INTERSTATE COMMERCE COMMISSION

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	)	
	)	Pursuant to Section 11 of the
UNITED TRANSPORTATION UNION, YARDMASTER DEPARTMENT,	)	New York Dock Conditions
	)	
Organization,	)	ICC Finance Docket No. 28676
	)	(Sub. No. 1)
and	)	
	)	
GRAND TRUNK WESTERN RAILROAD, INC.,	)	
	)	
Carrier	)	

OPINION AND AWARD

Background: This Board, on March 14, 1995, rendered a second decision in the dispute between these parties concerning the application of Interstate Commerce Commission ("ICC" or "Commission") imposed employee protective benefits.[1] The first decision, rendered on May 23, 1993, with Referee John C. Fletcher serving as Neutral Member, ruled that the parties' agreement dated September 4, 1979, ("1979 Agreement") was applicable as of June 24, 1980, the date the Carrier acquired the Detroit, Toledo Ironton Railroad Company ("DTI"). The second decision, with Referee Barry E. Simon serving as Neutral Member, addressed issues related to how the 1979 Agreement applies. This Board found that the parties had agreed to adopt the protective conditions set forth in *New York Dock Railway - Control- Brooklyn Eastern District*, 354 I.C.C. 399 ("*New York Dock*"), plus certain enhancements. The Board concluded that all of the *New York Dock* Conditions were applicable unless the 1979 Agreement provides otherwise.

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[1]The proposed Award was forwarded by the Neutral Member to both the Carrier and Employee Members on December 27, 1994, but was not adopted by the Board until March 14, 1995.

Among the issues presented to this Board at the hearing leading to the March 14, 1995, decision was the question of entitlement to fringe benefits for employees not working in the Yardmaster craft. The Board deliberately did not address that issue. Instead, the Board wrote:

> At the suggestion of the parties, the Board has not undertaken to compute the exact amounts to which Claimants are entitled under those claims not found to be barred by laches. The parties have assured the Board that the general interpretations herein shall be sufficient to permit them to reach agreement as to Claimants' entitlements, if any. The Board, however, will retain jurisdiction over these claims should the parties, after reasonable attempt, be unable to reach resolution.

Subsequent to the parties' receipt of the proposed Award, they attempted to resolve the issue of fringe benefits. Consequently, the matter was referred back to the Board for resolution. The Board met in Chicago, Illinois, on March 14, 1995. The Carrier submitted a brief in advance of that hearing; the Union waived its right to do so. At the hearing, the Carrier's brief was reviewed and both sides were given full opportunity to present argument and evidence in support of their positions. In addition to the Board Members, appearances were made by Lloyd E. Miller, General Chairman, and Rick A. MacDougall, Assistant General Chairman, for the Union, and by Mark Rose, Manager Labor Relations, and Jo DeRoche, Esq. (Weiner, Brodsky, Sidman & Kider), for the Carrier.

There is no reference to fringe benefits in the 1979 Agreement. Therefore, in accordance with this Board's March 14, 1995, Award, the provisions of Section 8 of the *New York Dock* Conditions apply. That Section reads as follows:

> *Fringe Benefits.* - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the

extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

Position of the Union: The Union has asserted that the intent of Section 8 was to make employees whole so they suffered no loss when unable to work in the Yardmaster craft. It argues the Commission contemplated that affected employees would be furloughed from the craft in which they had been working, thereby requiring them to work in another craft or not allowing them to work at all. To support its argument, the Union points to the phrase "benefits attached to his previous employment." According to the Union, this phrase would have no meaning if it was intended to deny Yardmasters their fringe benefits when they are required to work in another craft.

The Union argues Section 3 of the 1979 Agreement considers Yardmasters as being adversely affected as of the date of the acquisition (June 24, 1980), rather than the date they are no longer able to hold Yardmaster positions. It follows, says the Union, that protection of the employees' benefits begin that day, just as their dismissal/displacement allowances.

In its claims, the Union is seeking a continuation of the level of fringe benefits enjoyed by working Yardmasters while they are either working as a Trainman or a Trainmaster because their seniority does not entitle them to work in the Yardmaster craft. For instance, the Union notes that Trainmen do not receive paid holidays, personal days or sick days, although Yardmasters receive such benefits under the terms of their Agreement. Yardmasters also receive a supplemental sickness (disability income) insurance policy paid for by the Carrier, notes the Union. Additionally, the Union argues employees are entitled to moving expenses pursuant to Section 6 of *New York Dock* in the

event they are required to relocate in order to work in a subordinate craft, although none of the claims before the Board has involved this issue.

The Union advises that coverage of fringe benefits normally would be a subject for negotiation as part of an implementing agreement when the Carrier serves its notice under Section 4 of *New York Dock* of its intent to engage in a transaction. To get the provisions of the 1979 Agreement, though, the Union acknowledges it gave up the right to a 90 day notice and implementing agreements. Accordingly, it must rely upon the general provisions of the *New York Dock* Conditions.

Although none of the claims before the Board involves a furloughed employee, the Union argues an employee on furlough status would still be entitled to certain fringe benefits, such as insurance coverage. It acknowledges that benefits that are distinctively for employees in active service, such as sick pay, would not accrue to furloughed employees.

The Union denies it is seeking to allow employees to pyramid benefits when working in a subordinate craft. The Union avers the employee would receive the benefits of the craft in which he is working, but not less than the level of benefits to which he would be entitled if he were working as a Yardmaster.

In support of its position, the Union refers the Board to two Awards dealing with *New York Dock* Conditions. The first involved the Union Pacific, Western Pacific and Sacramento Northern Railroads and the United Transportation Union. Referee Charles M. Rehmus addressed twelve questions presented by the Union. The first question presented was, "Will the Health and Welfare Benefits for all Sacramento Northern Employees be preserved in their entirety?" The Board wrote:

Section 2 of New York Dock provides that unless future bargaining or applicable statutes require a change, all negotiated benefits of a consolidated railroad's employees are preserved. Section 8 of New York Dock provides that employees of a railroad affected by a transaction shall not be deprived of benefits attached to their previous employment. Since the Implementing Agreement for the consolidation here created prior rights SN employees and preserved their existing labor agreement, all Health and Welfare Benefits of SN employees who continue to work prior rights SN assignments are preserved. Further, and contrary to the Carrier's Brief, if a displaced SN employee who was or should have been protected subsequently is furloughed, he is still protected and his fringe benefits remain intact. This is required by Section 8, just as if he had originally been dismissed.

The problem arises here because the Implementing Agreement contemplates the possibility in Article 4 that a prior rights SN employee may come to work on WP assignments or commingled SN-WP assignments. They are then "subject to the appropriate Western Pacific Collective Bargaining Agreement." Fringe benefits such as Health and Welfare arise under collective bargaining agreements. At what point or length of service under the WP contract does a prior rights SN employee shift to the different WP Health and Welfare Plan, if ever? Certainly employees cannot shift back and forth between plans on a weekly or even a monthly basis. This is a problem best solved by negotiation, but it is not clear from the record that the parties have ever directly addressed this issue. They should do so now.

Answer to Question 1

Prior rights SN employees who continue to work on prior rights SN assignments will maintain their existing Health and Welfare Benefits. The same is true for displaced SN employees entitled to protective benefits, should they subsequently be furloughed.

The parties shall attempt to negotiate regarding the benefit plan shift, if any, of prior rights SN employees working under the terms of the WP agreement. Jurisdiction of this issue is retained. If the parties have not resolved it within 90 days of the date of this award, they may return for a final answer.

The second Award cited by the Union was Award No. 3 of Public Law Board No. 3367, between the United Transportation Union and the Detroit, Toledo & Ironton Railroad Company.[2] That Award stated:

> The claimants were under the protection period and receiving the monthly allowance as provided. Section 8 entitled Fringe Benefits provides that such benefits continue so long as such benefits are provided to other employees of the railroad in active service, or on furlough. The carrier argues that the issue is controlled by furlough provisions, ignoring that the benefits are still paid to employees in active service. The provisions of the Travelers policy have no bearing, as such language was not a part of the basic contract, and is subject to change with each new Travelers negotiation.
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> The Carrier assets *(sic)* that the dispute in this case involves the intent and meaning of the following language, which appears in Section 8 of the New York Dock Protective Conditions:
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> > "Under the same conditions and so long as such benefits continue to be accorded to other Employees of the Railroad in active service or on furlough as the case may be."
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> They further aver that the Carrier does not have to continue to pay premiums to Travelers for furloughed employees, therefore they do not have to pay premiums for protected furloughed Employees.
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> The Organization avers that Section 8. Fringe Benefits., which states in part:
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> > "8. Fringe Benefits - No employees of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment . . . "
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> is unambigious *(sic)* and has been interpreted to afford a protected dismissed employee the same benefits as if he had continued to work.

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[2]This Award, dated September 27, 1984, although involving the DTI, has no relation to the acquisition involved herein.

The Board finds that the intent of Section 8. Fringe Benefits was intended to afford the protected employee the same rights and benefits he would have had if he continued in uninterrupted service.

Position of the Carrier: The Carrier has framed the issue presently before the Board as follows:

> Whether Section 8 of *New York Dock* requires that a protected employee working in a secondary craft (or promoted to management) be paid the benefits under his primary agreement in addition to those benefits paid pursuant to his current employment?

The Carrier denies it is obligated to grant Claimants any fringe benefits beyond what they have already been afforded. In support of this position, the Carrier asserts that *New York Dock* protects the fringe benefits associated with "employment" by the carrier, not the benefits of a certain craft. According to the Carrier, the Organization's claim for Yardmaster fringe benefits goes back to what it refers to as the Organization's mistaken belief that *New York Dock* protects the rights of individuals to be Yardmasters; a concept that was not accepted by this Board in its March 14, 1995, Award. The Carrier asserts a person with no seniority to exercise, *i.e.*, a dismissed employee, could claim the benefits of the only craft in which he could work and from which he was furloughed. An employee who is able to continue employment by virtue of secondary seniority is paid the benefits under the collective bargaining agreements of his current employment, concludes the Carrier.

The Carrier insists that differences in specific benefits may not be pyramided. It notes that Claimant Wohlfeil (Case 1) has exercised his seniority to train service, which is covered by a separate collective bargaining agreement with the United Transportation Union, and that Claimant Vandendries (Case 2) has been promoted to Trainmaster, which is an official position not covered

by a collective bargaining agreement.[3] The Carrier says the Organization is seeking a "windfall" for these Claimants by asking for the benefits appurtenant to their current positions as well as the benefits to which they would have been entitled had they remained working under the Yardmaster agreement. This, says the Carrier, would exceed what regularly assigned Yardmasters are being paid in fringe benefits, which is contrary to the intent of the *New York Dock* Conditions.

The Carrier gives the following examples of the differences in fringe benefits enjoyed by Claimants in their present positions versus the benefits provided by the Yardmaster Agreement. It says that Claimant Wohlfeil, working as a Trainman, is covered by medical, hospitalization and dental insurance, as well as vacations in accordance with the national agreements. It avers these benefits are comparable to those Claimant would be entitled to had he been working as a Yardmaster. In addition, however, Carrier notes he receives personal leave days (11 in road service, 18 in yard service) and an annual productivity payment pursuant to the crew consist agreement. Carrier says this latter benefit equaled $5,794.32 for Claimant Wohlfeil in 1993 and $5,863.30 in 1994. As a Yardmaster, according to Carrier, Claimant would receive only two personal days. He would, the Carrier notes, be eligible for two insurance programs[4] pursuant to the national Yardmaster Agreements. The Carrier points out, however, that these plans do not require any payment by the Carrier; it only administers a payroll deduction plan. Finally, the Carrier notes that Yardmasters are

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[3]Claim 3 on behalf of Claimant Miller is not at issue in this case. In its March 14, 1995, Award, the Board found the claim to be barred by laches. Furthermore, as Claimant Miller is still employed as a Yardmaster, the issue of fringe benefits is moot as far as he is concerned.

[4]Supplemental Life Insurance Policy #G898024 and the Railroad Employees National Early Retirement Major Medical Benefit Plan.

entitled to 25 sick days for *bona fide* illness. These sick days, according to the Carrier, may be accumulated if not used, and redeemed for 50 cents on the dollar upon retirement or termination. The Carrier compares the cash value of Claimant Wohlfeil's 25 sick days for both 1993 and 1994 ($3886 if used as compensated sick time, or $1943 if redeemed) with the productivity pay he received as a Trainman.

Comparing the management fringe benefits enjoyed by Claimant Vandendries with those provided by the Yardmaster Agreement, Carrier notes he does not get personal leave days, but receives as many sick days as he needs and generally gets one more week of vacation. Additionally, the Carrier says it provides him with life insurance at the Carrier's expense.

Carrier asserts there is no arbitral precedent on this issue. It does, however, cite a November 6, 1985, Award issued by Referee Robert Peterson in a dispute between the Brotherhood Railway Carmen and the Missouri Pacific Railroad Company involving furloughed protected Carmen seeking fringe benefits in addition to their dismissal allowances. Specifically, the issue before that Board was:

> Is Carrier obligated to pay premiums to insurance companies for Health and Welfare benefits in behalf of employes who are furloughed and receiving dismissal allowances under the New York Dock Conditions in excess of those paid in behalf of furloughed employes who are not protected under said New York Dock Conditions?

In answering the Question at Issue in the negative, the Board wrote:

> Contrary to the BRC contentions that the decisions cited by the MP bear no relationship to the instant dispute, this Board finds that these other disputes did in fact involve furloughed employees and that in each instance it was held the affected protected employee be treated the same as other furloughed employees with respect to fringe benefits.

> The Board, also finds, contrary to the contention of the BRC, that it was in fact the findings of Special Board of Adjustment No. 570 in its Award No. 282, with Referee David Dolnick serving as the chairman and neutral member of that Board, that the carrier in the dispute before the Board was not obligated under Section 8 of the Washington Job Protection Agreement to make payment to the claimant in the dispute before that Board of a monthly premium the carrier would otherwise have paid to the insurer of the national plan of health and welfare benefits if the claimant had not been affected by a reduction in force. This Board does not find that because Special Board of Adjustment 570 had held that the claimant in the dispute before it would have been entitled to benefits provided in the health and welfare plan head he required hospitalization and/or medical care during the time he was entitled to a coordination of benefits allowance, that the Board was at this time making reference to the claimant being in a furloughed status, but rather that the claimant was for this purpose to have been treated as having been an active employee, albeit he had not been called for available work.
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> On the basis of the record as presented and developed, this Board believes it must be held that the Question at Issue be answered in the negative and that the claimant carmen are only entitled to the same benefits as accorded to other non-protected employees of MP while on furlough.

Although the Carrier suggests the Interstate Commerce Commission may have reached a contrary conclusion in a case involving Burlington Northern furloughed protected truck drivers represented by the Teamsters, it further argues that awards dealing with the entitlement of furloughed employees to fringe benefits are not relevant as neither Case 1 nor Case 2 involves a furloughed employee. Carrier states the same is true of the Rehmus Award cited by the Union.

Finally, the Carrier has submitted affidavits of Labor Relations officials from the Norfolk Southern, the Soo Line and the Burlington Northern, each asserting that protected employees on their respective properties receive only the fringe benefits of the craft in which they are working when they are required to exercise seniority to a secondary craft.

Discussion: As we noted at the beginning of this Award, the dispute herein requires an interpretation of Section 8 of the *New York Dock* Conditions. Having already held that *New York Dock* applies unless superseded by the 1979 Agreement, we find that there is no reference to fringe benefits in the 1979 Agreement. Accordingly, Section 8 applies.

It should also be noted that this Board has also already decided the issue of whether the 1979 Agreement guarantees protected Yardmasters a job in that craft until retirement. Answering that question in the negative, we held that a Yardmaster may be required to exercise seniority to a subordinate or secondary craft and have the earnings in that craft applied against his guarantee. At issue now, is the employee's entitlement to fringe benefits when working in that secondary craft.

Section 8 of *New York Dock* is almost identical to Section 8 of the Washington Job Protection Agreement (WJPA) of May 21, 1936. The WJPA provided as follows:

> Section 8. An employee affected by a particular coordination shall not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, and relief, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

This language was then adopted, with only slight modification, by the Interstate Commerce Commission in its first imposition of protective conditions in Finance Docket 14221, *Oklahoma Railway Co. Trustees Abandonment of Operation, etc.*, issued May 17, 1944 (*Oklahoma Conditions*). Essentially the same language has been used by the Commission in every subsequent imposition of protective conditions. Because of this almost 60 year history, it is somewhat astounding that neither party to this dispute was able to produce a single arbitration award dealing with an employee's

entitlement to fringe benefits when working in a subordinate or secondary craft. As noted in Footnote 3, the only two claims pending before this Board involve Yardmasters who are still in active service, albeit not as Yardmasters. It is, therefore, unnecessary for us to consider the issue of fringe benefits for furloughed employees.

In the absence of any arbitral guidance as to the meaning of Section 8, it is necessary for us to put the language of the provision in an historical perspective. When the WJPA was written in 1936, fringe benefits were typically not the subject of collective bargaining. The national holiday and vacation agreements were non-existent. Agreements providing for sick pay were in their early stages in the clerical craft. The carriers, however, unilaterally afforded their employees certain benefits connected with their employment. One such benefit was free transportation on passenger trains. Employees were also eligible to join hospital associations, which were precursors of health maintenance organizations. Relief associations also existed on some carriers, notably in the South, to provide welfare-type assistance to employees and their families. Pension plans which existed on some carriers were soon to be replaced or supplemented by the Railroad Retirement Act.[5]

Despite the fact that the nation's rail carriers and the unions representing their employees eventually negotiated a broader range of fringe benefits, such as holidays, personal days, vacation, etc., the terms used in Section 8 remained unchanged for six decades. The Commission, however, has not simply repeated the provision without giving it some consideration. In *Southern Railway*

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[5]The Railroad Retirement Act of 1934 was declared unconstitutional in 1935. *Railroad Retirement Board* v. *Alton Railway*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468.

Company - Control - Central of Georgia Railway Company, Finance Docket No. 21400, 331 ICC 151 (November 15, 1967) (*Southern Control II*), the Commission wrote:

> The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees. The existence of multiple sources of employee protection does not imply, however, that any employee necessarily has a right to duplicate benefits from all sources. (at 169)
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> * * *
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> These protective conditions imposed upon carriers under section 5(2)(f), which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces *in accordance with* the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. (Emphasis by Commission) (at 169-170)
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> * * *
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> Fringe benefits are now generally recognized in American industry as being an integral part of employee compensation, and this has long been so in the railroad industry. To view it otherwise would be to ignore reality. Rights with respect to insurance and hospitalization, we therefore conclude, are within the reach of the conditions of section 5(2)(f). (at 176)

The point of this brief history is to attempt to get some idea what is meant by the listing of particular fringe benefits in Section 8, to the exclusion of others. The operative phrase is "benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera." Under the rules of contract interpretation, we generally apply the principle of *ejusdem generis* to phrases such as this. Where general words (such as "*et cetera*") follow an enumeration

of specific terms, the general words will be interpreted to include or cover only things of the same general nature or class as those enumerated, unless it is shown that a wider sense was intended.[6]

While it could be argued the WJPA intended to cover all fringe benefits because negotiated fringe benefits were virtually non-existent in 1936, we must remember that it is no longer WJPA that we are interpreting. When *New York Dock* was first issued in 1979, there already existed a whole panoply of benefits, but none was included beyond those originally listed in WJPA. Those benefits also existed when the Commission decided *Southern Control II* in 1967, but the Commission referred only to insurance and hospitalization, even though it specially addressed fringe benefits in its opinion. If sick days, holidays, vacations, personal days, etc. are considered to be fringe benefits, why were they never mentioned in any of the Commission imposed protective conditions?

This Board is of the opinion that the distinction exists because the Commission recognized that employees who are transferred to the scope of another collective bargaining agreement, whether in the same craft, but on a different carrier, or in a different craft, derive their contractual fringe benefits from the contract under which they are working at a particular time. The Commission, we believe, did not wish to interfere with the parties' process of negotiating fringe benefits for employees covered by collective bargaining agreements. What it intended to preserve, however, were those benefits attaching to employment with the carrier, regardless of representation. The Commission carefully draws the line between the protections it affords and those which must be negotiated, such as allocation and utilization of forces and the application of seniority. This much we can conclude from the Commission's statements in *Southern Control II*.

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[6]Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition, p. 355.

This interpretation is consistent with the Union's observation that the application of fringe benefits is generally negotiated with a carrier when it serves its notice of intent to engage in a transaction. It is obvious that the Commission intends to leave matters of collective bargaining to the parties. The fact that the Union, in this case, is not entitled to notice under Section 4 of *New York Dock* does not change this division of responsibility. It is not for this Board to grant fringe benefit coverage under the guise of *New York Dock* when the Commission has chosen to leave it to the parties to negotiate. This is precisely the finding of the Rehmus Award cited by the Union. If the parties in that dispute were unable to resolve the issue of fringe benefits through negotiation, it would be submitted to arbitration pursuant to Section 4 of *New York Dock*.

It is the Board's determination, therefore, that Claimants' fringe benefits in the nature of time off with pay, such as holidays, sick time and personal leave days, are to be determined by the collective bargaining agreement or personnel policies applicable to the positions they are holding. Insurance benefits, on the other hand, must be afforded to Claimants in the same manner as if they were presently employed as Yardmasters.

Award: The claim for insurance benefits on behalf of Claimants Wohlfeil and Vandendries is sustained. Claims for other fringe benefits are denied.

Richard J. O'Brien
Carrier Member

Barry E. Simon
Chairman and Neutral Member

Donald R. Carver - dissenting in part.
Donald R. Carver
Employee Member

Dissenting in Part: I most respectfully dissent to denial of fringe benefits of "time off with pay..." I am in agreement with the finding concerning Clearance benefits.

Dated: April 28, 1995
Arlington Heights, Illinois

SERVICE DATE
JUN 7 1996

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EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 28676 (Sub-No. 3)

GRAND TRUNK WESTERN RAILROAD--CONTROL--
DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY
AND
DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
(Arbitration Review)

Decided: May 28, 1996

This proceeding is an appeal of the decision of an arbitration panel finding that, under section 8 of our standard New York Dock labor protection formula applied in railroad consolidation proceedings,[2] paid leave is not a compensable benefit but insurance benefits are. We are denying the appeal.

BACKGROUND

In 1979, the ICC issued a decision in Finance Docket No. 28676 (Sub-No. 1),[3] herein GTW I, the first sub-numbered case in these proceedings, allowing the Grand Trunk Western Railroad Company (GTW or "the carrier") to control the Detroit, Toledo and Ironton Railroad Company and the Detroit and Toledo Shore Line Railroad Company. To meet its obligation to impose labor protection conditions under 49 U.S.C. 11347, the ICC imposed a labor protection agreement negotiated between the parties. The agreement adopted the ICC's standard labor protection provisions established in New York Dock plus certain enhancements.

As a result of the transaction in GTW I, three yardmasters were displaced into lower paying positions, with only one of them remaining in the yardmaster craft.[4] The United Transportation

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

[2] See New York Dock--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) (New York Dock).

[3] Grand Trunk Western Railroad--Control--Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company, Finance Docket No. 28676 (Sub-No. 1) (ICC served Dec. 3, 1979).

[4] In particular, G.A. Wohlfeil was displaced into a lower-paying position as a switchman. J.A. Vandendries was displaced

(continued...)

Union (UTU)[3] filed claims on behalf of the three displaced yardmasters, alleging that they were entitled to benefits under the labor protection agreement adopted by the ICC when it approved the control transaction in GTW I. GTW did not dispute that the displacement of the three yardmasters was due to the control transaction in GTW I and that, therefore, the three claimants were at least potentially eligible for the protective benefits imposed in that transaction.[4] GTW, however, raised two other objections to the claims. Those objections were arbitrated in two separate proceedings held before the same panel, with Barry E. Simon serving as the neutral member.

In the first arbitration proceeding, GTW raised the defense of laches.[5] By decision issued March 14, 1995, the panel found that: (a) the claim of one of the yardmasters, L.E. Miller, was entirely barred by laches; (b) the claim of the second yardmaster, J.A. Vandendries, was partially barred by laches; and (c) the claim of the third yardmaster, G.A. Wohlfeil, was not barred by laches at all. In Finance Docket No. 28676 (Sub-No. 2), the second sub-numbered case in these proceedings, we upheld the panel's decision.[6]

In the subsequent arbitration proceeding before the same panel, the parties disputed whether section 8 of the New York Dock formula entitles the claimants not barred by laches to protection from changes in certain benefits that they received as yardmasters but lost when they were displaced (neither party claims that the negotiated enhancements are relevant to the dispute).[7] By decision issued April 28, 1995, the panel held

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[3](...continued)
first into a clerical position and subsequently became a trainmaster. The third claimant, L.E. Miller, kept his position as a yardmaster, but at a reduced salary.

[4] When the transaction was consummated in 1981, the Railroad Yardmasters of America (RYA) represented the yardmaster craft on the GTW, the acquiring carrier, but not on the carriers being acquired, where yardmasters were non-union employees. This situation continued until 1985, when, after a representation election, the National Mediation Board certified the RYA as the representative of the yardmaster craft for the entire merged system. In 1985, the RYA became a part of UTU, the petitioner in this appeal.

[5] It is well established that displaced employees are not eligible for labor protection benefits imposed on a transaction unless the displacement was caused by the transaction, rather than other factors, such as general business conditions, disciplinary action, or voluntary action by the employee.

[6] The first arbitration decision also resolved other issues that are not relevant here.

[7] Grand Trunk Western Railroad--Control--Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company, Finance Docket No. 28676 (Sub-No. 2) (ICC served Feb. 26, 1996).

[8] Section 8 of New York Dock reads as follows (360 I.C.C. at 87):

> 8. Fringe benefits.--No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation,
>
> (continued...)

that compensated leave, such as holidays, sick time, and personal leave, are not compensable benefits under section 8 but that the insurance benefits that claimants received when they were yardmasters must be paid to them.

By petition filed May 17, 1995, UTU requests that we review the panel's decision and reverse its exclusion of compensated leave as a benefit under section 8 of New York Dock.

On June 6, 1995, GTW replied, conceding that the issue is reviewable, but defending the panel's decision to exclude compensated leave as a compensable benefit under section 8 of New York Dock. GTW, however, urges us to overturn the panel's inclusion of insurance as a compensable benefit.

By motion filed June 14, 1995, UTU requests leave to file a tendered response to the carrier's June 6, 1995 reply. UTU argues that the carrier's request that we overturn the panel's inclusion of insurance as a compensable benefit is an untimely appeal to the panel's decision. UTU also responds to GTW's argument that UTU's position would allow the "pyramiding" of benefits. GTW filed yet another reply disputing UTU's argument that it filed an untimely appeal.

THE PANEL'S DECISION

The panel noted that, because it was not provided with arbitration precedent,[9] it relied on legislative history and general principles of statutory construction. The panel noted that the relevant language of section 8 has remained virtually unchanged in the labor protection formulas successively adopted after the prototype formula was adopted in the privately negotiated Washington Job Protection Agreement of 1936 (WJPA).[10]

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[9](...continued)
hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

The word "service" was inadvertently omitted from the original version and was added in Burlington Nor., Inc.--Cont. & Mer.--St. L.-San Fran. Ry. Co., 6 I.C.C.2d 351 (1990) (BN-Frisco Arbitration).

[10] On page 11 of its decision, the Panel stated, in reference to the history of labor protection: "Because of this almost 60 year history, it is somewhat astounding that neither party to this dispute was able to produce a single arbitration award dealing with an employee's entitlement to fringe benefits when working in a subordinate or secondary craft."

[11] A legislative history of the labor protection provisions appears in CSX Corp.--Control--Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990). The Washington Job Protection Agreement appears in Appendix B of that decision. Section 8 of that Agreement provided as follows:

> Section 8. An employee affected by a particular coordination shall not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, relief,
>
> (continued...)

The panel noted that compensated leave had become an established benefit, along with many other benefits, when New York Dock was decided in 1979. The panel indicated its belief, however, that the ICC intentionally did not include compensated leave in section 8's list of examples of protected benefits in New York Dock.

The panel found that the ICC in New York Dock distinguished between protections that must be negotiated and protections that can automatically be imposed under the formula. This led the panel to conclude that New York Dock does not protect employees from all losses of benefits that have been established by collective bargaining. In other words, according to the panel, if an employee has been displaced from a position where a benefit was negotiated under collective bargaining to a position where that benefit has not been negotiated for that position, it would be inappropriate to award that benefit for the protection period under New York Dock.

UTU argues that the panel's decision ignores the clear language of section 8. According to UTU, while compensated leave is not specifically mentioned in section 8, words like "such as" and "et cetera" allow the inclusion of all fringe benefits. UTU asserts that the examples listed in section 8 (free transportation, hospitalization, pensions, reliefs) include items that have no relation to each other, namely, "hospitalization" and "free transportation."

UTU disagrees with the panel's position that New York Dock does not protect benefits that have been negotiated. According to UTU, the proper subjects of negotiation are provided in Article I, section 4 of New York Dock, namely, selection of forces and seniority. UTU argues that section 4 deals with changes that are necessary to implement the transaction and thus proper subjects of negotiation, unlike fringe benefits. Moreover, according to UTU, the panel's reasoning cannot be valid because hospitalization, which is a named benefit in section 8, can be the subject of collective bargaining and can differ according to the agreement negotiated by each craft union.

GTW replies that section 8 protects only benefits "associated with employment" and that the compensated leave benefits sought by UTU would not be associated with employment because an unemployed or dismissed person could not be granted leave. On page 17 of its reply, GTW suggests that section 8 requires that we define "benefits" in a way that is consistent and feasible for both displaced (retained but demoted) and dismissed (furloughed) employees. In other words, according to GTW, if a presumed "benefit" may not be granted to a dismissed employee, then it cannot be considered a benefit for a displaced employee. According to GTW, UTU itself agreed with this distinction on the record of the panel's prior (March 14, 1995) decision.

In addition, GTW has raised an issue of whether, even if we assume that compensated leave and insurance are benefits under section 8, the benefits must still be denied under an asserted policy that prohibits "pyramiding" of benefits.

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[3] (...continued)
etc., under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

From the parties' comments, it is apparent that individual crafts on GTW can sometimes have unique benefits. Benefits available to lower-ranking crafts can apparently differ in kind from, and sometimes exceed in value, the benefits available to higher ranking crafts. As employees move up or down the ladder, benefits are not always progressively added or subtracted at each step. Thus, if employees were allowed to retain all the benefits of their prior positions and assume all the benefits of their new positions as they were displaced step-by-step down the ladder, their benefits could "pyramid" and become progressively larger. GTW views this as improper under New York Dock.

According to GTW, UTU is improperly seeking to pyramid benefits. GTW argues that UTU is not merely seeking to put claimants in the same or equivalent position that they would be in as to benefits if they were still yardmasters.[12] Rather, the carrier maintains that UTU is seeking to allow displaced claimants to receive the unique benefits of their yardmaster positions plus the unique benefits of whatever positions they were displaced into, even though neither position by itself offers both sets of benefits. According to GTW, if we were to interpret section 8 as requiring claimants to receive the compensated leave and insurance benefits applying to trainmasters without making downward adjustments in the benefits available to the crafts into which claimants were displaced, they would be receiving windfall benefits that would make them better off than they would be if they had never lost their yardmaster positions. This, says the railroad, would be contrary to the intent of New York Dock.[13]

In its tendered reply to GTW's reply, UTU states that it is not seeking the pyramiding of benefits as GTW uses this term. UTU's argument is that there is no pyramiding because the compensated leave benefits are different in kind than the benefits that are available in the lower positions.[14] UTU cites a court case in support of this position.[15]

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[12] If claimants were to be put in the same position concerning benefits that they would have been in as yardmasters until the end of their protective period, they would receive only yardmasters' benefits until the end of that period. They would not receive additional or different benefits available to employees only in the positions to which they were displaced.

[13] On pages 18-19 of its reply, GTW submits examples of how UTU's alleged approach would apply. For example, according to GTW, claimant Wohlfeil is allowed to take "productivity pay" as a trainman, which effectively compensates him for not taking sick leave, and this productivity pay exceeds the cash value of the unused sick leave to which he would be entitled as a yardmaster. Thus, according to GTW, if Wohlfeil were allowed an additional amount of compensated sick leave during his protected period under the yardmasters agreement under which he previously worked, with no compensating reduction in the benefits unique to his position as a trainman, he would be receiving "pyramided" or windfall benefits that would make him better off than if he had never been displaced.

[14] In reference to the sick leave and productivity example discussed in note 12, above, UTU's response is that these two benefits differ in kind and are thus not susceptible to pyramiding.

[15] UTU quotes the following language of New York Dock Ry. v. United States, 609 F.2d 83, 100-101 (2d Cir. 1979):

(continued...)

DISCUSSION AND CONCLUSIONS

We will accept the tendered reply statement filed by UTU on June 14, 1995, and GTW's reply thereto filed on July 3, 1995. UTU properly raises the jurisdictional issue of whether we may consider the argument in GTW's original reply statement that the panel improperly awarded insurance benefits. We will not consider these arguments concerning the panel's award of insurance benefits, because GTW has not raised them in a proper or timely appeal. Our regulations require that an appeal be filed within 20 days of service of the decision. 49 CFR 1115.8. This deadline was not met because GTW has not filed any appeal.

Review of arbitral decisions has been limited "to recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Chicago & N.W. Transp. Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd, International Bhd. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Generally, the agency will not reverse an arbitrator's decision unless it fails to draw its essence from the conditions imposed, the arbitrator's action was outside the scope of authority granted by those conditions, or there is egregious error. Lace Curtain, 3 I.C.C.2d at 736. Although this case does raise significant issues concerning the interpretation of New York Dock, the union has not demonstrated grounds for overturning the arbitral panel's determination. The panel's decision that compensated leave is not a "benefit" within the meaning of section 8 is a reasonable one, not egregious error, and we will not disturb it.[16]

The panel declined to interpret section 8 of New York Dock, "fringe benefits," to expand the list of specified benefits--"free transportation, hospitalization, pensions, reliefs, et cetera"--to include all fringe benefits. The limited recitation of fringe benefits in section 8 had its origin in the 1936 WJPA, where the list of "free transportation, hospitalization, pensions, and reliefs" first appeared. As the panel noted, the original recitation in 1936 reflected the entire list of fringe benefits that labor had managed to negotiate at that time. In 1979, when New York Dock was issued, labor had negotiated other fringe benefits. But when the ICC enumerated the benefits protected under section 11347 of the Interstate Commerce Act in 1979, it did not add to the list of specific examples. Had the ICC intended to embrace all fringe benefits within section 8, the

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[16](...continued)
As an illustration, let us assume the existence of two identical employee protective arrangements, except that one arrangement contains a provision guaranteeing an employee retraining rights for a six year period, while the other arrangement contains a provision guaranteeing him a right of priority in rehiring until he reaches normal retirement age. We do not believe that once an employee elects to be covered by the arrangement containing the retraining rights provision, the prohibition on pyramiding of benefits should preclude him from electing to be covered by the rehiring priority provisions in the other arrangement at the same time.

[16] The yardmasters have not claimed that they were placed in a worse position overall related to their employment as a result of the transaction. Apparently, they received a package of fringe benefits somewhat different from, although not inferior to, that which they previously enjoyed. Thus, we need not consider that issue here. Cf. BN-Frisco Arbitration, 6 I.C.C.2d 351, 354.

panel reasoned, it could have easily done so. Because it did not, the panel has concluded that the ICC did not wish to do so. The panel found "et cetera" to be too slender a reed to bear the weight of the "whole panoply of benefits" that existed in 1979 when New York Dock was issued or that exists today. We cannot say that this conclusion is unreasonable.

The UTU based its appeal on the argument that section 8 embraces all fringe benefits, which was their only argument that compensated leave fits within the ambit of section 8. In denying the appeal, we are not holding that fringe benefits under section 8 are limited to the four kinds listed in the WJPA and specified in section 8. In concluding that the ICC envisioned that some fringe benefits lay outside section 8 protection and must be bargained rather than mandated, the panel cited Southern Railway Company--Control--Central of Georgia Railway Company, Finance Docket No. 21400, 331 I.C.C. 151 (Nov. 15, 1967) (Southern Control II). In addition to expressing that principle, the ICC there held that "insurance" was a protected fringe benefit, even though it was not one of the 4 benefits listed in section 8. The ICC paired insurance with hospitalization in Southern Control II. Future claims that a particular fringe benefit falls within the scope of section 8--because it is a fringe benefit of the type mentioned there--can be determined by arbitrators on a case-by-case basis, with appeal to us as necessary.

Finally, because we are denying the appeal, we need not address the issue of whether treating compensated leave as a protected fringe benefit would result in the pyramiding of benefits.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU's appeal is denied.

2. This proceeding is discontinued.

3. This decision will be effective 30 days from the date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons and Commissioner Owen.

Vernon A. Williams
Secretary