

In the matter of the arbitration between:

NEW YORK DOCK RAILWAY & BROOKLYN
EASTERN DISTRICT TERMINAL

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

:
: Re: Finance Docket 28250
: Appendix III
:
: Award Issued:
:
: December 15, 1980

On August 19, 1980, the undersigned Arbitrator was nominated by the National Mediation Board to sit with the New York Dock Railway and certain of their employees represented by the Brotherhood of Locomotive Engineers affected by ICC Finance Docket No. 28250, Appendix III.

An arbitration hearing was held in accordance with Finance Docket 28250 Appendix III on November 19, 1980 in the offices of the New York Dock Railway. The following were present:

NEW YORK DOCK RR

BLE

Van Grace, Director, Employee Rel.
Christine Pasquariello, Esquire,
Vice President

J. W. Crawford, Vice President
J. S. Roborecky, General Chairman
Wm. Herchenroder, Vice Chairman

After receipt of the complete Finance Docket, the arbitration formally closed the record on November 28, 1980.

QUESTION-AT-ISSUE:

Does the consolidation of Seniority Rosters constitute a transaction as envisioned by the ICC when it wrote the New York Dock Protective Condition?

BACKGROUND

Description of Operations

New York Dock Railway (NYDR) and Brooklyn Eastern District Terminal (BEDT) are Class III, Terminal and Switching Carriers, subject to the jurisdiction of the Interstate Commerce Commission. Their operations are substantially similar in that each perform carfloat operations from adjacent but functionally disconnected terminals on the Brooklyn waterfront.

New York Dock Railway interchanges railroad cars with Conrail and the Baltimore and Ohio Railroad at their respective terminals at Greenville, New Jersey, and St. George, Staten

Island. Railroad cars at the New Jersey terminals are transported by tug/carfloat movement to and from NYDR's three terminals in Brooklyn (Fulton, Atlantic, and Bush Terminals). New York Dock Railway also interchanges rail cars with Conrail in Brooklyn via a land connection located in the Bush Terminal area.

Brooklyn Eastern District Terminal also operates carfloat service between Greenville and St. George Terminals and its two Brooklyn terminals (Kent Avenue and Brooklyn Navy Yard Terminals). Additionally, it operates the Greenville marine terminal facility for Conrail pursuant to contractual agreement.

Both companies own and operate the necessary marine equipment (e.g., tugs and carfloats) and maintain the float bridges located at their Brooklyn Terminals. None of the NYDR or BEDT terminals are inter-connected by rail, within either company, or between companies.

The Merging of NYDR and BEDT

A July 1975 study, entitled, "THE FINAL SYSTEM PLAN," which was published by the United States Railway Association

(USRA), and was issued in accordance with the provisions of the Regional Rail Act of 1973, has served as the blueprint for the reorganization of the rail system in the Northeast United States. The Plan, in recognizing the necessity of efficient operation of the Brooklyn Rail Terminals, stated that a program should be undertaken by Conrail, Chessie, the present independent dock carriers, and any interested public bodies which would seek to enact the following recommendations:

Consolidate facilities and services to eliminate present duplication.

Investigate the possibilities of a single management control for the entire float operation.

That the two Brooklyn-based terminal companies integrate or closely coordinate their cross harbor floating operations with Conrail for maximum efficiency.

In addition to the USRA's recommendations, the Brooklyn Terminal carriers were seriously affected by the economic malaise which struck the New York metropolitan area in the early 1970's. The hemorrhaging of business and industry from the City of New York had an immediate and adverse impact on NYDR and BEDT. As

Administrative Law Judge Glennon states in the initial ICC decision, dated May 13, 1977:

"The accounts of New York Dock present a dismal financial picture, with a negative working capital position, substantial over-capitalization, a negative net worth, and a 3-year record of deficit operations."

Both carriers experienced these damaging operating losses through the early to mid-1970's and anticipated a future which would hold more severe economic hardships.

The recommendations of the Final System Plan coupled with the serious operating losses of both companies led the management of NYDR to enter into negotiations with the then majority stockholder of BEDT for the purchase of its BEDT stock. The takeover bid was subsequently extended to encompass a tender offer for all of the outstanding shares of BEDT.

Evolution of Finance Docket 28250

In the initial ICC decision, May 13, 1977, Administrative Law Judge (ALJ) Glennon granted authority for NYDR to acquire control of BEDT's capital stock and imposed the "New Orleans" labor protective conditions as augmented by various components

of the Appendix C-1 conditions of the Rail Passenger Service Act (RPSA) of 1970.

Upon the parties filing exceptions to the ALJ's Order, Division 3 of the ICC approved and adopted the Initial Decision by an Order dated September 26, 1977, but substituted the Appendix C-1 conditions for those originally imposed.

On petition for a stay by Railway Labor Executives Association (RLEA) and Brotherhood of Railway and Airline Clerks (BRAC), Division 3, by further Order, dated September 29, 1977, permitted parties to consummate the transaction of control, but prohibited any action which would affect employees' rights until the Commission acted on RLEA's petition for review.

On April 11, 1978, Division 3 of the Commission, acting as an appellate division, again approved the acquisition of control and further modified the protective conditions previously imposed.

By Order dated July 17, 1978, the ICC granted RLEA and BRAC's petition for review and reopened the proceedings for further consideration of appropriate employee protective conditions.

By Order dated February 9, 1979, and served February 23, 1979, the full Commission formulated a definitive set of protective conditions by selecting the most favorable labor protective conditions contained in both the "New Orleans conditions" and the Appendix C-1 conditions. Additionally, modifications of certain key words were made which more precisely defined the intended scope of the "New York Dock conditions."

Finally, NYDR and BEDT petitioned the United States Court of Appeals for the Second Circuit to enjoin, set aside, suspend, modify, and otherwise review the labor protective conditions imposed by an Order of the ICC, served on February 23, 1979. In reviewing the matter, the Court of Appeals acknowledged that the "New York Dock conditions" are significantly more protective than any previously imposed. In denying the review and affirming the ICC's decision, the Court acknowledged the following:

"We are not unmindful of the fact that the ICC's imposition of these labor protective conditions may place substantial hurdles in the path of rail carrier management seeking to consummate in a smooth and rapid manner transactions covered by 49 U.S.C. §§11343-11346."

With the denial of review by the Court of Appeals, the final Appendix III protective conditions of the February 23, 1979, ICC order became binding.

Consolidation of Rosters

Pursuant to the authority contained in the Order, NYDR and BEDT began a phased program of integrating its employees represented by the seven labor organizations on the properties. Ninety-day notices, as prescribed in Article 1, Section 4 of Appendix III, were served on the following organizations:

Brotherhood of Locomotive Engineers

Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employees

International Association of Machinists
and Aerospace Workers

Marine Engineer Beneficial Association

International Organization of Masters,
Mates and Pilots

Seafarers International Union

United Transportation Union

The notices served on each organization were substantively identical in that they stated that NYDR and BEDT proposed

a coordination of the employees represented by the organization, with such coordination to take the form of the merger of the seniority rosters, the employees would be subject to one schedule of agreement; namely, the NYDR schedule, and would be employees of NYDR.

In the succeeding months Implementing Agreements creating single NYDR seniority rosters, as described above, were reached with four of the seven Union organizations (the Brotherhood of Railway Clerks, the International Association of Machinists and Aerospace Workers, the Marine Engineers' Beneficial Association, and the Seafarers' International Union).

On January 25, 1980, the NYDR and the BEDT posted notices of intent to dovetail seniority rosters of BLE employees. Unable to resolve the question at issue, the matter was moved to arbitration and the National Mediation Board nominated Dr. F. X. Quinn as Arbitrator.

POSITION OF EMPLOYEES

At the threshold of these proceedings, the Brotherhood of Locomotive Engineers challenges the jurisdiction of any Committee

over the instant dispute other than a Committee established under Section 11 of Appendix III, Finance Docket No. 28250. This challenge of jurisdiction is recorded necessarily because the record is void of definite designation of the Section under which this Committee was established and the dispute is being adjudicated. Discussion of other questions are entered into without waiving the objections to jurisdiction.

It is the position of the BLE that the actions contemplated by the carriers' notices of July 11, 1979 and/or January 25, 1980, do not constitute a "transaction" as defined in Article I, Section 1(a), Appendix III of Finance Docket No. 28250. It is further the Organization's position that the dispute on the "Question at issue" is subject to arbitration under Section 11, Appendix III before the provisions of Section 4 can become applicable.

The BLE contends that there is no evidence or even contention on the part of the carrier that any unification, consolidation, merger or pooling of the separate services of the NYD and BEDT will occur which will in any way necessitate merging the seniority rosters of the engine service forces. It is obvious that the carriers' sole purpose has been an attempt to merge the engineers

seniority rosters by use of Finance Docket 28250, Appendix III even though no consolidation or coordination of facilities or services are involved. Such action is in direct conflict with the provisions of Section 2, Article I, Appendix III, which states:

- "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future agreements or applicable statutes."

The seniority rights of engineers and helpers on the NYD and BEDT are collective bargaining rights, covered by Schedule Article 11 on the former and Schedule Article 8 on the latter, which the carrier is attempting to change without following the prescribed procedures, set forth in the collective bargaining agreement, for such changes to be made pursuant to provisions of the Railway Labor Act. There has been absolutely no showing of a "transaction" as contemplated and defined by Appendix III. Without a transaction, Section 4, Appendix III cannot be used as a tool to bypass the

requirements of the Railway Labor Act for the sole purpose of merging seniority rosters.

The employees refer to the opinion of the United States Court of Appeals, Second Circuit, Docket No. 79 4086, dated November 7, 1979. In denying the carriers' petition for review of the final ICC Order, the Court reviewed the historical background and found:

"...the Washington Job Protection Agreement of 1936 ('WJPA') generally is conceded to be the blueprint for all subsequent job protection arrangements."

The Court then cited the WJPA definition of "coordination" as being:

"...joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operation or services previously performed by them through such separate facilities."

In rejecting the petitioners' objection to the ICC definition of the term "transaction" in FD 28250, the Court stated:

"Although this definition has no precise ancestor in either the 'New Orleans conditions' (as clarified in Southern Control II) or in Appendix C-1 conditions, it is

"clear from the definition itself, as well as from the ICC's expressed intention in formulating this definition, that the goal which the ICC had in mind was to encompass in its definition of 'transaction' the same situations that were within the parallel term 'coordination' employed in the admitted blueprint for all current employee protective packages, the WJPA."

The BLE contends that the WJPA Section 13 Committee decision has application to the instant case. In applying the decision to the instant case, the "Carriers plan for coordinating services amounts, at most to a proposed merging of rosters and does not constitute a 'transaction' as defined in Section 1(a), Article I, Appendix III of Finance Docket No. 28250. A transaction not being under consideration, there is no occasion for a Section 4 agreement."

In conclusion it is submitted that the carriers' proposed merging of rosters is not subject to the provisions of Section 4, Appendix III as the action contemplated by the carriers' notices do not constitute a "transaction." It is further submitted that arbitration procedure for resolving the "Question At Issue" is provided for under Section 11, Appendix III.

POSITION OF CARRIER

The carrier contends that the February 9, 1979 ICC decision included the modification of the pivotal term "transaction." This modification redefined and broadened the term to mean "any actions taken pursuant to authorizations of this Commission on which these provisions have been imposed." As a result of this change the Commission felt the need to cite not once, but twice an example of what appropriately falls under the umbrella of this redefined term. Both versions of this example of a transaction follow as presented in context:

"Due to our modification of the term 'transaction', any future related action taken pursuant to our approval (i.e., consolidation of rosters as a result of the control) will require full and literal compliance with the conditions."

"We also note that the broad definition is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 et seq., because the event actually affecting the employees might occur at a later date than the initial transaction, yet still pursuant to our approval (consolidation of employee rosters, etc.)."

The Commission without any ambiguity provides the answer: YES, this is exactly what the ICC envisioned, they stated as much (see parentheses in above quotations.)

The carrier avers that since the transaction of consolidating seniority rosters is exactly what the ICC anticipated, the question to be addressed is, Does the Consolidation of Seniority Rosters Fall Under the Purview of Section 4 in Appendix III? Section 4, of Appendix III, states that certain criteria or conditions determine the applicability of the section. First, the railroad who is contemplating a transaction must be subject to the conditions of Finance Docket 28250; clearly NYDR and BEDT are. Second, the transaction must have the potential of causing at least one of three consequences; namely, "the dismissal or displacement of any employee, or rearrangement of forces." Since NYDR does not anticipate the immediate dismissal of BLE employees as a result of the transaction, the first of the three consequences will not be further examined. Displacement of employees and rearrangement of forces, however, clearly apply to the contemplated transaction. Displacement is defined in Appendix III, as:

"An employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working condition."

Since it is the singular purpose of Finance Docket 28250 to provide protection to those employees who are placed in a worse condition with respect to his compensation and rules governing his working condition as a result of a transaction, it is next necessary to determine if any NYDR and/or BEDT employees may be displaced and/or suffer a rearrangement of forces as a consequence of consolidation of rosters.

In the case of NYDR and BEDT dovetailing the two seniority rosters into one, certain changes must resultantly follow. Specifically, alterations in employee seniority standing and associated privileges will be affected. A total of seven employees are involved in the transaction and four of the seven are adversely affected in terms of their seniority standing as a result of the consolidation of rosters. This, in and of itself, constitutes a rearrangement of forces and may in turn cause the displacement of employees. For example, when the present NYDR and BEDT positions are abolished and subsequently rebulletined as NYDR positions, the

majority of employees will have reduced placement on the new seniority roster. This reduced standing has potential for immediate and negative repercussions. An illustrative case in point is the man holding the fifth most senior position on the new roster. Since between the two companies, four locomotive engineers hold regular positions, two with NYDR and two with BEDT, he would have to accept Helper work in lieu of Engineer's work as a result of the consolidation of rosters. Before the merging of rosters, however, he stood No. 2 on the NYDR roster and was thereby able, due to his seniority on that roster, to hold a regular engineer's position. Similar situations could occur to other employees as a result of the consolidation.

Without doubt, NYDR and BEDT employees may become adversely affected as a result of the merging of seniority rosters since the consolidation requires a rearrangement of forces, which may cause the displacement of BLE employees. As such, the employees must, by definition, come under the protective conditions as specified in Appendix III, Article 1, Section 4, of Finance Docket 28250.

It is the position of the carrier that the transaction of consolidating rosters meets the criteria as specified by the Commission. The transaction causes a rearrangement of forces by altering employee seniority roster standing, which will almost certainly place employees in a worse condition with respect to their compensation and/or working conditions.

OPINION

The record indicates that NYDR and BEDT employees may become adversely affected as a result of the merging or dovetailing of seniority rosters since the intended consolidation requires a rearrangement of forces, which may cause the displacement of BLE employees. Therefore, by definition, the employees come under protective conditions as specified in Appendix III, Article 1, Section 4, of Finance Docket 28250. The challenge of the BLE to this arbitration and its jurisdiction is not valid.

"Transaction" was clearly defined and delineated in the February 9, 1979 ICC decision which gave specific mention to consolidation of employee rosters.

Our review of the record indicates that NYDR and BEDT faithfully initialed and completed each procedural step as required

under Section 4. The appropriate ninety-day notices were posted and the final impasse was submitted to arbitration in accordance with Section 4.

What follows is a comparison of action required by the ICC as specified in Finance Docket 28250, Appendix III, Article 1, Section 4, and that action taken by NYDR and BEDT in attempting to consolidate seniority rosters of BLE employees. The left column of information represents an itemization of the ICC requirements, while the right column presents a factual chronological listing of actions initiated by NYDR and BEDT. Since two different ninety-day notices were issued by NYDR and BEDT, ICC requirements Items #1 through #3 must be examined twice, once for each of the two notices:

ICC REQUIREMENTS

1. At least a ninety day notice of intended transaction shall be displayed on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees.
2. Notice shall contain full and adequate statement of proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.
3. Prior to consummation the parties shall negotiate in the following manner:
 - a. Within five days from the date of receipt of notice, a place shall be selected to hold negotiations.

NYDR AND BEDT ACTIONS

1. Under authority granted by the ICC, NYDR and BEDT issued a ninety day notice, dated July 11, 1979, pursuant to Article 1, Section 4 of Appendix III, to the BLE.

The notice was sent registered mail to union representatives and were additionally posted on appropriate bulletin boards.
2. The notice stated that the consolidation sought the coordination of NYDR and BEDT forces and services performed by such employees, so that the services of the two companies would be performed jointly under the supervision of NYDR. The notice also contained a specification of the number of employees affected.
3. On July 23, 1979, NYDR and BEDT requested an initial meeting be held on August 10, 1979. Request was sent registered mail to Mr. Roborecky and to Mr. Crawford, Vice President.
 - a. BLE (Mr. Crawford) acknowledged receipt of the July 11, 1979, ninety days' notice in a letter dated July 30, 1979, and requested a postponement of the initial meeting until August 27, 1979.

ICC REQUIREMENTS

3. b. These negotiations shall be for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix.
- c. These negotiations shall commence immediately thereafter and continue for at least thirty days.

NYDR AND BEDT ACTIONS

3. b and c

A series of negotiations were held through October and November 1979, in an effort to arrive at an acceptable implementing agreement and schedule of agreement. Substantial progress was made toward reaching agreement until an impasse was reached concerning the consideration to be given for the elimination of arbitrary payments.

***** SECOND NOTICE *****

1. Ninety day notice (repeated).

1. When it became apparent that the impasse could not be resolved, thereby preventing the development of an implementing agreement and new schedule agreement, NYDR and BEDT, on January 25, 1980, published a second ninety day notice. This notice limited the proposed transaction to the dovetailing of seniority rosters only.

Copies of the second notice were sent registered mail to the Local and General Chairmen, and to the Vice President.

2. Notice shall contain full and adequate statement (repeated).

2. The January 25, 1980, notice cited requisite authority for the contemplated consolidation and stated that employees would be dovetailed onto a single roster and would be considered employees of NYDR. Additionally, the notice cited the number of employees affected by the consolidation.

ICC REQUIREMENTS

NYDR AND BEDT ACTIONS

3. Prior to consummation, the parties shall negotiate....(repeated).

a. Within five days.....
....(repeated).

b. These negotiations shall be for the purpose of.....
.....(repeated).

c. These negotiations shall commence(repeated).

3.

a. On January 25, 1980, NYDR and BEDT requested an initial meeting be held on January 31, 1980. Request was sent registered mail to Local and General Chairmen, with a copy to the Vice President.

On February 1, 1980, BLE acknowledged receipt of the January 25, 1980 notice and requested postponement of initial meeting until February 19, 1980.

b. and c.

A series of negotiations were held during the months of February and March 1980, in an effort to satisfy the union's need to reach a new schedule of agreement prior to the consolidation of rosters. Negotiations continued in attempts of resolving the previously established impasse concerning the matter of arbitraries.

ICC REQUIREMENTS

4. Each transaction which may result in dismissal or displacement of employees or rearrangement of forces shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.
5. If at the end of the thirty days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with procedures specified.

Within five days from the request for arbitration the parties shall select a neutral referee.

NYDR AND BEDT ACTIONS

4. These requirements were met by negotiating an implementing agreement and schedule agreement.
5. When it became apparent that resolution of the impasse was not possible and, therefore, an implementing agreement could not be reached, NYDR and BEDT, on April 7, 1980, notified BLE of their intent to invoke arbitration pursuant to authorization granted under Article 1, Section 4, of Appendix III. The notice was sent registered mail to the BLE Vice President with copies to the General and Local Chairmen.
6. The April 7, 1980 notice of arbitration also contained the suggested date of April 17, 1980 to meet and select a referee.

BLE acknowledged receipt of the April 7, 1980 letter and requested postponement of initial meeting until April 28, 1980.

ICC REQUIREMENTS

7. In the event they are unable to agree within said five days upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

NYDR AND BEDT ACTIONS

7. An attempt to select a mutually agreeable referee at the April 28, 1980 meeting was unsuccessful. Agreement to request appointment of referee by the National Mediation Board was reached.

On May 2, 1980 NYDR and BEDT sent a telegram to the National Mediation Board requesting appointment of a referee.

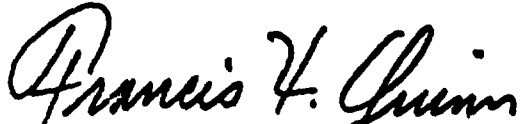
On May 20, 1980, NYDR and BEDT specified the nature of the conflict between the carrier and the union and, again, requested appointment of a referee.

A comparison of the steps necessary to successfully enact a coordination of rosters, as defined by the ICC, and of the actual steps and time frames of action taken by NYDR and BEDT to effect the consolidation of seniority rosters provides clear evidence of the propriety of NYDR and BEDT's effort to consolidate rosters.

Therefore, we must answer the Question-At-Issue in the affirmative.

AWARD

1. The consolidation of rosters as contemplated by NYDR and BEDT does constitute a transaction as envisioned by the ICC.
2. The contemplated transaction falls under the scope of Section 4, of Appendix III.
- 3, NYDR and BEDT fulfilled all requirements specified in Section 4, when contemplating the consolidation of rosters.


Francis X. Quinn, Arbitrator

December 15, 1980