In the Matter of Arbitration

Brotherhood Railway Carmen - Division of TCIU	)	File: 2118
vs	)	ICC Finance Docket 28905
CSX Transportation, Inc. (former L&N and former C&O Railway)	)	

The Questions To Be Resolved

Question No. 1

Should Carmen J. G. Davis, R. C. Richey, K. R. Howell, G. H. Shively, H. M. Pike,Jr., W. E. Henderson, C. R. Thompson Sr., J. T. Osterhage, A. L. Walker, W. G. Metzger, Jr., T. D. Phillips, D. M. Campbell, B. J. Miller, C. D. Ford, C. E. Moore, and E. Draper, Jr. who were presently being used to fill vacancies and vacations at the time of the notice was served by the Carrier to transfer work from South Louisville to Raceland and close the car repair facility at South Louisville, be considered as 'dismissed' or 'displaced' employees and afforded the protective benefits of the New York Dock Conditions?

Question No. 2

Should Carmen Painters G. W. Hodgen, J. D. Meadows III, and E. H. Page III, who had been regularly recalled and were regularly assigned when notice was served by the Carrier to transfer work from South Louisville Shops to Raceland Car Shop and close their car repair facility at South Louisville, be considered as 'dismissed' or 'displaced' employees and afforded the protective benefits of the New York Dock Conditions?

Question No. 3

Should L. C. Wright who was demoted from a supervisor's position to the rank of Carman subsequent to notice being served by Carrier to transfer work from South Louisville to Raceland and close its car repair facility at South Louisville, thereby resulting in his being furloughed, be considered as a 'displaced' or 'dismissed' employee and afforded the protective benefits of the New York Dock Conditions?

Background

In 1987 the Carrier employed thirty-nine (39) Carmen and nine (9) painters in its South Louisville, Kentucky Car Shop. This shop is one of the facilities used by the former Louisville and Nashville Railroad (L&N) prior to the merger of this railroad with what is now CSX Transportation Corporation. The Carrier's repair program in 1987 consisted in upgrading open top hopper cars and box cars of the 50 foot variety. The 1987 repair program at South Louisville was scheduled to finish by November 25, 1987.

Some five (5) days before this date the Carrier served notice under provisions of New York Dock Conditions that its repair program for 1988 would be transferred to, and coordinated with its Raceland, Kentucky Car Shop. This shop is one of the facilities used by the former Cheasapeake and Ohio Railroad (C&O) prior to its merger with what is now CSX Transportation Corporation. The notice of transfer and coordination stated that such would be effective on or about February 19, 1988. This notice also stated that thirty (39) Carmen positions at South Louisville would be abolished, as would nine (9) painter positions, and that a like number would be established at Raceland.

For the record the Notice of November 20, 1987 is quoted here in full.

> (TO) ALL CONCERNED
>
> This is notice pursuant to Article I, Section 4 of the New York Dock Conditions as prescribed by the Interstate Commerce Commission in Finance Docket No. 28905, that effective on or about February 19, 1988 the South Louisville Car Shop, Louisville, Kentucky will be closed; and all freight car heavy repair work at the South Louisville Car Shop will be transferred to the Raceland Car Shops, Raceland, Kentucky and coordinated with work presently being performed at the Raceland Car Shops under the C&O Agreement.

In connection with the above transaction it is anticipated that the following positions will be abolished at South Louisville:

39 Carmen
9 Painters

and that the following positions will be established at Raceland:

39 Carmen
9 Painters

Negotiations with employees' representatives for the purpose of reaching implementing agreements which will protect the interests of the employees in accordance with the New York Dock Conditions will commence as soon as possible.

(signed)
J. T. Williams
Director of Labor Relations

In accordance with the above negotiations took place in December of 1987 between the Carrier and Organization Committees from both the South Louisville and Raceland Shops. These tripartite negotiations were finalized in February of 1988 and on February 25, 1988 an Agreement was signed by the Carrier's Senior Manager of Labor Relations, Jacksonville and by representatives of both the South Louisville and Raceland Organization Committees.

During the negotiations, and after the Agreement of February of 1988 was signed, it was the position of the South Louisville Committee that privileges under this Agreement should accrue not only to encumbents of regularly assigned, bulletined positions at the South Louisville Shop at the time the November 20, 1987 Notice was issued, but also to some nineteen (19) other employees who were "working" albeit not regularly assigned by bulletin. These included sixteen (16) Carmen on furlough status throughout the period who were called to work only when regularly assigned Carmen were absent, and three (3) Carmen Painters who were recalled in September and October of

1987 to help finish the 1987 car program at South Louisville, and who were furloughed again on November 25th when the program ended. These Carmen are the Claimants to Questions 1 & 2 before this Arbitration Committee. The Claimant to Question 3 and the claim contained therein stems from a different set of circumstances which will be identified and discussed in detail later in this Award. As a preliminary matter it can be stated that the Claimant in Question 3 was furloughed as a supervisor on November 24, 1987, returned to rank of Carmen, and is claiming privileges under the 1988 Agreement result of this latter status. According to the South Louisville Committee, all twenty (20) of these employees were "affected by the transaction" which took place between South Louisville, and Raceland Car Shop and should be protected accordingly.

Absent resolution of this dispute the Organization's South Louisville Committee resorted to procedures available to them under Section 10 of the February, 1988 Agreement which reads, in pertinent part, as follows:

> 10. Any dispute or controversy arising between the parties signatory hereto with respect to the interpretation or application of any provision of this Agreement will be handled in accordance with the provisions of Article I, Section 11, of New York Dock unless otherwise agreed.

Procedural Issues

The Agreement of February, 1988 is the result of tri-partite negotiations and it is the argument of the Carrier before this Committee that all parties thereto should be permitted to participate in arbitral hearings to resolve disputes arising from the interpretation of such Agreement. The Carrier argues that Section 4 of the New York Dock Conditions require that Notice of transaction be given in writing to "interested employees" and their representatives. In view of this, according to the Carrier, disagreements over the interpretation of Agreements arising from such Notice should also include all of the original parties,

even though the forum to resolve such differences is mandated by Section 11 of New York Dock. The arbitrator agrees. For this reason the Committee from South Louisville, and that from Raceland and/or their representatives were permitted to present their positions at the hearing. The latter presented oral testimony, as well as a written document, although no submission, which was accepted into the record. Raceland's Committee's evidence dealt with subject-matter pertinent to Question 1 & 2 before this Arbitration Committee. It is the conclusion of the arbitrator that in addition to finding support for procedural conclusions contained herein, under Section 4 of New York Dock, the intent of Section 11(b) of the Conditions likewise permit divergent interests on the part of Organizations to be made known at proceedings such as this, although none of the parties specifically requested that members of this Arbitration Committee per se include representatives from both the South Louisville, and Raceland Car Shops.

The arbitrator was troubled, however, with the presence at the hearing of independent counsel for one of the Claimants who stated that he was present as an "observor". Because of objection by one of the interested parties, the arbitrator was obliged to rule that the arbitral process was not a public one as contemplated by the Railway Labor Act, New York Dock Conditions nor, as far as could be determined, the Agreement of February 25, 1988 which referenced New York Dock at Section 10 to resolve problems of contract interpretation. Such is also consistent with all known, prior arbitral precedent. Counsel was most courteous in obliging the Committee with respect to this procedural question.

Position of the Parties, Discussion and Findings

Although the Committee must deal only with the interpretation of one Agreement, and particularly certain provisions contained therein as outlined below, the circumstances and evidence of record surrounding each of the three Questions before the Committee are different. Each will, therefore, be treated separately.

Question No. 1

The position of the South Louisville Committee is that language found in Section 3(a) of the February 25, 1988 Agreement was meant to "include all employees who were...employed at the time Notice was served", and that it included the sixteen (16) Carmen who are Claimants under this Question. In hearing and in its submission to this arbitrator, the Committee argues that during negotiations leading up to the Agreement, and after it was signed, it has consistently held that these Carmen were protected under New York Dock and that this was the intent of the language negotiated into the 1988 Agreement. The language in question states the following:

> 3(a)
>
> The abolishment of positions at South Louisville Shop will occur as to the number and date shown in the Carrier's Notice of November 20, 1987 or as subsequently amended by mutual agreement. At least fifteen days prior to the transfer, all positions to be established in the coordinated operations at Raceland Car Shops will be bulletined at the South Louisville Car Shop for a period of ten calendar days. All Carmen and Painters in active service during any part of the bulletin period will be afforded the opportunity to bid for such positions in their respective classifications.

Of particular concern to all parties to this dispute is the correct intent of the phrase: "...(a)ll Carmen and Painters in active service..." which is found in 3(a). The South Louisville Committee states that this phrase does not mean "regularly assigned by bulletin", but only means those who were "employed", or working at the time Notice was served. According to the South Louisville Committee, the sixteen (16) Claimants under this Question were all being used to "...fill vacancies and vacations of regular employees who were...absent for various reasons...(in) 1987", and some of the Claimants had worked as many as 180 days and more, although several of them had worked less than 10 days during this time-frame. The facts of record are in dispute with respect to exactly how long each of the sixteen (16) employees worked during

1987 at the South Louisville Shop. These details, per se are of little evidentiary concern with respect to this Question 1. The issue at bar is not who worked how many days, but whether the phrase:"...active service" encompasses only "regularly assigned by bulletin" employees, or not. According to the South Louisville Committee, given their operationalization of the phrase: "...active service", the Claimants to Question 1 fall under the protection of Section 1 of the New York Dock Conditions which read, in pertinent part, as follows:

> 1. Definitions...(a) 'Transaction' means any action taken pursuant to authorization of this Commission on which these provisions have been imposed.
>
> (b) 'Displaced employee' means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> (c) 'Dismissed employee' means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

The position of the Carrier is the Claimants to Question 1 do not meet the test of either 1(b) or (c) of New York Dock cited in the immediate foregoing since none of them were "employees" stricto dicto. The Carrier argues that none of these employees were in active service during any part of the bulletin period, but were all on furlough status, and had been between "one and a half and two and a half years prior to the transaction". According to the Carrier, there is no causal nexus between their furloughs and the transaction which ultimately took place on July 5, 1988. "Their earlier furloughs were solely due to a lack of work". The Carrier further argues that the Claimants would have remained "furloughed regardless of whether or not the Car Shop was transferred to Raceland". The Carrier cites arbitral precedent for its position that

under New York Dock Conditions, and in other numerous shop personnel transfers, the parties have "never protected previously furloughed employees who worked during the absence of regularly assigned employees, or included such personnel in the transfer process". The Carrier notes that furloughed South Louisville employees were dealt with in the February 25, 1988 Agreement under Section 3(e). This states the following:

> 3(e)
>
> In the event all positions added in the coordinated operation to which work is transferred are not filled, pursuant to the procedures in paragraphs (b) and (c) such unfilled positions shall then be filled by recall of furloughed employees at that location. If any such positions still remain unfilled, they will accrue to furloughed South Louisville Carmen and Painters (as the case may be) and then be filled pursuant to existing rules. An employee accepting a position pursuant to this paragraph (e) will not be afforded the protection or moving allowances contained herein as a result of this transaction.

The Carrier adds that rights accruing to furloughed South Louisville Car Shop employees fall under this Section 3(e), and not under Section 3(a) as claimed by the Committee from that location. Signatory Committee members from Raceland are in accord with this line of reasoning.

Findings

There is no dispute of record that the status of the sixteen (16) Carmen was that they were furloughed and that whatever work time they accumulated at the South Louisville Car Shop during the time-frame in question was as fill-ins for regularly assigned by bulletin employees who were absent. The focus of the instant dispute is whether such status qualified them as "displaced" or "dismissed" employees under Section 1 of the New York Dock Conditions or as an employee who had been in "active service" in terms of the intent of Section 3(a) of the February, 1988 Agreement.

The record clearly shows that two of the parties to the tripartite Agreement of 1988 resisted the interpretation which the South Louisville Committee is arguing here during the time of the negotiations which led up to that Agreement and that they

continued to do so before this Arbitration Committee. That they were successful in doing so is the result of two evidentiary facts of record. The first deals with the language of the 1988 Agreement itself, at Section 3(e); the second deals with common understandings of the question here at bar in terms of both past practice, as well as arbitral precedent.

Since Section 3(e) deals with furloughed employees (Carmen and Painters) at South Louisville, it appears to the Committee that those with the undisputed status of the Claimants to Question 1 was dealt with in the 1988 Agreement. Their rights and privileges are laid out in this Section of the Agreement in language that is both clear and unambiguous. If the arguments progressed by the Claimants are to be taken literally, it is unclear how Section 3(e) can or should be interpreted. The logic of contract suggests that the position of the Carrier in this matter is the stronger one. Secondly, both of the other parties to the tripartite Agreement argued before this Arbitration Committee, both orally and by means of written submissions, that there is simply no known past practice of providing the type of protections requested here, for furloughed employees under circumstances parallel to those of this case. This is not disputed by the South Louisville Committee and absent rebuttal the Arbitration Committee has little choice but to take these arguments at face value. The Carrier also argues that arbitral precedent dealing with the relationship between transactions under New York Dock Conditions and dismissed/displaced employees has concluded that the latter cannot have furlough status when a transaction takes place. This is a conclusion arrived at, for example, in the matter of this Organization and the Boston & Main Corporation in an Award issued in 1984 by arbitrator Cushman. That Award, in turn, cites an earlier one by arbitrator Seidenberg, in a dispute between the Brotherhood of Maintenance of Way Employees and the B & O Railroad, wherein the latter addresses the status of "inactive" (furloughed) employees at the time of an ICC approved transaction. The Seidenberg Award implies that those on furlough status do not have the same protections as those holding bulletined positions but

they should not, however, be treated with impunity which would result in "...unilateral...extinguish(ing)(of)...vested seniority...rights". Such did not happen in this instance, since Section 3(e) of the 1988 Agreement does provide protections for such benefits, upon the availability of work at Raceland. Pertinent arbitral precedent is also found in an Award issued by arbitrator Rohman which dealt with a dispute between the United Transportation Union and the Union Pacific Railroad under AMTRAK C-1 Conditions. The latter define a displaced/dismissed employee in the same way as New York Dock does. 1/

There is insufficient substantial evidence to warrant a sustaining conclusion with respect to the claim associated with Question 1.

Question No. 2

The same Agreement provisions germane to Question 1 are applicable to this question. What differs here is the fact that the three (3) Claimants worked as painters, and that they had, in fact, been recalled and were holding bulletined positions in 1987 at the South Louisville Shop for a short period of time. These painters established seniority in the South Louisville car shop in September (2 Claimants) and October (1 Claimant) of 1987. Two of these painters worked for a total of slightly over 50 days each in 1987, and one worked 22 days during that year. On November 18, 1987, prior to issuing the Notice of transfer of work at the South Louisville car shop, the Carrier notified these three painters that they would be furloughed, along with other car shop employees, on November 25, 1987. They were furloughed at that time and not recalled to active service on January 4, 1988 as were a number of their fellow employees (Employees Ex. E).

1/ See, for example, BRCU&C-TCU vs The Denver & Rio Grande Western R.R., CA-3-87 AMTRAK 33-11 C-1 Conditions, Award issued , Suntrup, arbitrator.

It is the position of the South Louisville Committee that these three painters were employees protected under New York Dock Conditions and that they were adversely and directly affected by the transaction which took place under these same Conditions.

The Carrier argues, on the other hand, that the transaction which took place, and the furlough of the three painters is unrelated, and that no causal nexus exists and/or can be established between these two events. According to the Carrier, the three painters were called in late 1987 to help "finish out the 1987 car program" and were "again furloughed on November 25, 1987 because the 1987 program was completed". The painters were not needed for the 1988 program and, according to the Carrier, were advised of this before the announcement Notice was issued related to the transfer of work. According to the Carrier, "...(t)he completion of the 1987 car program (at South Louisville) and resultant shutdown of the shop until the start of the 1988 program is not a 'transaction' as defined in New York Dock Conditions. No authorization from the Interstate Commerce Commission is required for such an event and, therefore, the Claimants were not furloughed as a result of the transaction".

Findings

The record establishes that the factual difference between the three (3) painters under consideration here and the sixteen (16) carmen who were party to Question 1 is that the latter were on furlough status throughout 1987, whereas the former were recalled to bulletined positions for a short time during this same year. The amount of time they worked, however, clearly establishes that the role they played in the 1987 car repair season was one of adjunct in order that all work scheduled for that season could be finished by the November 25, 1987 target date. Such conclusion is further supported by the fact that they did not, in fact, establish seniority in the South Louisville Car Shop until two months (and in one case, one month) before the end of the 1987 program.

In addition to the above considerations, the painters were technically in the same position as the sixteen (16) Carmen who were party to Question 1, if not de facto at least de jure since all three of them had been advised, before the Notice of transaction, that they would be furloughed five days after it was issued. Can it be reasonably argued that the Carrier served notice of furlough before issuing the Notice of transaction in order to avoid potential problems related to claimed protections because the painters might be considered in "active service" under the language of Section 3(a) of the 1988 Agreement if it had not followed this course of action? The facts of record do not support such conclusion. The painters contributed very little to the completion of the 1987 car repair program at South Louisville because there was little work for them to do as evidenced by the amount of time they worked at that location during this year. On the basis of evidence of record, it is credible as the Carrier argues, that it foresaw nothing for them to do in the 1988 season and furloughed them because of this. Further, the the South Louisville Committee also apparently recognized this since it does not raise the issue, nor do the Claimants, that they were furloughed in anticipation of the transaction.

On the day the February 25, 1988 Agreement was signed the Carrier officer wrote to the Organization representatives at both the South Louisville and Raceland Shops that the phrase "in active service" found in Section 3(a) of the Agreement "is intended to mean those Carmen and Painters who are regularly assigned by bulletin to positions during any part of the bulletin period will be afforded the opportunity to bid for such positions in their respective classifications". The Officer underlined, when writing this letter, that he understood this it was the understanding of only two of the three parties signatory to the Agreement. This Arbitration Committee must agree with the majority on this issue and conclude that the three (3) Painters, as the sixteen (16) Carmen considered in Question 1, were not displaced/dismissed employees in accordance with the meanings of such in New York Dock Conditions at 1(b)(c). The arbitrator can find insufficient substantial evidence of a nexus between the furlough of these three employees, and the transaction at bar.

Arbitral precedent cited in the Findings under Question 1 apply equally to conclusions applicable to Question 2.

Question No. 3

The same provisions cited above in Questions 1 & 2 from the 1988 implementing Agreement, as well as New York Dock Conditions apply to Question 3. Question 3 deals, however, not with a Carman who was on furlough de facto or de jure when the Notice of transaction was issued on November 20, 1987, but with an employee who was a supervisor at that time. After this time, he was furloughed as a supervisor, on November 24, 1987 and as a consequence of this reassumed status as a Carman. This Claimant holds South Louisville Car Shop seniority as of June 6, 1969. Approximatley eleven years after establishing seniority on that roster, he accepted a promotion to a supervisory position and held that position at the time of the Notice of transaction. The South Louisville Committee argued at the hearing that this Claimant did not only "lose his position as supervisor...due to (the) transaction, but also as a Carman". Or, as it puts it otherwise, "...(i)f the Carrier had not closed its car shop at South Louisville, then the present supervisory force would have been needed, and thus (would have) remained in effect. However, when the facility was closed, and all of the working personnel was dispensed with, there was need for fewer supervisors and Claimant Wright was consequently demoted to a Carmen and his seniority, as such, placed him in a furlough status".

The Carrier, on the other hand, argues that there is no relationship between the Claimant to Question 3's furlough as a supervisor and the transaction in the car repair shop since as a supervisor he did not even work in that shop: he worked in the locomotive shop. According to the Carrier, Mr. Wright's position in that shop was but one of some 1,000 management positions eliminated in 1987 as part of a well-publicized downsizing process which had begun in late 1986 and which needed no approval from the ICC. When the Claimant to this question was furloughed as supervisor, he elected

to return to the rank of Carman. According to the Carrier, given the Claimant's seniority date in the Car Shop, he was on furlough status which had occured "some 2 ½ years before the Car Shop coordination".

Findings

This Arbitration Committee has no jurisdiction under either the Railway Labor Act, New York Dock Conditions, or the Implementing Agreement of 1988 signed between the parties to this case to rule on issues related to the furlough of this Claimant in his capacity as supervisor working for the Carrier. The issue before it is whether the Claimant has protections under New York Dock Conditions after he reassumed his status as Carman after he was furloughed as supervisor in November of 1988. The factual question before this Committee is whether the Claimant, as a Carman, had furlough status or not when he returned to that rank. If he did, then the issue before the Arbitration Committee becomes one parallel with that considered under Question 1. Did he? The Carrier states that he did and if he would have continued to work through the 1980's as a Carman he would have been furloughed several years before the 1987 coordination was announced. Although the South Louisville Committee argues that if the Claimant had not been furloughed as supervisor, he would not have had to reassume Carman status, which is true, it also underlines in its submission to this Committee that such action placed him "in a furlough status". No evidence was presented at the hearing by the Claimant, who was present, to suggest otherwise and the Committee must, therefore, accept this corraborated evidence at face value. Since the Claimant was on furlough status, as Carman, he was not, therefore, in active service "...during any part of the bulletin period". All conclusions with respect to protections this Claimant had under the 1988 Agreement under Section 3(e), and with respect to past practice and arbitral conclusions, as they are outlined above under Question 1 here apply.

There is insufficient substantial evidence to warrant a sustaining conclusion with respect to the claim associated with Question 3.

AWARD

Question No. 1

The Claimants under this Question shall not be considered as 'dismissed' or 'displaced' employees, and they shall not be afforded the protective benefits of the New York Dock Conditions.

Question No. 2

The Claimants under this Question shall not be considered as 'dismissed' or 'displaced' employees, and they shall not be afforded the protective benefits of the New York Dock Conditions.

Question No. 3

The Claimant under this Question shall not be considered a 'dismissed' or 'displaced' employee, and shall not be afforded the protective benefits of the New York Dock Conditions.

Edward L. Suntrup
Neutral Member

J. T. Williams
Carrier Member

R. P. Wojtowicz
Employee Member

We Dissent

Chicago, Illinois
January 31, 1989