the Carrier, the term "employee" as used in the New York Dock protections is defined with reference to the history of labor relations in the railroad industry. Therefore, the Carrier urges that this Committee consider the definition of employee as used in the Railway Labor Act, and by the Interstate Commerce Commission. According to the Carrier, the New York Dock Conditions apply only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented by a union labor organization.

The Carrier urges further that the I.C.C. has defined who are subordinate officials, in its Ex Parte 72 documents. According to the Carrier, no positions comparable to the Claimants' have been identified in the I.C.C.'s findings. The Carrier also has cited several court and arbitration decisions which it contends support its interpretation, and which will be discussed as necessary in the Opinion section below.

OPINION

This is a case stemming from the case of P.J. Kelley and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees v. Union Pacific Railroad Company, (Stallworth, 1987). In that decision the Arbitration Committee found that the Claimant was entitled to New York Dock benefits as a result of a force reduction related to the merger/consolidation which created the Union Pacific Railroad in its current form. The Parties report that some fifty cases which arose as a result of the Kelley case have now been settled and the Neutral Member of this Arbitration Committee wishes to commend the Parties for their ability to settle the vast majority of these cases without the need to resort to arbitration.

Before the Committee today are the claims of two non-agreement employees, who were affected by the same overall company-wide force reduction which affected Mr. Kelley. Both employees worked in the Carrier's Information and Communication Services Department (I&CS) in Omaha, Nebraska at the time this dispute arose. According to the Carrier, the function of the I&CS Department is to design, implement and maintain all of the information systems serving the various departments operating within the railroad. The Department also maintains and constructs communications systems within the railroad, such as telephone systems and microwave communications.

Claimant Ehrlich (Case No. 6) was employed as a Senior Industrial Engineer in the I&CS Department at the time this dispute arose. Claimant James (Case No. 7) was employed as Project

Director in the same department, also in Omaha. In a memo dated May 1, 1986, the Carrier announced a voluntary force reduction program for non-agreement personnel throughout the entire company. On May 9, 1986, the Vice President in charge of the I&CS Department sent a second memo to the non-agreement personnel within his department, indicating which positions the Carrier wanted to eliminate, either through the voluntary or through a subsequent involuntary force reduction program. Claimant Ehrlich's position was clearly slated for elimination. As for Claimant James, one of the thirty-two Project Director positions in his Department was to be eliminated. However, the second memo stated that simply because an employee's position was slated for elimination did not mean that that employee would be eliminated, however; nor would the absence of the employee's position on the list guarantee the employee a job in the department after the force reduction.

Both Claimants Ehrlich and James opted for the voluntary force reduction program. They each exercised their seniority to take bargaining unit jobs which pay less than their non-agreement salaries, but they each also received a buy-down allowance of $37,920 and $32,112 respectively.

Claimant James filed his claim in March, 1987 and Claimant Ehrlich filed his claim shortly after the Kelley decision was rendered. The Carrier denied the claims on a number of grounds, some of which were resolved by other cases in the Kelley line. The following grounds for denial form the basis of this dispute as it arises before this Committee:

1) he Claimants are not "employees" as that term is used in the New York Dock Conditions;

2) The Claimants were not dismissed or displaced employees because they voluntarily accepted the force reduction; and

3) The Claimants were not affected by a New York Dock transaction because the force reduction was not a New York Dock transaction as it affected them.

If the Claimants were not employees as that term is used in the New York Dock Conditions then there is no need to examine the other issues in this case, because they would not be entitled to benefits under any circumstances. Therefore, the Committee will address this issue first.

Were the Claimants Employees Under the New York Dock Conditions?

Definition of Employees

Whether the Claimants were employees under the New York Dock Conditions is the threshold issue in this dispute. Even if the force reduction was a "transaction" as that term is used in the New York Dock Conditions, and affected certain employees as such, the Claimants would not be entitled to its benefits if they do not fall into the group of employees who were intended to benefit from protection.

Article IV of the New York Dock Conditions states in relevant part,

> 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.

It is under this section that non-agreement employees, like the Claimants in the instant case, file their claims for New York Dock protection.

The Parties concur that not every employee of the railroad is entitled to New York Dock protection. They disagree, however, about the extent of the group entitled to protection under Article IV. The Organization asserts, moreover, that even if this Committee adopts a restrictive definition of the group entitled to coverage, the Claimants here would fall under the more restrictive definition. The Carrier disagrees.

The core of the dispute regarding coverage is whether the definition of an employee entitled to benefits is the definition of "employee" as that term is used in the Railway Labor Act, or whether it has some broader meaning.

Section 1, Fifth of the Railway Labor Act states in relevant part,

> Fifth. The term 'employee' as used herein includes <u>every person in the service of a carrier</u> (subject to its continuing authority to supervise and direct the manner of rendition of his service) <u>who performs any work defined as that of an employee or subordinate official</u> 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....

Beginning in 1924, under an order known as "Ex Parte 72" the ICC has refined the meaning of this section by defining exactly which

positions may be considered "subordinate officials" under the Railway Labor Act. The agency has examined hundreds of jobs to determine whether they are entitled to union bargaining rights under the Act.

As noted in Bond and Topolosky v. Union Pacific Railroad (Neutral Member, Stallworth, 1985), neither the New York Dock Conditions nor its legislative history assist in defining "employee" as it is used in that document. Nevertheless, the Committee concludes that there is a sufficient link between the history of collective bargaining in the industry and the development of labor protective conditions to indicate that the more restrictive definition used in the Railway Labor Act should apply.

The New York Dock Conditions were not negotiated in a labor relations vacuum. When the framers of the document used the term "employees" they were using it in an industry where that word has become a term of art, meaning employees and "subordinate officials," as they have been defined by the ICC, under the Railway Labor Act.

In this respect, this Committee concurs with the view expressed by Arbitrator Jacob Seidenberg in Maeser, Murphy, Sengheiser and Shupp v. Union Pacific Railroad Company, Missouri Pacific Railroad Company (Neutral Member, Seidenberg, 1987), a New York Dock decision involving this Carrier,

> A review of the history of labor protective conditions compels us to hold that the term "employee" was not intended to be applied in a generic sense, i.e. all persons employed by the railroad, but rather the term, as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as being other than administrative, managerial, professional or supervisory in nature.
>
> (Emphasis added, pp. 38-39).

Arbitrator Seidenberg ably traces in this opinion the close historical relationship between labor protective conditions and collective bargaining in the railroad industry. He demonstrates how the first labor protective agreements related to mergers, such as the Washington Job Protection Agreement (WJPA) in 1936, were negotiated by labor unions not for the benefit of railroad personnel generally, but to protect the jobs of their own union members specifically. In addition, he notes that these agreements had their antecedents in attempts by railroad unions during the Depression to obtain guaranteed employment for their members, not for railroad employees as a whole.

Arbitrator Seidenberg also notes that in later mergers the railroads began to seek agreements voluntarily with their unions over labor protective conditions before they were unilaterally imposed by the ICC, in order to forestall the unions from protesting the proposed mergers. He concludes,

> These are the reasons why we cannot accept the Claimants' contention that there is no nexus between the collective bargaining relationship in this industry and the imposition of labor protection conditions in the industry. The labor protection conditions were basically brought about by railroad brotherhoods for its members and were not intended to be directed to or established for all personnel employed in the industry who might be adversely affected by the merger.
> (Maeser, p. 42).

The Organization suggests, however, that we adopt a contrary view expressed by Arbitrator David Brown in Curly, Ernst, Groh, Holland, Martin, Richter, Sanford, and Trautman v. Missouri Pacific Railroad Company (Neutral Member, Brown, 1987), in which the Committee held that the definition of "employees" in railroad labor protective conditions is not limited to the definition of employee as it is used in the Railway Labor Act. The opinion stated,

> Section 1 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.
> (Curley, p. 20).

The Committee in the Curley case did look to other legislation imposing protective conditions in the railroad industry, however, to help define "employee" under the New York Dock Conditions. In three similar acts involving the former Milwaukee Road, and Rock Island Railroads and the Staggers Rail Act of 1980, Congress generally extended protective benefits to all employees except "president, vice president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person

performing such functions." According to the Curley opinion, affording protection to all employees below the rank of vice president makes sense because these employees have little, if any, control over the events which precipitated the need for the protection. See also, Edwards v. Southern Railway Company, 376 F.2d (4th Cir. 1967).

There is some appeal to this argument, especially since only the top officers of a carrier are likely to have any control over whether a merger actually occurs. However, as noted in the Maeser case referred to above, each of these three acts was prompted by "emergencies created by bankruptcies and liquidations of major carriers that could wreck havoc on affected geographical areas." (Opinion, p. 42). Arbitrator Seidenberg noted, for example that the Railroad Reorganization Act represented an unprecedented incursion by the federal government into the railroad industry, creating Conrail after the bankruptcy of the Penn Central and six other northeastern carriers. Because the labor protective benefits were actually funded by the federal government in that case, Arbitrator Seidenberg suggests that the government was concerned that all the employees of the carrier would be treated equally with the federal funds that were involved.

Maeser also suggests that a similar emergency situation existed with regard to the two other railroads as well. Furthermore, even in those situations, the acts provided that for employees represented by labor organizations, the labor organization and the carriers were specifically permitted (and thus

encouraged) to negotiate labor protective conditions. Therefore, Arbitrator Seidenberg deduced that employee protection, even in non-merger situations, is an integral part of the collective bargaining process.

This Committee finds this reasoning sound. The three bankruptcy/restructuring acts cited by the Organization represent unusual emergency situations in which large numbers of employees were likely to be quickly and permanently terminated from any employment with the railroads. The same situation does not pertain to mergers, especially since most non-agreement employees have seniority to bump back into bargaining unit jobs. Usually they do so at the cost of a decrease in wages which is sometimes substantial. But their position is still very different from an employee caught in a bankruptcy situation, and therefore this Committee does not concur with the reasoning that the coverage of these laws should be adopted over the coverage in the Railway Labor Act.

The decision in Curley seems to be based upon the view that these men, who had little if any control over the merger, were nevertheless adversely affected by it. However, a proof of harm alone is not sufficient. Rather, this Committee concurs with the view expressed by Arbitrator Seidenberg in the opinion cited above, when he said,

> We have no doubt that there were individuals employed by (the MP railroad) who were disadvantaged or whose economic well being [was] adversely affected by the merger of these two Carriers. However, that is not the criterion for labor protection. The rationale and history of these benefits are that they were to be extended only to rank and file employees

> because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.
> (Maeser, p. 47).

Arbitrator Seidenberg goes on to say that in the last fifty years of the adjudication of labor protective disputes, only the Curley award has held that "an individual employed by a railroad, regardless of position, was entitled to labor protection because his job tenure or job status was disrupted or adversely affected by a merger." (Maeser, p. 47). In line with this view are court decisions which hold that officials of carriers are not eligible for benefits. McDow v. Louisiana Southern Railway Company, 219 F.2d 650 (5th Cir. 1955); Edwards v. Southern Ry. Co., 376 F.2d 665 (4th Cir. 1967); Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977); and In the matter of Florida E.C. Ry., No. 4827-J, (S.D.Fl. 1960) ("employees" encompasses persons (including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act, but not "officers," or "department heads, and those in the next echelon, such as assistants and staff members to the department heads.") Having established the way in which this Committee views this dispute over the coverage of the New York Dock Conditions, the Committee now turns to a consideration of the individual Claimants' positions vis a vis these standards.

Application of the Standards to the Claimants' Positions

Claimant Ehrlich

At the time this dispute arose Claimant Ehrlich was employed as one of two Senior Industrial Engineers in the Information Systems Organization of the I&CS Department. According to his job description (Carrier Exhibit No. O-1), his principal function in that job was like that of an efficiency expert, i.e. to design and administer a Work Measurement Program which would "provide the above managers the tools needed to better control their employees and operations for improved productivity." He reported directly to the Manager of Manpower Planning or to one of his two subordinates. In addition, the job description states,

> The position requires extensive analytical ability and professional experience and proficiency in all work measurement principles used. Either professional or practical training in Work Measurement or Industrial Engineering is required with extensive experience in methods work preferred. (Carrier Exhibit No. O-1).

As stated earlier, the Claimant is not entitled to New York Dock benefits if he is not an employee or subordinate official, as those terms have been defined under the Railway Labor Act. There is little dispute that the Claimant does not fall into these categories, based upon this job description, for the following reasons.

First, the ICC has defined throughout the years what it means by a subordinate official. It has determined, for example, that certain technical engineers may properly engage in collective bargaining. This class is defined as

> civil, mechanical, electrical and other technical engineers inferior in rank to engineers of maintenance of way, chief engineers and division engineers; engineers of maintenance of way and other technical engineers. We are of the opinion that instrument men, rod men, chain men, designers, draftsmen, computers, tracers, chemists and others engaged in similar engineering or technical work are not "officials of carriers." (Carrier Exhibit R, p. 2).

No evidence has been brought forth before this Committee to demonstrate that the Claimant is a part of this class. Furthermore, the Committee concludes that this classification does not encompass the Claimant because the Claimant's job is not what we ordinarily mean by the "technical engineering" addressed in this paragraph. Although Claimant's type of "engineering" has some relationship to scientific or technical principles, it is primarily and inextricably a management function which would not normally be subject to collective bargaining. The very nature of the Claimant's position was inherently professional and managerial and not work normally performed by the bargaining unit.

It is true that other employees who might work in a personnel office and therefore be excluded from collective bargaining might nevertheless be entitled to New York Dock benefits because, except for the office in which they work, they would have had the opportunity to pursue collective bargaining. However, this is not the case with an employee who designs and installs work measurement programs. There is no evidence in this case that the Claimant's position was ever eligible for unionization.

Furthermore, the level of the Claimant's position is a factor in the Committee's decision. There was no evidence that the

Claimant's job was at the draftsman or chemist level mentioned in the Ex Parte 72 order. His job description states,

> Even though departmental policy is determined by higher authority the interpretation and implementation of the Work Measurement Program and all system analysis in the project is the responsibility of the incumbent.
> (Carrier Exhibit O-1, p. 2).

Therefore, the Claimant clearly had more responsibility than the type of engineers referred to in the Ex Parte 72 documents.

In addition, the job description states that he will report directly to the Manager, Manpower Planning or one of his two immediate subordinates. In addition, he was given the authority to supervise other industrial engineers. These are factors that the ICC has considered in making determinations of whether a position is one of a subordinate official.

Considering the Claimant's rank, the management nature of his job, the history of unionization regarding his position, and his supervisory powers, the Committee concludes that Claimant Ehrlich was not an "employee" as that term is used in the New York Dock Conditions. Therefore, he was not entitled to New York Dock protection, even if he were adversely affected by a merger-related transaction.

Claimant James

At the time this dispute arose Mr. James was one of thirty-two Project Directors in the Development and Implementation Section of the Information Systems Organization of the I&CS Department. According to his job description (Carrier Exhibit O-1) the major

function of his job is to direct the research, development, design and implementation of new data systems and/or changes to existing systems.

There was no evidence that the Claimant's position is one that the ICC has found to be that of a subordinate official. Unlike the case of Claimant Ehrlich above, the referee in the case of Claimant James has been unable to locate any classification in the Ex Parte 72 orders which corresponds to the Claimant's position and the Parties have not identified any such classification.

As with Claimant Ehrlich, there is no claim that Claimant James' position as Project Director was ever part of the bargaining unit. This factor alone is not conclusive, because there may be positions which would be subject to unionization if they were not in the personnel area or of a confidential nature. However, there is no indication that either of those factors applies here.

Furthermore, like Claimant Ehrlich, Claimant James' position calls for supervisory duties as necessary to complete a project. In addition, the Claimant's level of responsibility is such that he normally would be considered an official rather than an employee or subordinate official. Like Claimant Ehrlich, he had the authority, within his job description, to determine how a project should be designed and implemented, and to direct other employees to do it, based on the needs of the department he was serving.

Furthermore, as far as the Committee can ascertain from his job description, Claimant James did not need the approval of higher

management to conceive and carry out a project. His job description states as his first job duty,

> Planning & Control: Establishes schedules and determines project checkpoints. Assigns tasks to project personnel in accordance with priorities, critical path and capabilities of assigned personnel. Monitors progress and checks results. Informs Manager as to project progress.
> (Carrier Exhibit O-1).

These are not the type of duties that would normally be associated with a bargaining unit job, or that of a subordinate official. The level of control, authority and responsibility accorded the Claimant are those reserved to management.

In reaching this decision, the Committee has given careful consideration to the fact that the Claimant was one of thirty-two Project Directors in his department. Nevertheless, there was no evidence that his job entailed less responsibility than the way it is described in his job description, or that he was subordinate to other project directors. From the level of responsibility his job description describes, the Committee concludes that he was clearly an official of the railroad, as that term is defined in the New York Dock conditions.

Arguments that Apply to Both Claimants

The Organization argues, however, that the Claimants should be considered in the same position as Mr. Kelley, because their jobs were rated only about 90 points higher than his in the Carrier's job rating system. (His was rated at 360 points, while both Claimants here were around 450). According to the Organization, this is far different from the Claimants in Bond and

Topolosky, supra, who were each rated at more than 1000 points by the same Carrier.

The Carrier in the Kelley case had initially made the same argument made here, i.e. that the Claimant should not be considered an "employee" for New York Dock purposes. The Carrier dropped that argument before it reached the Arbitration Committee, however, so the Committee never ruled on whether Mr. Kelley's position was such that he should be included or excluded from New York Dock coverage. If the Committee had addressed the issue it might have decided that he was not entitled to New York Dock benefits on that basis. Therefore, the decision in Kelley does not control or even apply to this aspect of this case.

The Organization also contends that under even a more restrictive definition of "employee", the Claimants should be considered employees covered by New York Dock. According to the Organization, claimants in many of the arbitration cases in this area lost their employment for the most part because they did not have union security or because they declined offers of other employment with the Carrier which would have necessitated a change of residence. Neither of these factors are present here, the Organization contends, and therefore these decisions should not apply.

It is true that many of the arbitration awards addressing the issue of entitlement to New York Dock benefits have considered the factors mentioned by the Organization. However, there are other decisions in which these were not factors, and even where these

factors were present, the awards are squarely based upon the view that employees whose positions would not normally qualify them for unionization are not eligible for New York Dock benefits. From a careful reading of these opinions, the Committee concludes that the same results would have been reached, even if the other factors mentioned by the Organization here had not been present in those cases. See, e.g. Benham v. Delaware and Hudson Railway Co., (O'Brien 1986); Maeser, supra; Bond & Topolosky, supra.

Therefore, the Committee concludes that the Claimants were not employees as that term is used in the New York Dock Conditions. Because they were not covered by the protection, there is no need to address the other two issues in this case, i.e. whether they were "displaced," by accepting the terms of the voluntary force reduction, and whether they were affected by a transaction.

AWARD

The Committee concludes that the Claimants were not "employees" for purposes of New York Dock protection. Therefore, their claims shall be denied.

James J. Shannon
Carrier Member

William R. Miller
Employee Organization
Member

Lamont E. Stallworth
Neutral Member

Dated this 12th day of December, 1989.

City of Chicago
County of Cook
State of Illinois