SPECIAL BOARD OF ARBITRATION

Established Pursuant to Article 1 Section II
of the New York Dock II Conditions

CASE NO. 4
AWARD NO. 4

PARTIES TO THE DISPUTE

Transportation-Communications International Union (BRAC)

and

Norfolk Southern Corporation

Hearing Held: September 29, 1988, Room 320, City Centre Building 223 East City Hall Avenue, Norfolk, Virginia

QUESTION AT ISSUE:

Employee's Question at Issue

"Does Article 1, Section 3 provide that upon the expiration of an affected employee's New York Dock protective period, that employee is entitled to the protection of any other protective arrangement to which he is entitled?"

Carrier's Question at Issue

"Does Article 1, Section 3 of the New York Dock protective condition permit an employee who has elected coverage under that arrangement to revert to the coverage of a pre-existing protective agreement at the expiration of the protective period of New York Dock?"

OPINION OF BOARD

The Interstate Commerce Commission hereinafter referred to as the I.C.C. approved the application of the Norfolk & Western Railway Company, hereinafter referred to as Carrier, to purchase the Illinois Terminal Railroad Company. (For details, see ICC Finance Docket 29455 (Sub. - No. 11). Said approval was granted on June 22, 1981. As part of this arrangement or transaction, the I.C.C. imposed the employee merger protection 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. 2nd 83 (2nd cir. 1979). Later by date of July 29, 1981, Carrier served notice pursuant to Article I, Section 4(a) of New York Dock of its intention to coordinate and/or consolidate the above Carriers respective facilities, operations and services, and thus in accordance with the provisions of New York Dock, the affected labor Union, hereinafter referred to as the Organization consummated an Implementing Agreement with Carrier on October 13, 1981. In implementing the transaction, seniority districts were redesigned and employees working on the Illinois Terminal Railroad Company were affected and certified as such. The two (2) claimants involved in this dispute were affected by the transaction and accordingly filed permissible claims for New York Dock benefits. Mr. B.J. Conrad became a dismissed employee effective December 15, 1981 and Mr. E.J. Unterbrink became a

displaced employee circa late 1981. Several years later after the expiration of the protective period, both individuals sought rights and protective benefits pursuant to Article I, Section 3 of the New York Dock Conditions and claimed entitlements under the February 7, 1965 Mediation Agreement. Article I, Section 3 of the New York Dock Conditions is verbatimely referenced as follows:

"3. 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 if any 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 this protective period under that arrangement."

Carrier denied the claims on the grounds that reversion to the protective coverage of the February 7, 1965 Mediation Agreement was an explicit form of pyramiding and impermissible under Article I Section 3 of the New York Dock Conditions. It placed great emphasis upon the 2nd circuit's interpretation of Article I, Section 3.

As part of its defense, the Organization carefully developed an historical analysis of protective benefit arrangements,

particularly the rationale and eventual denouement of the Appendix C-1 Conditions mandated by Congress and promulgated in detail by the United States Secretary of Labor. These conditions were imposed pursuant to the implementing requirements of the Rail Passenger Service Act of 1970. Article I, Section 3 of the Appendix C-1 Conditions is reproduced as follows:

> "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 employees, 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."

It was the Organization's position that said provision clearly intended that an employee subject to the Appendix C-1 Conditions was not precluded from benefit protection under another agreement. In other words an employee was not barred from seeking protection under another extant agreement, when the protective period of Appendix C-1 expired. It noted, however, that notwithstanding the Award issued by Referee Harold M. Weston on January 6, 1972, wherein he held that an employee had to choose either all of the benefits of Appendix C-1 or all of the benefits of the other optional protective agreement, (Merger Protective Agreement), the I.C.C. and the 2nd Circuit reversed this "harsh" decision. (For the text of the Weston Award, see In the Matter of the Arbitration between Penn Central Transportation Company and Brotherhood of Railway, Airline & Steamship Clerks, Freight

Handlers, Express & Station Employees, June 6, 1972.) It further pointed out that with the labor protective provisions of Appendix C-1 as a model, the I.C.C. had a ready example of protective conditions which fulfilled the requirements of Section 5 (2)(f) of the Interstate Commerce Act (recodified as Title 49, Section 11347) as well as Section 405 of the Rail Passenger Service Act (45 U.S.C. 565). It also maintained that later when the I.C.C. added new language to Article I, Section 3 of the New York Dock Conditions, specifically, the wording: "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", it was irrefutably clear that an affected employee was not estopped from seeking protective benefits under another agreement. In essence, it observed that it was never intended that a covered affected employee would forfeit completely protective benefits available under another agreement, when the initially elected benefit arrangements expired. Furthermore, it noted that when the 2nd Circuit reviewed the I.C.C.'s February 9, 1979 Decision on further consideration, the Federal Court took exception to the Carriers (petitioning railroads) assertion that the new language added to Article I, Section 3 of the New York Dock Conditions permitted duplication or pyramiding of benefits. It referenced in part, the 2nd Circuit's decision with respect to the implicit prohibition against pyramiding:

"The ICC, both in its brief and at oral argument, placed great stress on the fact that an employee, upon the expiration of the benefits provided under the plan originally selected, would be entitled to the benefits contained in the plan not selected only 'for the remainder, if any, of (the) protective period under the arrangement.' Apparently the ICC believes that this limiting phrase captured the essence of the original prohibition against pyramiding of benefits contained in Appendix C-1. Certainly, however, the two cannot be equated. The very concept of pyramiding has no relevance to a situation where benefits provided under different plans expire at the same time. Thus, in those situations where there are no 'remainder benefits' in existence when the benefits provided under the originally selected plan expire, pyramiding of benefits is prevented, not by any prohibition against pyramiding, but as there are no 'benefits' to pyramid, by force of logic.

"Our interpretation of the ICC's rephrasing of the prohibition against pyramiding is not an attempt to substitute our view for that of the agency. As previously developed, an employee could not receive the same type of benefit under the different plans at the same time, for that would be prohibited duplication. See note 22 supra. Further, an employee could not combine the greater benefits of one provision with the lesser obligations of another, for that would be prohibited by the final proviso of Article I, Section 3 of Appendix C-1, language that has been included verbatim in the "New York Dock Conditions," see note 17 and text p. 96 supra. Therefore, since it seems apparent that the ICC wished to soften the harsh effect of the Weston interpretation without depriving the prohibition against pyramiding of all content, we believe our interpretation of the Commission's language to be the intended one." (Page 18.)

(For the full text of the 2nd Circuit Court's decision, see New York Dock Railway And Brooklyn Eastern District Terminal v. United States of America and Interstate Commerce Commission 609 F. 2nd 83 (2nd cir. 1979))

In addition, it contended that an arbitral decision involving the United Transportation Union and Conrail upheld a similar position regarding protective benefits under another protective arrangement and also noted that a Carrier official via an internal interpretative memorandum acknowledged that when protection expired under the elected arrangement, the affected

employee was still entitled to the unexpired benefits of the other extant arrangement. (See In the Matter of United Transportation Union (T) and Consolidated Rail Corporation Docket No. CRT-1691 dated June 18, 1985 and the outline of the New York Dock Conditions distributed by Carrier's Manager Costs and Profitability Analysis on October 3, 1979)

Contrawise, Carrier maintained that an employee who has elected a particular type of benefit contained in the New York Dock Conditions cannot revert to the same kind of benefit of a pre-existing protective arrangement when his/her protective period under New York Dock expired. Specifically, it argued that the language of Article I, Section 3 effectively prohibits an employee who has elected the monetary benefits and protective period under the New York Dock Conditions. In effect, it contended that when the affected employee opted for the monetary benefits of the New York Dock Conditions, said employee accepted the conditions, responsibilities, and obligations attendant to such benefits, including the prescribed protective period.

Furthermore, it noted that when the parties Implementing Agreement was reached on May 19, 1982, Section 2 thereof did not contemplate placing additional employees under the coverage of the April 7, 1965 Memorandum (Merger Implementing) Agreement or the September 29, 1976 Memorandum Agreement between the Norfolk & Western Railway Company (NW) and the Brotherhood of Railway Clerks (BRAC). It asserted that had the parties intended

for employees to have the option to revert to coverage under the February 7, 1965 Mediation Agreement, after the New York Dock Conditions protective benefits expired, the negotiators could have readily included such language in the Implementing Agreement. It reviewed the Weston Award within the context of the language of Article I, Section 3 of Appendix C-1 protective conditions and observed that when the ICC adopted the language of Article I Section 3 of the New York Dock Conditions, the Commission was "apparently" attempting to soften the harshness of the "all or nothing" interpretation of the aforementioned award. As futher proof of its position, Carrier argued that the 2nd Circuit's decision, particularly as said decision addressed the intent and purpose of the pyramiding clause clearly disposed of any interpretative ambiguity. In pertinent part, the Circuit Court held:

"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.'"

It was Carrier's position that in view of this clear language,

the affected employees herein who elected a particular kind of benefit under one protective arrangement because of its favorable amount or duration, were precluded from "picking up" that same kind of benefit under another protective arrangement at the expiration of the protective period.

In considering this case, the Board, of judicial necessity, notes that 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. There were no indications as to how the language of the above section, specifically, the last proviso thereof, was construed by other carriers and organizations, subject to New York Dock Conditions, and there were no arbitral awards specifically interpreting the definition and application of pyramiding under Article I, Section 3. The award cited by the Organization, to be sure, addressed, in part, the questions posed in the instant dispute, but it fell short of providing a comparative assessment of distinguishable benefits. It did not address in depth the question of benefit pyramiding or the adjudicative applicability of Article I, Section 3. Moreover, the Claimants in that case initially received benefits under Title V of the Regional Rail Reorganization Act of 1973, and not under Article I, Section 3 of the New York Dock Conditions.

In the case herein, both Claimants had opted for benefits under New York Dock Conditions and both Claimants sought benefit protection under the February 7, 1965 Mediation Agreement, when

the initially selected benefits expired. Accordingly, and pursuant to the last paragraphs of Article I, Section 3, of the New York Dock Conditions, Claimants filed for protective benefits under the February 7, 1965 Mediation Agreement, but were apprised that they could not revert to the monetary protection and protective duration of the February 7, 1965 Mediation Agreement. Carriers' denial centered exclusively on the 2nd Circuit's decision, while the Organization's position pivoted primarily on the legislative-judicial history of the Appendix C-1 conditions and the New York Dock Conditions.

Essentially, what is before this Board is the proper definition and appropriate application of Article I, Section 3 of the New York Dock Conditions, particularly the last proviso thereof, beginning with the words "provided further,". The New York Dock Conditions did not adopt the precise language of Appendix C-1, specifically the explicit language barring duplication or pyramiding of benefits, but it did include a specific prohibition against duplication and an inferential prohibition against pyramiding. It is the latter proviso that is at issue herein.

On its face, this proviso would basically support the Organization's position. It does not specifically mention the word "pyramiding" as such, though the language, "he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement" clearly conveys this concept. The 2nd Circuit pointed

this out in its decision and we are thus compelled to respect its analysis and explication. In part, it stated:

"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." (See page 98 of the 2nd Circuit Court's decision).

It then went on to define pyramiding and used an example to illustrate its point.

"First we see 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 these 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." (See pages 99 and 100 of the 2nd Circuit Court's decision) 609 F. 2nd 83 (1979)

In note 22, it acknowledged its agreement with the dissenting member of the Weston Arbitration Panel on the definition of benefit duplication, but observed also its disagreement with the dissenting member's interpretation of the prohibition against the pyramiding of benefits. In part, it succinctly stated:

"The dissenting member cites no sourse material compelling his interpretation of the concept of pyramiding."[1] (See pages 98 and 99 of the 2nd Circuit Court's decision. 609 F. 2nd 83 (1979))

By contrast, it observed:

"Because the practice of linking the greater benefits of one provision to the lesser obligations of another provision already appears to be clearly prohibited by the final proviso of Art.I §3 of Appendix C-1, we decline to follow the dissenting member's opinion which ascribes this function to the prohibition against pyramiding of benefits. Although our interpretation of the prohibition against pyramiding of benefits is not compelled by any source material, at least it is consistent with the original language of Art.I §3 of Appendix C-1 and insures that each of its elements retain substantive effect." (See p. 99 of the 2nd Circuit Court's decision 609 F. 2nd 83 (1979))

As can be readily seen from this analysis, the 2nd Circuit Court's interpretation of benefit pyramiding differs significantly from the interpretation of the Weston Arbitration Panel's dissenting member and provides a distinction among benefit entitlements. In other words, when component benefits are provided under different sets of employee protective conditions, and these benefits differ only as to duration and amount, not type or kind, then an employee selecting coverage under one set of protective conditions, receives such component benefits to the exclusion of similar component

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[1]The dissenting member of the Weston Arbitration Panel explained the concepts of duplication and pyramiding as follows:

"[A]n employee covered by the [collective bargaining] agreement who chooses the "moving expense" protection of Appendix C-1 must accept the obligations as well as the benefits of the specific provision in Appendix C-1 which provides that protection--he cannot have both the "moving expense" allowance provided in Appendix C-1 and the "moving expense" allowance provided in the [collective bargaining] Agreement as that would be duplication; nor may he select the more attractive benefit of a specific provision of one formula of protection and the lesser obligations contained in a similar provision in another formula of protection as that would be pyramiding. "Each benefit carries with it the obligations which accompany that benefit."

benefits provided under the other sets. Conversely, when different sets of employee protective conditions contain compnent benefits that differ as to type or kind between the sets, the employee in electing coverage under one set of component benefits is not precluded from receiving benefits contained in the other sets that have no counterpart in the set initially selected.

In the dispute at issue, and consistent with the unambiguous interpretation of the 2nd Circuit Court, Claimants are not barred from obtaining the protective entitlements of the February 7, 1965 Mediation Agreement, as long as the benefits are not of the same type or kind, previously granted under Article I, Section 3, of the New York Dock Conditions.

AWARD AND ORDER

1. The Answer to the Question at Issue submitted by the Employee Organization is Yes, but only to the extent that such benefits are not of the same type or kind previously granted under Article I. Section 3 of the New York Dock Conditions.
2. The Answer to the Question at Issue submitted by the Carrier is Yes, but only to the extent expressed in the Board's Answer to Question 1.

George S. Roukis, Chairman and
Neutral Member

G.C. Edwards, Carrier Member

J.C. Campbell, Employee Memi

Dated: October 16, 1991