BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED
UNDER ARTICLE I, SECTION 11 OF THE
NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

PARTIES TO DISPUTE	TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION AND UNION PACIFIC RAILROAD COMPANY	)	DECISION

ORGANIZATION'S QUESTIONS AT ISSUE:

Question No. 1:

Is Carrier in violation of the New York Dock protective conditions when Claimants J. S. Edgar, D. R. Garrett, C. L. Harvey, and other employees who are protected under a previous transaction/arrangement are denied retention of such protection and benefits when affected by subsequent transactions?

Question No. 2:

If the answer to Question No. 1 is yes, shall the Carrier now be required to provide J. S. Edgar, D. R. Garrett, C. L. Harvey and all other employees denied their initial entitlement to protective benefits under a protective arrangement and upon its expiration the ability to revert to the subsequent arrangement provided they continued to maintain their responsibilities and obligations under the applicable protective agreement and or arrangements?

CARRIER'S QUESTION AT ISSUE:

After having specifically rejected the opportunity to receive New York Dock employee protective benefits under the provisions of Implementing Agreement No. NYD-217, is an employee eligible to (sic) those rejected 'NYD-217' benefits at the expiration of the benefits to (sic) which he/she elected to retain?

HISTORY OF DISPUTE:

On August 25, 1988 the Interstate Commerce Commission (ICC) issued its Decision in Finance Docket No. 32000 authorizing the acquisition of control by Rio Grande Industries, Inc. and its wholly owned subsidiaries over Southern Pacific Transportation Company and its wholly-owned subsidiaries. The ICC made the transaction subject to the labor protective conditions set out in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock Conditions). On October 27, 1992 pursuant to Article I, Section 4 of the New York Dock Conditions the Organization and Southern Pacific Lines (SPL) entered into an agreement implementing the transaction (SPL Implementing Agreement). All Claimants in this case were employees affected by the transaction and received benefits under the SPL Implementing Agreement and the New York Dock Conditions.

By Decision No. 44 of August 6, 1996 in Finance Docket No. 32760 the Surface Transportation Board (STB), which assumed certain functions of the ICC after that agency was abolished, approved the merger of the Union Pacific Corporation and its wholly-owned subsidiaries and the Southern Pacific Rail Corporation and its wholly-owned subsidiaries. That transaction also was made subject to the New York Dock Conditions. Pursuant to Article I, Section 4 of those conditions the Southern Pacific Transportation Company/Union Pacific Railroad Company and the Allied Services Division of the Organization entered into an agreement on December 18, 1996 implementing the transaction (No. NYD-217). All Claimants in this case have been

affected by that transaction and are eligible to receive benefits under Implementing Agreement No. NYD-217 and the New York Dock Conditions.

A dispute developed between the Carrier and the Organization as to whether employees affected by the two transactions had a right to continue receiving New York Dock benefits in connection with the first transaction and at the end of the benefit period pertaining to that transaction receive the New York Dock benefits under the second transaction for the benefit period remaining on that transaction. By letter of August 5, 1997 the Organization informed the Carrier that it was the Organization's position affected employees could do so.

By letter of August 19, 1997 to each of the Claimants in this case the Carrier stated that in accordance with the provisions of Implementing Agreement No. NYD-217 the employee had three options for protective benefits: to accept benefits under Implementing Agreement No. NYD-217 with specified average test period hours and earnings expiring July 31, 2003; to accept ". . . previous protective benefits . . .", i.e., benefits under the New York Dock Conditions imposed in connection with the transaction authorized in Finance Docket No. 32000, with higher average test period hours and earnings than under Implementing Agreement No. NYD-217 but expiring February 28, 2000; or protective benefits under the Job Protection Agreement of February 7, 1965, as amended, with a specified daily benefit lower than either of the other two options but which applies for the life of employment. The letter made clear that election of one set of benefits constituted a waiver of the other two which could not ". . . be

reverted to upon expiration of the protective benefits selected." Each Claimant elected one of the options under protest.

By letter of September 17, 1997 the Carrier responded to the Organization's letter of August 5 expressing its disagreement with the Organization's position stated therein. Subsequent efforts to resolve the dispute have been unsuccessful.

The parties invoked the arbitration procedures of Article I, Section 11 of the New York Dock Conditions. This Committee was established as provided in Article I, Section 11(a). The parties selected the undersigned as Neutral Member of the Committee. The Committee held a hearing in this case on February 24, 1998 in Washington, DC where all parties were given the opportunity to present evidence and to engage in oral argument. Additionally, each party filed a written submission with the Committee. The parties agreed to extend the time provided in Article I, Section 11(c) within which this Committee must render its Decision.

FINDINGS:

The dispute in this case centers upon the meaning of Article I, Section 3 of the New York Dock Conditions which provides:

> Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, however, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other

> arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of his protective period under that arrangement.

Both implementing agreements involved in this case contain a provision incorporating the New York Dock Conditions, including Article I, Section 3, into each agreement.

The Organization maintains that the Carrier's action in this case violated the final proviso to Article I, Section 3. The Carrier maintains that what the Organization seeks here would constitute a "pyramiding" of benefits which is prohibited by Article I, Section 3.

The foregoing language of Article I, Section 3 of the New York Dock Conditions was a revision of the following language of the provision as it originally read:

> Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that there shall be no duplication or pyramiding of benefits to any employee, and, provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

That language was taken from Article I, Section 3 of the Appendix C-1 employee protective conditions applicable to the creation of Amtrak by the Rail Passenger Service Act of 1970. The prohibition against pyramiding of benefits was interpreted in

Arbitration of Penn Central Transportation Company and BRAC, Jan. 6, 1972 (Weston, Neutral) as requiring an election either of the Appendix C-1 Conditions or conditions under a preexisting agreement or arrangement and that election of the Appendix C-1 Conditions barred receipt of any benefits of the preexisting agreement or arrangement in the future. In the New York Dock Railway case before the ICC railway labor organizations proposed what is the current language of Article I, Section 3 of the New York Dock Conditions in order to blunt the effect of the Weston Award. In adopting that language the ICC stated:

> Both RLEA and BLE express concern over the interpretation of Article 1, section 3 as it is now written. We agree that a fair and equitable arrangement usually should not require a complete forfeiture of other existing labor protective conditions. Because the section as now written has been interpreted in such a manner, we feel it is necessary to rephrase the condition so as to preclude the possibility of such a reading. Our study of the provision suggested by RLEA indicates that it preserves existing protections yet with the required prohibitions against duplication of benefits (see the first proviso) and against pyramiding (see the latter portion of the final proviso). We will adopt the proposed provision as we feel it is an appropriate clarification of the intent of that section.

In New York Dock Ry. v United States, 609 F.2d 83 (2 cir 1979) the United States Court of Appeals for the Second Circuit affirmed the New York Dock Conditions as promulgated by the ICC. In so doing the Court interpreted Article I, Section 3 as retaining the prohibition against pyramiding of benefits and defined that term as follows:

> We think it a fair characterization that the ICC's principal purpose in rephrasing the prohibition against pyramiding of benefits was to circumvent the unnecessarily harsh "all or nothing" interpretation of that prohibition contained in the 'Weston award,' and that the ICC's position on this issue basically parallels the approach taken by the dissenting member of the

arbitration panel. However, in its rephrasing the ICC uses language that is interpretable as completely nullifying any real substance in the prohibition against pyramiding.

The common understanding of the term 'pyramiding' calls to mind a process in which things are stacked or piled, one on top of the other. We have not uncovered, nor has the ICC brought to our attention, any evidence indicating that the term 'pyramiding,' as employed in Appendix C-1, is intended to convey a meaning different from this one suggested by common understanding. Nevertheless, language in the final proviso, which is intended to embody the prohibition against pyramiding, could be interpreted here in such a manner as to render the prohibition meaningless.

We do not believe that the ICC intended its rephrasing of the prohibition against pyramiding to strip that provision of all its substance, and so we advance what we believe to be encompassed by the concept of pyramiding, and then illustrate by example what we believe is and what we believe is not prohibited by the language of the final proviso. First, we believe that the concept of pyramiding refers to a situation where the same type or kind of benefit is made available to an employee under two or more employee protective arrangements, and those benefits differ only as to amount and duration. To use a variation of the example given in the BLE illustration reproduced in note 23, supra, let us assume that such benefits are wage protective provisions, one guaranteeing an employee 75% of his most recent annual earnings for life, the other guaranteeing an employee just for a six year period 100% of his most recent annual earnings, and also providing for subsequent indexing to keep current with cost of living and wage increases. We believe that an employee would be engaging in a prohibited pyramiding of benefits if he elected coverage under the employee protective arrangement containing the higher guaranteed wage for a six year period, and then, at the expiration of that wage protective period, elected to receive the lower guaranteed wage for the remainder of his life.

We do not, however, subscribe to the view expressed in the 'Weston award' that the concept of pyramiding has any application to a situation where different types or kinds of benefits are made available to an employee under two or more employee protective arrangements. 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 provision in the other arrangement at the same time. Furthermore, we take the 'remainder, if any' language in the final proviso to mean that if all benefits in the retraining rights package originally elected by the employee expired at the end of a six year period, and the employee by that time had not yet reached normal retirement age, the prohibition against pyramiding of benefits would not prevent him from continuing to be covered by the rehiring priority provision for the remainder of its term, notwithstanding the fact that the principal benefit package that he originally had elected has expired.
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> To summarize briefly, we believe that the ICC, in formulating the final proviso dealing with the prohibition against pyramiding of benefits, intended its meaning to be substantially as follows: when component benefits are provided under different sets of employee protective conditions, and those benefits differ only as to duration and amount, and not as to type or kind, then an employee, in electing coverage under one set of employee protective conditions, receives such component benefits to the exclusion of similar component benefits provided under the other sets: however, when different sets of employee protective conditions contain component benefits that differ as to type or kind between the sets, then an employee, in electing coverage under one set of employee protective conditions, should not be rendered ineligible to receive benefits contained in the other sets that have no counterpart in the set he elected. This construction of the final proviso would seem to retain genuine substance in the prohibition against pyramiding of benefits, while at the same time circumventing the most objectionable aspects of the 'Weston award.' (Footnotes omitted)

On February 4, 1980 the ICC issued its Decision in Mendocino Coast Ry., Inc. - Lease and Operate — California Western RR, Finance Docket No. 28256, in which it made the following pertinent ruling with respect to Article I, Section 3:

> That section now provides that nothing in that appendix shall be construed as depriving an employee of any rights or benefits or eliminating any

> obligations under an existing job security or other protective conditions or arrangement, but precludes the duplication or pyramiding of benefits and states that the benefits shall be construed as including the conditions, responsibilities, and obligations accompanying such benefits. This section is susceptible to the reasonable interpretation, noted by the BN as having been expressly agreed to between employee representatives and the carriers: that an employee may not concurrently enjoy the benefits arising under more than one arrangement at any given time, but an employee may, upon expiration of the benefit period of the arrangement elected by him, enjoy the benefits arising under the arrangement not initially elected by him, if the benefit period under this second arrangement has not yet expired.
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> We have no doubt that this favored interpretation will be adopted in the event of any future dispute regarding the interpretation of article I, section 3. Such dispute would require arbitration for self-effecting means of resolving interpretational conflicts.

Since the ICC's Mendocino Coast Decision there have been two arbitration awards under Article I, Section 11 of the New York Dock Conditions interpreting Article I, Section 3 in the context of questions similar to those presented in the instant case. Both awards address the issue of pyramiding.

In UTU and Conrail, June 18, 1985 (Yagoda, Neutral) the Arbitration Committee faced a situation wherein two adversely affected employees pursuant to Article I, Section 3 had elected to receive the benefits of Title V to the Regional Rail Reorganization Act and after termination of Title V claimed benefits under the New York Dock Conditions. The Carrier denied the claim on the ground of pyramiding. Noting that neither the Weston Award nor the Second Circuit's decision disposed of the controversy before it, the Arbitration Committee ruled in favor of the Claimants citing the language of the final proviso of Article I, Section 3.

In TCU and Norfolk Southern Corp., Oct. 16, 1991 (Roukis, Neutral) the Arbitration Committee faced a situation in which adversely affected employees initially elected the benefits of the New York Dock Conditions under Article I, Section 3 and after expiration of those benefits sought the benefits of the February 7, 1965 protective agreement which extended for the life of employment. The Carrier denied the employee's request. Again, the Arbitration Committee ruled in favor of the employees. However, in so doing the Committee rejected the rationale of the Yagoda award with respect to the pyramiding of benefits under Article I, Section 3 of the New York Dock Conditions and adopted as controlling the rationale of the Second Circuit with respect to that matter.

The issue squarely presented to this Arbitration Committee by the instant case is whether Claimants, having been affected by the SP/UP merger and having elected to continue to receive the benefits of the New York Dock Conditions in connection with the previous SPL merger, may receive New York Dock Condition benefits imposed in connection with the SP/UP merger after expiration of the benefit period for the conditions Claimants elected to receive. Put another way, would such a result constitute improper "pyramiding" under Article I, Section 3 of the New York Dock Conditions?

Our first point of inquiry must be what definitive pronouncements have been made by the ICC or STB on the question. As can be seen from the foregoing analysis of applicable ICC/STB decisions there is little guidance in this regard. As noted by the Arbitration Committee in the Roukis award, ". . . the only detailed interpretative

assessment of Article I, Section 3 of the New York Dock Conditions is found in the 2nd Circuit's lengthy decision." (Emphasis original). Apparently, neither the Yagoda or Roukis awards were appealed to the ICC/STB for review. At least this Committee has been furnished with no ICC/STB ruling which would so indicate. Nor has the Committee been furnished with any ICC/STB ruling subsequent to the Second Circuit's decision, except the Mendocino Coast Decision, which interprets the language of Article I, Section 3. As the foregoing quote from the Mendocino Coast Decision reveals, the prohibition against pyramiding was mentioned but not discussed in any meaningful or definitive way.

There having been no definitive ruling by the ICC/STB with respect to the prohibition against pyramiding in Article I, Section 3 subsequent to the Second Circuit's decision, the pronouncements of that Court on the issue must be considered authoritative. Further supporting this conclusion is the fact that the Second Circuit in making such pronouncements was enforcing the ICC's order imposing the New York Dock Conditions. In so doing the Court affirmed the authority of the ICC to impose specific labor protective conditions. Accordingly, the Court's interpretation of the meaning of those conditions cannot be divorced from the ICC's authorship of them. In other words, the Second Circuit upheld the ICC's authority to impose the conditions as interpreted by the Court.

The Second Circuit clearly held that in Article I, Section 3 the ICC intended the prohibition against pyramiding of benefits to apply to the following situation:

> . . . when component benefits are provided under different sets of employee protective conditions, and those benefits differ only as to duration and amount, and not as to type or kind, then an employee, in electing coverage under one set of employee protective conditions, receives such component benefits to the exclusion of similar component benefits provided under the other sets; . . . .

Here Claimants elected to receive benefits under the New York Dock Conditions in connection with the SPL merger and sought to receive benefits under the same conditions in connection with the UP/SP merger after the conditions originally elected expire. The only difference appears to be as to duration and amount, remuneration being greater under the New York Dock benefits originally selected. Accordingly, what Claimants seek to do here falls within the Second Circuit's definition of pyramiding and is thus prohibited under Article I, Section 3.

We cannot agree with the Organization that the pronouncements of the Second Circuit with respect to the prohibition against pyramiding in Article I, Section 3 constitute dicta. On the contrary, we believe the Court's comments are an integral part of its decision.

The Organization's argument that the Carrier's position in this case violates the six year period of benefits mandated by the New York Dock Conditions imposed in the SPL merger is unpersuasive. Article I, Section 3 mandates an election between the benefits of the New York Dock Conditions and any preexisting conditions applicable to affected employees. That election is subject to the proscription against pyramiding. Again,

pyramiding as defined by the Second Circuit clearly includes what the Organization seeks here.

The Organization also relies upon the following language which appears in both the SPL implementing agreement and implementing agreement No. NYD-217:

> Employees referred to in this Article who elect the New York Dock Conditions protection and benefits prescribed under this Agreement shall, at the expiration of their New York Dock Conditions protective period, be entitled to such protective benefits under applicable protective agreements provided they thereafter continue to maintain their responsibilities and obligations under applicable protective agreements and arrangements.

Clearly this language must be interpreted in light of the prohibition against pyramiding as defined by the Second Circuit. In that light, the language does not support the Organization's position.

The Organization cites implementing agreements and other transactions on this Carrier in support of the argument that the Carrier has not followed consistently the position it takes in this case. However, the pertinent language of those implementing agreements differs materially from the pertinent language of the two implementing agreements under consideration in this case. Moreover, the position taken by the Carrier in other transactions does not appear to qualify as an established practice.

For similar reasons the Organization's point that other Carriers have adhered to the Organization's interpretation of Article I, Section 3 in this case is not well taken. Whatever may have been done by voluntary agreement on other Carriers, in the absence

of similar agreement in this case there is no support for the contention that the Carrier subscribes to the Organization's position here.

Article I, Sections 5 and 6 of the New York Dock Conditions are of little help to the Organization. The Organization argues that New York Dock benefits enjoyed by Claimants in this case as a result of the SPL merger cannot be terminated except under the specific conditions set forth in those provisions. However, such provisions must be interpreted in light of Article I, Section 3 as interpreted and applied by proper authority, in this case the United States Court of Appeals for the Second Circuit. In light of that interpretation the Organization's argument has little weight.

Pyramiding of benefits is very much involved in the questions at issue in this case as demonstrated by the foregoing analysis. Accordingly, the Organization's contention to the contrary is without significant support.

While it is true, as the Organization maintains, that arbitration decisions interpreting the Washington Job Protection Agreement (WJPA) are proper guidance for arbitrators interpreting the New York Dock Conditions, that proposition does not save the Organization's case here. Many of the WJPA issues decided by previous arbitrations are distinguishable from those in the instant case. Those WJPA arbitration decisions on issues reasonably analogous to those we face here must be dealt with in light of the Second Circuit's interpretation of Article I, Section 3. Again, in light of that interpretation the Organization's argument on this point fails to persuade.

Clearly, the Organization's attack upon the Carrier's option form is valid to the extent that the form seeks to deny employees affected by the SP/UP merger the right guaranteed by Article I, Section 3 to revert to preexisting protective agreements or arrangements for the unexpired term of such agreements or arrangements where to do so does not constitute pyramiding. In this regard we note that the Carrier's attempt to stop employees from reverting to the benefits of the February 7, 1965 protective agreement after expiration of New York Dock protection would violate the Roukis award upon which the Carrier relies so heavily. However, in light of the Second Circuit's interpretation of the pyramiding prohibition in Article I, Section 3, the applicable implementing agreements coupled with the historic elective application on this property, the Carrier may prevent employees who elect the New York Dock Conditions of the SPL merger from receiving the benefits of the New York Dock Conditions arising from the SP/UP merger upon expiration of the SPL merger benefits.

At the hearing the Organization introduced Court and ICC decisions in support of its arguments. Our analysis of these decisions forces us to conclude that they are inapposite. Accordingly, they are not persuasive.

AWARD

The Organization's and Carrier's Questions at Issue are answered in accordance with the findings.

William E. Fredenberger, Jr.
Chairman and Neutral Member

D. D. Matter
Carrier Member

R. F. Davis
Employee Member

DATED: 6-16-98