

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. 2
Carrier.)	Award No. 2

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 R. N. Rose, Jr., 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, 1991.¹ 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

The Carrier announced an agreement in principle to sell its Birmingham Line to the SOU on June 8, 1987. In a bulletin dated January 29, 1988, a Burlington Northern (BN) supervisory agent at

¹ 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.

Birmingham notified BN employees that effective February 1, 1988, the BN would begin to daily transport 17-20 Carrier hopper loads of coke between Birmingham and Memphis. Thus, the Carrier diverted business from its Birmingham line to the BN after the Birmingham Line sale was announced but before the effective date of the SOU's acquisition of the line.

During 1987 and most of 1988, Claimant, a Trainman on the Birmingham District, was furloughed. Carrier payroll records indicate that, during the twelve months preceding the Birmingham Line sale, Claimant was called for emergency service on sixteen days. Indeed, Claimant did not earn any wages between March 12, 1988 and August 7, 1988, the day Claimant voluntarily marked up on the Memphis Extra Board.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Carrier deliberately diverted traffic from its Birmingham line to the BN in anticipation of the impending transaction. The Carrier impermissibly furloughed Claimant just before the effective date of the Birmingham Line Sale in violation of Section 10 of the New York Dock Conditions. Transferring twenty carloads of coke per day to the BN reduced the frequency of trains traveling over the Birmingham line prior to the sale. If the Carrier had not already reached a tentative sales agreement with the SOU, the Carrier would not have diverted revenue-producing freight traffic. In addition, the Carrier began diverting other traffic to the BN with the understanding

that the Carrier would handle the traffic from Memphis northward. When the Carrier rearranges forces in anticipation of a sale, the adversely affected employees are entitled to the full panoply of New York Dock protective benefits just like employees who are affected simultaneous with the implementation of the transaction.

B. The Carrier's Position

Claimant was neither a displaced nor a dismissed employee within the meaning of the New York Dock Conditions. Claimant was not involved in any chain of displacements. His job was not abolished either before or after the Birmingham Line Sale. Rather, during the year prior to the sale and for more than a month following the sale, Claimant was on furloughed status. Indeed, Claimant was laid off long before the alleged diversion of hopper carloads to the BN. His employment relationship with the Carrier was unaffected by the Birmingham Line Sale. Moreover, inasmuch as Claimant worked seven days in February, 1988, the number of days he worked actually increased after the Carrier purportedly shifted freight traffic to the BN.

IV. DISCUSSION

Section 10 of the New York Dock Conditions provides:

Should the railroad rearrange or adjust 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 under this appendix, this appendix will apply to such employee.

Section 10 gives employees adversely affected by an impending transaction access to New York Dock benefits even though the transaction has not yet been consummated.

Nevertheless, Section 10 does not relieve the Organization of its burden of going forward as described in Section 11(e). Besides identifying a transaction, the Organization must come forward with pertinent facts demonstrating a coherent connection between the upcoming transaction and any adversity suffered by Claimant. In this particular case, the Organization has fallen short of satisfying its burden.

The mere fact that a transaction occurs does not entitle all employees on furloughed status to be automatically certified as dismissed employees. In this case, the record does not contain any probative evidence showing that any Birmingham District position, which Claimant previously held, was abolished in anticipation of the Birmingham Line Sale. Quite to the contrary, Claimant was on furloughed status not only before the Carrier shifted the coke business to the BN on February 1, 1988 but also well before the sale was announced. Claimant's employment status remained unchanged after the diversion of traffic.

The Organization relies on UTU v. ICG, Award No. 8, OSL § 11 Arb. (Twomey; 4/11/85) but the Claimant therein was furloughed from the extra board because the Carrier abolished a road switcher just days before the transaction. The furlough of the claimant in Award No. 8 was effective the same date as the transaction. Furthermore, unlike the instant case, the Organization fulfilled its burden of showing a nexus between an upcoming transaction and the adverse effect on an employee's compensation in Award No. 8.

AWARD AND ORDER

Claim denied.

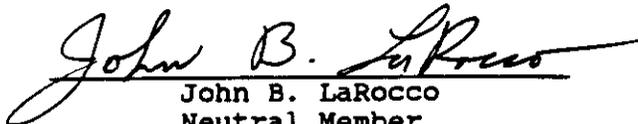
DATED: September 30, 1991



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