

ARBITRATION COMMITTEE

In the Matter of the	)	
Arbitration Between:	)	
	)	
UNITED TRANSPORTATION	)	Pursuant to Article I,
UNION,	)	Section 11 of the New
	)	York Dock Conditions
Organization,	)	
	)	
and	)	I.C.C. Finance Docket
	)	No. 31088
ILLINOIS CENTRAL RAILROAD,	)	
	)	Case No. 1
Carrier.	)	Award No. 1
_____		

Hearing Date: August 2, 1991  
Hearing Location: Sacramento, California  
Date of Award: September 30, 1991

MEMBERS OF THE COMMITTEE

Employees' Member: Bruce Wigent  
Carrier Member: J. S. Gibbins  
Neutral Member: John B. LaRocco

STATEMENT OF THE CLAIM

Claim that W. A. St. John is entitled to New York Dock protective benefits as a result of the Birmingham Line Sale.

OPINION OF THE COMMITTEE

I. INTRODUCTION

On May 9, 1991, the Interstate Commerce Commission (ICC) permitted the Illinois Central Railroad (Carrier) to sell 199 miles of its track running between Fulton, Kentucky and Haleyville, Alabama, to the Southern Railway (SOU). The purchase price was approximately \$38 million. Simultaneous with the line sale, the ICC granted the Carrier permission to discontinue 81 miles of trackage rights over the SOU and the Burlington Northern Railroad Company between Haleyville and Birmingham, Alabama. The ICC concurrently approved the SOU's acquisition of bridge trackage rights over the Carrier's line between Fulton and Centralia, Illinois, a distance of approximately 154 miles. These three transactions will be collectively referred to as the Birmingham Line Sale. [ICC Finance Docket No. 31088.]

To protect employees affected by SOU's purchase of the Fulton to Haleyville line, the ICC imposed the employee protective conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Carrier pursuant to the relevant enabling statute, 49 U.S.C. §§ 11343, 11347. To protect employees affected by the SOU's acquisition of trackage rights over the Carrier (to Centralia), the ICC imposed the employee protective conditions set forth in Norfolk and Western Railway - Trackage Rights - Burlington Northern, 354 I.C.C. 605 (1978); as modified by Mendocino Coast Railway, Inc. -

Lease and Operate, 360 I.C.C. 653 (1980) on the Carrier. To protect employees affected by the Carrier's abandonment of trackage rights between Haleyville and Birmingham, the ICC imposed employee protective conditions set forth in Oregon Short Line Railroad Co. - Abandonment - Goshen, 360 I.C.C. 91 (1979) on the Carrier. Since these three separate employee protective conditions contain virtually identical provisions and because the sale was the predominant transaction, this Committee will refer only to the provisions of the New York Dock Conditions.

This Committee is duly constituted under Section 11 of the New York Dock Conditions in accord with a Letter Agreement dated May 29, 1991.<sup>1</sup> All interested parties were given proper notice of the hearing held on August 2, 1991. Under Section 11 of the New York Dock Conditions and Article III of the Arbitrated Implementing Agreement formulated under Section 4 of the New York Dock Conditions, this Committee has jurisdiction over the dispute and the parties herein.

The Birmingham Line Sale became effective on June 28, 1988.

## II. BACKGROUND AND SUMMARY OF THE FACTS

During 1987 and the first few months of 1988, Claimant worked off the Memphis Extra Board. Just five days before the effective date of Birmingham Line Sale, Claimant marked up for a regular flagging assignment in through freight service between Memphis, Tennessee, and Paducah, Kentucky. After completing just

<sup>1</sup> Inasmuch as all sections pertinent to this dispute appear in Article I of the New York Dock Conditions, this Committee will only cite the particular section number.

four round-trips, Claimant was displaced, on June 29, 1988, by R. A. Williams, a senior employee who, in turn, had been rolled by Trainman Mays. The latter employee, who initiated the chain of displacements, had been displaced at Jackson, Tennessee, a location on the sold property. On June 30, 1988, Claimant marked up on the Memphis Extra Board. At this time, Claimant had an opportunity to exercise his seniority to another flagging turn on the same Memphis to Paducah regularly assigned through freight service.

Several months later, Claimant filed for a New York Dock displacement allowance when his extra board earnings fell below his protective guarantee.

### III. THE POSITIONS OF THE PARTIES

#### A. The Organization's Position

Since Claimant was in the chain of displacements which directly emanated from the Birmingham Line Sale, Claimant was an adversely affected employee entitled to protective benefits. Stated differently, if the sale had not occurred, Claimant would not have been rolled from his flagman assignment. The displacement placed Claimant in a worse position with respect to his compensation as well as the rules governing his working conditions. Whether or not a position paying compensation equal to or greater than the compensation Claimant earned while working off the extra board is irrelevant when determining whether he should be a certified employee. If a higher rated position was available to him in the exercise of his seniority, the earnings

of the position could be offset against Claimant's protective guarantee. However, the existence of a higher paying job in and of itself does not prevent Claimant from being certified, especially when the adverse effects (wage loss) of a displacement do not arise until some time after Claimant's actual displacement.

B. The Carrier's Position

Although Claimant was in a chain of displacements resulting from the Birmingham Line Sale, he was not a displaced employee within the meaning of the New York Dock Conditions. Put simply, Claimant was not adversely affected by the displacement inasmuch as he could have obtained an available job identical to the position from which he was displaced. He could have obtained a flagman's assignment in the same regular through freight service between the same destinations without any reduction in compensation. Since Claimant decided not to remain flagging in through freight service, he voluntarily went to the extra board. Any subsequent loss of earnings was due to his own voluntary move to the extra board.

IV. DISCUSSION

In compliance with Section 11(e) of the New York Dock Conditions, the Organization identified a Section 1(a) transaction. Indeed the parties concur that Claimant was in the direct line of displacements, originating at Jackson, emanating from the Birmingham Line Sale. Section 11(e) also requires the Organization to state pertinent facts surrounding the transaction

showing that Claimant was either a displaced or dismissed employee. The question in this case is whether or not the Organization has come forward with sufficient facts proving that Claimant fell within the Section 1(b) definition of a displaced employee. Section 1(b) provides:

"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.

As the Organization implies, the term "adverse effect" does not appear within the four corners of the New York Dock Conditions. Nevertheless, the Section 1(b) definition of a displaced employee requires a factual finding that an employee was placed in a worse position with respect to his compensation or rules governing his working conditions. This terminology connotes that the employee must suffer some monetary loss or a change in the employee's working agreement rules. Put differently, the critical words "worse position" contemplate that an employee must suffer some detriment to his employment status to fall within the definition of a displaced employee.

In this case, Claimant could have procured a flagging position in exactly the same through freight service between Memphis and Paducah which he held prior to his displacement. Had Claimant moved to the flagging assignment, he would not have suffered any loss of compensation. In BRAC v. Cincinnati Union Terminal, Appendix C-1 Arb., Issue No. 10 (Rohman; 7/13/73), an arbitration committee ruled that "...where an employee is able to obtain a position where his compensation is equal to or greater

than his compensation prior to the transaction, such employee is not placed in a worse position, assuming that the rules governing his working conditions remain the same." Similarly, in Issue No. 10A, the same committee decided that if an employee could have secured a different but available position carrying a rate of pay equal to or in excess of his protective rate, the employee is not a displaced employee. In an Oregon Short Line arbitration between these same parties, the arbitration committee adjudged that where an affected employee "...was able to obtain a position where his compensation was equal to or greater than his compensation prior to the transaction, he was not placed in a worse position with regards to his compensation and does not qualify as a 'Displaced employee.'<sup>2</sup> UTU v. ICG, OSL § 11 Arb., Award No. 4 (Twomey; 4/11/85). This Arbitration Committee is obligated to follow the entrenched precedent on this property. Award No. 4 of the Oregon Short Line Committee militates against any finding that Claimant should be automatically certified as a displaced employee.

The Organization's argument that a higher paying job should only be held against Claimant once he is certified contravenes not only the express definition of a displaced employee but also Section 1(d) of the New York Dock Conditions. If Claimant was certified, his protective period commences to run. Yet, Section 1(d) provides that the protective period is the "...time during

---

<sup>2</sup> The definition of a displaced employee in the Oregon Short Line Conditions is exactly the same as the definition of a displaced employee in the New York Dock Conditions.

which a displaced or dismissed employee is to be provided protection...." Under this language, an affected employee's protective period cannot begin to run until the employee has satisfied the threshold requirement, that is, the affected worker is either a displaced or dismissed employee.

The awards cited by the Organization are inapposite to the issue herein. In Award No. 1 of Public Law Board No. 3367 (Sempliner), the railroad actually reduced the extra board because there was insufficient work to absorb an increase of five employees who were added to the Board as a result of the transaction. When the Board was reduced, the affected employees suffered a reduction in compensation and lacked the alternative of procuring a position with an equal or higher rate. Claimant, if he had gone to the flagging position, would not have incurred a wage loss. In UTU v. NW, Award No. 1, NYD § 11 Arb. (Peterson; 11/28/86), the arbitration committee reached a specific factual finding that the grieving employee suffered a loss of compensation immediately following his displacement. His later failure to exercise his seniority to the highest rated position did not alter the fact that he had been initially placed in a worse position with respect to his compensation. Here, Claimant was not placed in a worse position when he was displaced on June 29, 1988. The Organization cited one award standing for the proposition that the adverse effect flowing from a transaction need not be immediately felt by the employee. UTU v. C&O/B&O, NYD § 11 Arb. (Prover; 5/18/87). It is true that the adverse effect could occur subsequent to the transaction but in

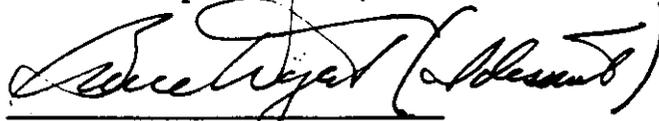
Claimant's case, such effect is too speculative since he voluntarily moved to a position with a potentially lower rate. The Prover Arbitration Committee decision would apply if Claimant had taken the flagging assignment and then subsequently suffered a loss in employment status provided the Organization stated pertinent facts linking the later reduction in earnings back to the Birmingham Line Sale.

In summary, the intervening cause of Claimant's eventual loss of earnings was a voluntary seniority move as opposed to a displacement as a result of a New York Dock transaction.

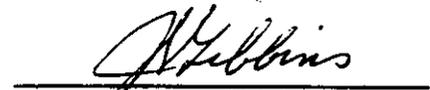
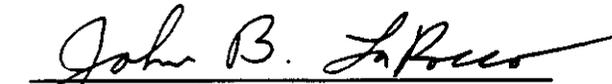
**AWARD AND ORDER**

Claim denied.

DATED: September 30, 1991



Bruce Wigent  
Employees' Member

  
J. S. Gibbins  
Carrier Member  
John B. LaRocco  
Neutral Member