Case No. 1
Award No. 1
File:NW-IT-12(IT)

SPECIAL BOARD OF ADJUSTMENT NO. 922
UNDER THE PROVISIONS OF
SECTION 11(a) OF THE NEW YORK DOCK II CONDITIONS
Between
UNITED TRANSPORTATION UNION
and
NORFOLK & WESTERN RAILWAY COMPANY

QUESTION AT ISSUE: Is Mr. P. M. Anderson entitled to the benefits of the protective conditions set forth in the New York Dock II Conditions in view of the NW and IT decision to consolidate their respective facilities, operations and services at St. Louis, Missouri and Decatur, Illinois on May 8, 1982?

BACKGROUND: The instant claim originated as a result of the coordination of operations on the Norfolk and Western Railway Company (NW) and Illinois Terminal Railroad Company (IT), which was approved by the Interstate Commerce Commission (ICC) in its decision in Finance Docket 29455. Conditions for the protection of employes enunciated in New York Dock Ry. - Control - Brooklyn Eastern District, 360 ICC 60(1979) (New York Dock Conditions) were imposed in connection with this transaction.

Upon receipt of the ICC's approval in June of 1981, carrier issued notices as set forth in Section 4 of the New York Dock II Conditions and began negotiations toward reaching implementing agreements with the

various labor organizations involved. Once this process was completed, coordination was effectuated on May 8, 1982.

The claimant commenced his employment with Illinois Terminal Railroad Company as a switchman on March 7, 1978, at which time he was assigned to the extra board at St. Louis. On February 8, 1980, claimant sustained an injury to his back while on duty with his employer. He subsequently recovered from such injury and returned to the service of carrier; however, on March 23, 1982, he again injured his back and was unable to perform his duties as a switchman. Consequently, on May 8, the date the coordination of the two railroads was implemented, Mr. Anderson was marked off because of his injury. He remained off duty in such status until June 1, 1982, at which time he returned to duty on the extra board. At such time he was notified that he was furloughed.

Although Mr. Anderson had received no previous notification of having been furloughed, on May 9, 1982, carrier notified all other employees below Rank No. 182 (L. D. Webster) that they were furloughed because of excessive forces due to the consolidation. Mr. Anderson's rank on the seniority roster is No. 227, and he had reported for duty on June 1 in response to the direction of carrier's medical examiner and with the latter's certification that Anderson was able to work as a switchman as of such date.

On June 6, 1982, Mr. Anderson filed, on the form provided by carrier, a "REQUEST TO BE RECOGNIZED AS A PROTECTED EMPLOYE UNDER NYD II." Carrier responded to such request on August 9, 1982, advising

that such request was denied "in view of the fact that he was off due to a personal injury at the time of the consolidation". Under date of October 5, 1982, such denial was appealed, the letter of appeal setting out the argument that since employes both junior and senior to claimant had been certified as protected employes Mr. Anderson should receive the same consideration.

Carrier responded that in view of the fact that Anderson "did not hold a position on May 8, 1982, there was no way he could meet the criteria of either a 'displaced' or a 'dismissed' employe as defined in section 1(b) and (c) of Appendix III of the New York Dock II Conditions."

The language of the New York Dock II Conditions most directly involved herein reads as follows:

> 1. Definitions.-(a) "Transaction" means any action taken pursuant to authorizations 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.

ANALYSIS AND FINDINGS: The "transaction" involved herein was the coordination which took place on May 8, 1982, a coordination of activity and operations which resulted in a substantial reduction in the number of emloyees required. Carrier therefore immediately

furloughed a number of employees, some of whom were senior to, and some of whom were junior to, claimant on the newly combined seniority list. Thereafter, carrier approved the certification as protected employees of certain employees junior to Mr. Anderson as well as those senior to him on such list.

The critical language involved herein is that found in Section 1(b). Was Switchman Anderson a "displaced employee" under the definition set forth in New York Dock II? Without such definition we might be justified in viewing displacement simply as a forced move directly resulting from the exercise of seniority by one or more senior employees and caused by a reduction in force made necessary by a diminished need as a result of the coordination of work activity. Indeed, some referees have looked for a chain of bumps to support a direct causal relationship between the transaction and the claimed diminution of earnings or adverse effect of rule changes. However, we think the true intent of the applicable language is made plain in question and answer No. 6 of the agreed-upon interpretations of New York Dock II Conditions, reading as follows:

> "Q. It is necessary that an employee be displaced from his assignment or position in order to establish eligibility for protective benefits under New York Dock?
>
> A. No, provided it can be shown that as a result of the involved 'Transaction' such employee 'is placed in a worse position with respect to his compensation.'"

In spite of such interpretation, however, and in spite of carrier's concession that the protective agreement was "designed to

provide protection to employees against adverse effects flowing from the specific transaction involved", carrier advances the following argument:

> "...carrier submits that in order to be recognized as either a "displaced" or a "dismissed" employe one must be able to establish a direct causal relationship between the transaction and the alleged adverse effect. However, in the instant claim neither the Organization nor Mr. Anderson have yet to establish such a link. Rather, they have been content to progress Mr. Anderson's original allegation that he was adversely affected on May 8, 1982, in spite of the fact that he was then out of service due to a personal injury and as such, did not hold a position with either Carrier at the time of the transaction.
>
> With this in mind, the Carrier submits that the accepted touchstone for determining whether an employe qualified for either a displacement or a dismissal allowance, is the loss of a regular job, or the loss of earnings due to being involved in a chain of displacements that resulted from the transaction. However, Mr. Anderson neither held a regular job nor was he involved in a chain of displacements that resulted from the transaction and, as such, failed to establish a causal connection between his situation on May 8, 1982 and the transaction."

Carrier does not argue that claimant suffered no adverse effect from being furloughed. Instead, it pleads the absence of a causal relationship between the transaction (which, of course, substantially reduces the need for switchmen) and the furloughing of Switchman Anderson.

What, then, precipitated the furloughing of claimant? Had there been no coordination would not claimant have been working from the extra board at St. Louis on June 1, 1982, or as soon thereafter as he stood first out? If switchmen both senior and junior to claimant were adversely affected by the coordination and therefore certified as

protected employees, how could claimant suffer no adverse effect although furloughed just as were his colleagues?

The burden of the carrier's position is that at the exact time the transaction takes place the employee must be in "a regular job" which he loses or from which he is moved with resultant loss of earnings. This argument presupposes that the effect must be immediate. However, we view such reasoning as a strained interpretation of the applicable language.

"'Displaced employee' means an employee of the railroad (which, as of May 8, 1982, Mr. Anderson was) who, as a result of a transaction (here a coordination resulting in less work for employees on the seniority roster) is placed in a worse position with respect to his compensation (he was furloughed without pay, but would not have been had the coordination not taken place)..."

Carrier dogmatically asserts that under New York Dock II an employee cannot be protected from adverse effect of the transaction unless on the very date of the transaction he held a position or regular job with one of the merging carriers. However, such language cannot be found in New York Dock II Conditions or in the agreed-upon interpretations of its language.

Section 1(b), in defining "displacement", really makes no mention of position or job. It refers only to "employee". Now, it cannot be doubted that on May 8, 1982, and at all other relevant times, P. M. Anderson was an employee of the Illinois Terminal or its merged successor.

It will at the same time be noted that in the definition of "dismissed employee" in Section 1(c), "position" is twice mentioned, each time in connection with the abolition of the same. Such language makes readily identifiable the dismissed employee, but such language is irrelevant to the issue before us now.

We hold that, subject to proof of actual reduction in earnings as contemplated under Appendix III of Finance Docket No. 28250, Mr. Anderson is entitled to the benefits of the protective conditions set forth in New York Dock II Conditions.

A further question is raised by reason of the fact that for most of the year immediately prior to May 8, 1982, Switchman Anderson had no earnings because he was out of service due to his injury.

The governing language is found in Section 5(a) of New York Dock II Conditions, reading in pertinent part as follows:

> Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

We understand carrier's position to-be that in this case the 12 month period for computing average monthly compensation would be the 12 month period immediately preceding May 8 or perhaps June 1. It is readily apparent that any such rule would eliminate Mr. Anderson from protection. Such an interpretation would effectively deny protection for an employee unable to work for any considerable period of time

because of an injury suffered while serving his employer. This is manifestly unfair and certainly was not intended by the framers of the agreement. Therefore, any such substantial period of time should not be counted, particularly since it would not consist of "months in which he performed services". The date of Mr. Anderson's displacement was June 1, 1982. Prior to his second injury on March 23, 1982, he performed services during a period of approximately (3) weeks. His last 12 months of service would include such period together with a sufficient amount of the period immediately preceding his first injury on February 8, 1980, to total 12 months. Under Section 5(a) his compensation during such period should be adjusted so as to reflect subsequent general wage increases, and from such can be determined his average monthly compensation and average monthly time paid for in the test period.

AWARD: Subject to his showing of loss of compensation, Mr. P. M. Anderson is entitled to the benefits of protective conditions set forth in the New York Dock II Conditions.

David H. Brown
DAVID H. BROWN, Chairman and Neutral Member

G. C. Edwards
G. C. EDWARDS, Carrier Member
2 dissent

L. W. Swert
L. W. SWERT, Organization Member

St. Louis, Missouri
January 28, 1985