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| In the Matter of an Arbitration Between<br><br>CSX TRANSPORTATION, INC. (Former Chesapeake & Ohio Railway and Louisville & Nashville Railroad)<br><br>- and -<br><br>SHEET METAL WORKERS INTERNATIONAL ASSOCIATION | New York Dock Labor Protective Arbitration<br><br>OCC Finance Docket Nos. 28905 (Sub No. 1) and 29916 |

ARBITRATION COMMITTEE

RICHARD P. BRANSON, Assistant Directing General Chairman, SMWIA
ROBERT H. MELOTTI, Manager-Labor Relations
DANA EDWARD EISCHEN, ESQ., Neutral Chairman

## PROCEEDINGS

This Arbitration Committee was convened by the Parties to an Implementing Agreement between CSX Transportation, Inc. (CSXT), C&O Railway Company (C&O) and Sheet Metal Workers International Association (SMWIA or Union) making applicable to a transaction involving locomotive repair facilities at the CSXT South Louisville Shop, C&O Huntington Locomotive Shop, and CSXT Corbin Shop the labor protective conditions set forth in New York Dock Railway Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 1979 (New York Dock Conditions or NYD). Under Section 10 of that Implementing Agreement (attached hereto in its entirety as Attachment A) any dispute or controversy with respect to the interpretation or application of the Implementing Agreement is to be arbitrated in accordance with the provisions of Article I, Section 11 of NYD, unless otherwise agreed. In January 1990, the Parties submitted the present controversy to this Arbitration Committee and selected Dana Edward Eischen, Esq. to serve as Neutral Chairman. The Parties exchanged written pre-hearing submissions in advance of the hearing which was held at Jacksonville, Florida on April 5, 1990. At the hearing the Parties presented oral argument and documentary evidence and were afforded a full opportunity to submit their positions on the record. The record was closed with oral summation at the hearing and the Parties jointly stipulated to a relaxation of the NYD procedure time limits.

## ISSUE

The original claim letter dated November 12, 1988 sought NYD protective benefits for twenty-three (23) named Sheet Metal Workers furloughed November 9, 1988 at the Huntington Locomotive Shop, Huntington, West Virginia. At the Arbitration Committee hearing on April 5, 1990, the Parties stipulated that the three (3) named Claimants who had transferred to Huntington from the South Louisville Shops (Harold B. Ferrell, Keith E. Pierson, Hilbert F. Mayes) each indisputably were entitled to and each had in fact been paid by Carrier NYD protective benefits during their furlough periods commencing November 9, 1988; accordingly, their claims were withdrawn from this arbitration. The Parties also stipulated that during the period April-August 1989 each of the Claimants had been recalled to service at Huntington Locomotive Shop from their November 9, 1988 furlough. Thus, the issue for determination in this proceeding is as follows:

> Were Sheet Metal Workers Robert Cecil, James C. Skeans, Albert E. Lewis, Noah Williamson, Reed A. Washington, Danny K. McSweeney, Noel D. Shaffer, Thomas C. Jones, Donald C. Mullins, Michael A. Pusateri, Michael Alan Thompson, Opha R. Bennett, Delbert J. DeHart, Eric L. Sparks, Donald L. Livingstone, Thomas E. Lawless, James r. Qualls, Keith A. Miller, Paul Norman Keller, and/or Lowell T. Ransbottom entitled to NYD protective benefits during their respective furlough periods at Huntington Locomotive Shops from November 9, 1988 through to their respective April-August 1989 dates of recall to service?

## BACKGROUND

As a consequence of the Locomotive Shop closing and work transfer transaction described in the Implementing Agreement of May 21, 1987 (Attached A), some forty-five (45) Sheet Metal Worker employees whose positions were abolished at South Louisville Shops were offered the opportunity to follow the work to Huntington Locomotive Shop. Of this number, twenty-one (21) South Louisville Shop employees elected not to transfer and twenty-four (24) Sheet Metal Worker employees for South Louisville Shop did transfer to Huntington (including the above-mentioned individuals Harold B. Ferrell, Keith E. Pierson and Hilbert F. Mayes). Most of the 24 former South Louisville employees who transferred to Huntington had greater seniority in the craft than most of the 60 or 70 SMW employees already working at Huntington, and therefore ranked higher on the dovetailed Huntington Shop Seniority roster. At the bottom of the dovetailed roster was an undisclosed number of Huntington Shop Sheet Metal Worker employees who were hired or recalled to service subsequent to the transfer of the South Louisville Shop

Approximately four (4) months after completion of the transfer from South Louisville to Huntington, thirty-five (35) SMW employees at Huntington were notified they would be "affected as a result of a force reduction", effective November 9, 1988.

employees furloughed at Huntington on November 9, 1988; twelve (12) were individuals who had been recalled at

Huntington after the South Louisville transfers; three (3) were individuals above-named who had transferred from South Louisville Shop to Huntington under the Implementing Agreement; and twenty (20) were individuals who had already been working at Huntington at the time of the transfers. Of these 35 individuals, the NYD protective benefit entitlements of only the latter group of 20 employees (Claimants) is at issue in this arbitration.

SMWIA General Chairman A. R. Hicks initiated these claims by letter November 12, 1988, reading in pertinent part as follows:

> The Carrier notified me near the last of January, 1988 that there was a surplus of twenty-three (23) to twenty-eight (28) Sheet Metal Workers because of not sufficient work being transfered from South Louisville, Kentucky to Huntington Shops, Huntington WV. I stated, at that time that the Agreement covered these employees who were working at the Huntington Shops, Huntington, WV on January 26, 1987.

Following unsuccessful on-property discussions, Carrier's Director, Labor Relations, A. R. Males denied the claims by letter dated September 1, 1989, reading in pertinent part as follows:

* * *

> It is your contention that these furloughs occurred as the result of the Louisville-Huntington Coordination, which occurred between August 4, 1987 and June 1, 1988; however, you have made no connection between this coordination and these furloughs. The Huntington furloughs of November 1988 were not the result of the coordination, but were in conjunction with a general force reduction system-wide. Merely making allegations and filing a claim for protection benefits does not meet the requirements of the Agreement.

* * *

Factually, at the beginning of August 1988 the Carrier conducted a study of the volume of business at each location, and the volume compelled the Carrier to make system-wide reductions. Carrier's improved quality control in the maintenance of locomotives and a decline in business at Huntington and other points consistent with the general economic condition of the company at that time, dictated the need to reduce forces in all crafts, including Sheet Metal Workers, and such occurred only after total exhaustive efforts failed to negotiate an alternate way of reducing forces with your Organization. On Wednesday, November 9, 1988, at 7:00 am, thirty-five (35) Huntington Shop Sheet Metal Workers were furloughed. (Emphasis in original.)

Coordinated with the Sheet Metal Workers' furlough was a notice furloughing ninety-five (95) Machinists and twenty-six (26) Electricians. Carmen, Upholsterers, Supervisors, Firemen and Oilers, and boilermakers were separated by negotiated buyout agreements.

The force reduction was no surprise to the Organization. As you will recall, we advised the Organization in early August 1988, (not January 1988, as alleged) that a system-wide force reduction was planned and, at that time, we proposed a voluntary separation program ....

* * *

In the weeks that followed our initial discussion and offer in August 1988, no decision was reached by the SMWIA to accept the Carrier's proposal despite numerous meetings with your Organization.... Carrier was forced to implement its previously announced plan to furlough 68 sheet metal workers at various points on the system. At the same time, inasmuch as no agreement had been reached with the electricians' and machinists' organizations, Carrier initiated furloughs of 147 machinists, and 84 electrical workers throughout the system. Force reductions in the other shop crafts were achieved through means of the Voluntary Separation Agreements with the other Union Representatives. (Emphasis in original.)

These furloughs occurred when it became obvious that fewer workers were needed at many

locations than were employed. These furloughs were not related to any New York Dock covered transaction. The claimants were furloughed simply due to lack of work for them to perform. As stated above, recognizing the need to reduce forces, the Carrier made every effort to extend alternatives to the affected employees, but the Organization rejected our generous proposals. The Carrier asked for nothing, except the Organization's concurrence, which was not forthcoming. Now the Organization demands protection for these employees, when it was unwilling to provide alternatives before the reduction in forces actually occurred. Now, it is to late, and these employees, unaffected by any New York Dock covered transaction, are ineligible for any benefits or protection.

Furthermore, the burden of proof rests upon the party who asserts a claim. No causal nexus is shown to support the Organization's contention that the furloughs were a direct result of the coordination; however, many awards require that the Organization show causal nexus between the event and an adverse effect upon one or more employees. Clearly, the Organization has not made such a case in this dispute.

It is clear that even with the transfer of work from Louisville, insufficient work due to a decline in business at Huntington resulted in the furloughs. Subsequent to this reduction in forces, no work has been transferred to any other location, nor has the Carrier subcontracted any sheet metal work. Sheet Metal Workers continue to perform Rule 126 work; no significant change in the work they perform has occurred. The fact remains, these Claimants have not been affected in any manner by the prior Louisville-Huntington Coordination. The furlough of employees in this case, quite clearly is not on the Carrier's shoulders. No evidence has been presented in support of this claim because none exists. the claim consists solely of the Organization's attempt to absolve itself of responsibility in this matter.

Furthermore, it is well recognized within the industry that a general pattern of furlough/recall employment reflects the fluctuation in business demands. The same pattern prevails in this instance. As an example, Claimant Robert Cecil

was furloughed in 1979, and again in 1980, and when the volume of Carrier's business required his services, the Carrier recalled Mr. Cecil. This case is no different, and Mr. Cecil and the other Claimants have been recalled and are working again at the Huntington Shops.

Accordingly, your claim for protective benefits is without merit and is declined.

The foregoing positions of the parties remained deadlocked following additional conferencing and the dispute eventually was appealed to this Arbitration Committee for final and binding determination under Section 10 of the Implementing Agreement.

## OPINION OF THE CHAIRMAN

Disputed conversations between local Union officials and Carrier officers or newspaper stories quoted out of context are not the proper determining factors for deciding an NYD protective benefits dispute. At bottom line, the fundamental question in this case is whether the record persuasively demonstrates a reasonably direct causal connection between the "Louisville-Huntington Coordination" under the Implementing Agreement of May 21, 1987 and the subsequent force reduction furlough of the Claimants at Huntington Locomotive Shop on November 9, 1988. The evidentiary standards, burdens of proof, and governing principles for making such a determination are well established in

[illegible]strative law and in authoritative arbitration and judicial

[illegible]gs.

[illegible] recent controversial decisions

Commerce Commission (ICC) appears to hold that the appropriate

causal standard in NYD disputes is "proximate" rather than "but for" causation. See Finance Docket No. 28490, Atlantic Richfield Co. and Anaconda Co. - Control - Butte, A. & Pac. Railroad, etc., February 17, 1988 ("BAP"; Finance Docket No. 30965, Delaware and Hudson Railway Co. - Lease, etc. - Springfield Terminal, February 17, 1988 ("Springfield Terminal"); Finance Docket No. 28538 (Sub. No. 24), Burlington Northern, Inc. - Control and Merger - St. Louis & San Francisco Railway Co., June 8, 1988 ("Frisco"). The ICC apparently bases these decisions in large part upon its interpretation of the statutory language and associated congressional intent of 49 U.S.C. 11347 from which the New York Dock definitions were extrapolated. Even though the U.S. Court of Appeals for the Eighth Circuit reversed the ICC in Frisco for its heavy-handed incursion into the arbitral role of interpreting collective bargaining agreements, the Court implicitly upheld the ICC's "reasonably direct causal connection" standard of causation in such cases. BLE v. ICC, Civil Action No. 88-2120, 1989, U.S. App. Lexis 13796 (C.A. 8th, September 13, 1989).

Quite independent of the line of ICC decisions, per se, the better reasoned and more recent arbitral decisions in this arena also have tended to require a real and discernible causal nexus between the subsequent adverse effect (the November 9, 1988 furlough of Claimants at Huntington) and the earlier event out of which protection was generated (the "Louisville-Huntington Coordination"). See In the Matter of Arbitration Between Missouri Pacific Railroad Company and American Train Dispatchers

Association, Finance docket No. 27773 (Arbitrator Nicholas Zumas, July 31, 1981); In the Matter of Arbitration Between United Transportation Union and Main Central Railroad Company, Finance Docket No. 29720 (Arbitrator Robert M. O'Brien, August 10, 1984); In the Matter of Arbitration Between United Transportation Union and Norfolk & Western Railway Company, Finance Docket No. 29430 (Arbitrator Robert E. Peterson, August 29, 1986); In the Matter of Arbitration Between United Transportation Union and Chicago and Northwestern Transportation Company, Finance Docket No. AB-36 (Sub No. 2) (Arbitrator Gil Vernon); In the Matter of Arbitration Between Brotherhood of Maintenance of Way Employees and Maine Central Railroad Company, Finance Docket No. 29720 (Arbitrator I. M. Lieberman, February 26, 1985).

In sum, the teaching of all these authoritative precedents is:

> Before an employee is entitled to benefits ... there must be a reasonably direct causal connection between the transaction and the injury sustained; in other words the transaction must be the proximate cause of the injury .... If an employee is dismissed or displaced for reasons not connected with the transfer he is not entitled to the benefits.

Application of the foregoing standards to the facts of record yields the unavoidable conclusion that the Union failed to meet its burden of persuasion in this case. Bare assertions of

[illegible] guments and showing a four-month hiatus between [illegible] transfers and the November 9, 1988

[illegible] the transfers were the reasonably

direct proximate cause of these Claimants being furloughed. Moreover, Carrier presented unrebutted evidence of other supervening causes for the November 9, 1988, i.e.: system-wide reductions in force due to a general Fall 1988 decline in business, a specific drop-off in coal loadings in Kentucky and West Virginia in 1988, and recurrent cyclical fluctuations in rail car and locomotive construction, maintenance and repairs. In that connection, the undisputed record shows that prior to the "Louisville-Huntington Coordination" each of the Claimants experienced periodic furloughs and recalls at Huntington and each Claimant was recalled to service at the Huntington Locomotive Shop within six to eight months of the November 9, 1988 furlough.

Based upon all of the foregoing, this Board must conclude that Claimants were not entitled to NYD protective benefits during their respective furlough periods from Huntington Locomotive Shop from November 9, 1988 through to their respective April-August 1989 dates of recall to service.

AWARD OF THE ARBITRATION COMMITTEE

Sheet Metal Workers Robert Cecil, James C. Skeans, Albert E. Lewis, Noah Williamson, Reed A. Washington, Danny K. McSweeney, Noel D. Shaffer, Thomas C. Jones, Donald C. Mullins, Michael A. Pusateri, Michael Alan Thompson, Opha R. Bennett, Delbert J. DeHart, Eric L. Sparks, Donald L. Livingstone, Thomas E. Lawless, James r. Qualls, Keith A. Miller, Paul Norman Keller, and/or Lowell T. Ransbottom were not entitled to NYD protective benefits during their respective furlough periods at Huntington Locomotive Shops from November 9, 1988 through to their respective April-August 1989 dates of recall to service.

Dana Edward Eischen, Chairman and Neutral Referee
Dated at Ithaca, NY on May 22, 1990

Richard B. Branson
Member, Concur/Dissent
at _____

Robert H. Melotti
Company Member, Conc.
Dated at _____
on _____