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Transportation Communications International Union

Robert A. Scardelletti, *International President*

LEGAL DEPARTMENT

Mitchell M. Kraus, *General Counsel*

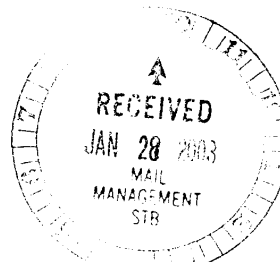
Christopher J. Tully, *Assistant General Counsel*

207118

January 27, 2003

VIA OVERNIGHT MAIL

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C.

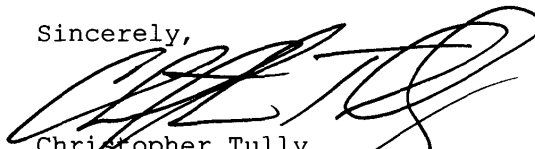


**RE: Finance Docket No. 34004 - Canadian Pacific Railway
Company and Napierville Junction Railway
Company-Corporate Family Transaction-St.
Lawrence & Hudson Railway Company, Ltd.
(Petition to Reopen)**

Dear Mr. Williams:

Enclosed for filing please find an original and ten (10) copies of the Petition to Intervene of the Transportation Communications International Union ("TCU") in this matter, along with accompanying attachments. An additional copy of these filings has been enclosed; please stamp-date these items and return them to the undersigned in the enclosed, self-addressed, stamped envelope.

Sincerely,


Christopher Tully
Assistant General Counsel

Enclosures

cc: J. Parker, IVP
K. Cline
D. Gerth, Esq.

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Office of Proceedings

JAN 28 2003

Part of
Public Record

♦ 3 Research Place ♦ Rockville, Maryland 20850-3279 ♦
Phone-301-948-4910 ♦ FAX-301-330-7662 ♦ Website-www.tcunion.org



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Finance Docket No. 34004

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JAN 28 2003

MAIL
MANAGEMENT
STB

**CANADIAN PACIFIC RAILWAY COMPANY AND NAPIERVILLE
JUNCTION RAILWAY COMPANY—CORPORATE FAMILY TRANSACTION—
ST. LAWRENCE & HUDSON RAILWAY COMPANY LIMITED
(PETITION TO REOPEN)**

**TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION'S
PETITION TO INTERVENE**

The Transportation•Communications International Union ("TCU") hereby files this Petition to Intervene in the currently pending Petition to Reopen, filed by Petitioner Karen Cline ("Petitioner") on August 12, 2002, for the limited purpose of responding to arguments made by Respondent Canadian Pacific Railway Company ("CP") in its September 24, 2002 Motion to Supplement the Record. Specifically, TCU wishes to intervene solely for the purpose of responding to CP's argument that Petitioner's September 5, 2002 request for arbitration in this matter was untimely.

Further, consistent with TCU's limited intervention in this matter, the Board should reject CP's position that the September 5, 2002 request for arbitration was untimely.* CP's position is simply wrong in its interpretation of the literal language of Article I, Section 11 of the *New York Dock* Conditions, flies in the face of both longstanding practice and arbitral authority, and would effectively amount to rewriting the *New York Dock* Conditions.

* TCU takes no position as to the underlying merits of Petitioner's *New York Dock* claim.

I. TCU's Petition to Intervene Is Appropriate and Should Be Granted.

TCU's Petition to Intervene is appropriate, as it has been both timely filed and as TCU has a substantial interest in the Board's response to CP's argument on this issue.

TCU's Petition to Intervene is timely, in that: (1) the Petitioner is not a member of this Organization; (2) her claim for *New York Dock* benefits was not filed through or by TCU; (3) the specific point to which TCU is responding was raised in the first instance by CP in its September 24, 2002 Motion to Supplement the Record; and (4) the Board has not published in the Federal Register a notice of these proceedings nor of the procedural issues contained therein. Consequently, TCU first learned of this docket in mid-December 2002, and has made a good faith effort to review the filings and file this Petition in a timely manner.

Further, TCU has a substantial interest in the Board's response to CP's argument, as CP is effectively seeking an interpretation of Article I, Section 11 that: (1) would presumably apply to all existing and subsequent *New York Dock* disputes, (2) is contrary to the very text of that provision; (3) contradicts the only existing arbitral authority on the issue; and (4) flies in the face of longstanding *New York Dock* practice between labor organizations and carriers. For these reasons, TCU submits that its Petition to Intervene is appropriate and should be granted.

II. CP's Position that Article I, Section 11(a) Renders Petitioner's Request for Arbitration Untimely Is Without Merit, and Should Be Rejected.

CP argument that Petitioner's September 5 request for arbitration was untimely under Article I, §11 of *New York Dock* is utterly without merit. At page 2 of its Motion to Supplement the Record, CP argues that, because Petitioner's claim for benefits was denied on May 8, 2002, and was repeated

in a letter from CP dated July 25, 2002, her September 5 request for arbitration was untimely, as it fell outside the 20 day-period specified in Section 11(a). This position should be rejected by the Board outright.

A. CP's Position is Contrary to the Text and Intent of Article I, Section 11.

CP's argument is completely at odds with the actual language of Article I, Section 11, which reads in relevant part:

11. Arbitration of disputes. – (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix . . . within 20 days after the dispute arises, it *may* be referred by either party to an arbitration committee. . . .

(Emphasis added). This language makes clear that the 20-day period relied upon by CP is, in fact, the minimum amount of time parties must wait before submitting the dispute to arbitration; the use of the permissive “may” – rather than the mandatory “must” or “shall” – makes it clear that the 20-day period is not intended as a bar date. *See, e.g.,* Black's Law Dictionary 979 (6th ed. 1990); *Koch Refining Co. v. U.S. Department of Energy*, 497 F. Supp. 879, 891 (D. Minn. 1980) (“‘May’ is a permissive word, and will be construed to vest discretionary power, unless the context of its use clearly indicates a purpose to use it in a mandatory sense.”) (internal citations omitted); *Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 687 (Tex. App.-Austin 1996) (“The word ‘may’ means possibility, permission, liberty or power; it does not indicate a mandatory requirement.”), *rehearing overruled* (1996), *writ denied* (1997); Elkouri & Elkouri, *How Arbitration Works* (5th ed. 1997), at 489 (in general, “the word ‘may’ has been given its ordinary ‘permissive’ meaning in absence of strong

evidence that a mandatory meaning was intended.”). Thus, from a strictly textual standpoint, CP’s argument must be rejected.

In addition to being contradictory to the text of Article I, Section 11, CP’s position is equally at odds with the underlying intent of this language – i.e., to promote the settlement of *New York Dock* disputes by voluntary means, without the obstruction of rigid deadlines for compelled arbitration. Indeed, the language of this provision incorporates this intent by requiring parties to wait *at least* twenty (20) days after a dispute arises before invoking arbitration – at least twenty days that the Board (and the Interstate Commerce Commission before it) intended the parties to use to reach a voluntary settlement of the dispute. CP’s position would effectively short-circuit this process by compelling parties to invoke arbitration almost immediately, regardless of whether more time and more extensive discussion would produce a voluntary settlement. Thus, CP’s position should be rejected on these grounds as well.

B. CP’s Position is Contrary to the Only Existing Arbitral Precedent on this Particular Issue.

CP’s position is also at odds with the only arbitral authority on the subject. In *Railway Employees’ Department, AFL-CIO and Chicago and Western Indiana Railroad Company* (1973) (“Dolnick Award”) (Attachment 1), Arbitrator David Dolnick interpreted Article I, §11 of the Appendix C-1 Conditions (which is, in relevant part, identical to Article I, §11 of *New York Dock*) with respect to the Carrier’s argument that the Organization’s request for arbitration was time-barred because the Organization had not requested arbitration within 20 days after the dispute arose. Arbitrator Dolnick rejected this argument outright:

We shall first discuss and dispose of the procedural issue. Article 1, Section 11(a) provides, in part, the following:

“11. ARBITRATION OF DISPUTES – (a) In the event Railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this Appendix, except Sections 4 and 12 of this Article I, within 20 days after dispute arises, it may be referred by either party to an arbitration committee . . .”

The common and ordinary meaning of that language is obviously clear and meaningful. If the parties are unable to settle a “dispute or controversy with respect to the interpretation, application or enforcement of any provision of this Appendix, . . . within 20 days after the dispute arises” they may refer it to an arbitration committee. *They may not refer it to the arbitration committee before said settlement period has lapsed. By no means of any recognized rules of contract interpretation can that language be construed to mean that referral to the arbitration committee must be made within 20 days after the dispute arises.*

Dolnick Award, at 5-6 (emphasis added). The Dolnick Award is the only authority TCU was able to find on this issue (either supporting or contradicting TCU’s position), which is not surprising, given the specific language of Article I, §11 and the longstanding practice between labor organizations and carriers subject to the *New York Dock* Conditions. Therefore, CP’s position should also be rejected on the additional ground that it contradicts established arbitral precedent.

C. CP’s Position is Contrary to Longstanding New York Dock Practice Between Labor Organizations and Carriers.

Rail Labor Organizations and Carriers alike have long accepted the application expressed in the Dolnick Award with respect to the progression of disputes involving the interpretation, application or enforcement of the *New York Dock* protective conditions, pursuant to Article I,

Section 11. When necessary for dispute resolution under Section 11, Labor Organizations and Carriers have invoked arbitration only after lengthy discussion (verbal and written) and ample opportunities for rebuttal, which easily exceed the 20-day deadline CP seeks to invent for purposes of this proceeding. There have been literally hundreds of decisions under the auspices of the *New York Dock* Conditions (and other imposed protections) which TCU and other Rail Labor Organizations have progressed in this manner (i.e., more than 20 days elapsing between the time the dispute arises and the time arbitration is invoked). TCU could cite to the Board all of these cases as supportive of the consistent manner in which Section 11 is applied. However, for the sake of brevity we bring to your attention the following cases which the Board has previously reviewed, and for which the Board has the complete record, including documentation as to the initiation of the dispute and the invocation of arbitration, as examples of the consistent application of Section 11(a).

They are:

<u>Carrier/ Organization</u>	<u>Date Carrier Denied Claim (i.e., dispute arose)</u>	<u>Date Arbitration Invoked</u>
NS/TCU	9/24/1997	11/17/1998 (418 days)
CSX/TCU	6/22/1988	9/25/1991 (1,180 days)
UP/TCU	6/17/1997	11/26/1997 (162 days)

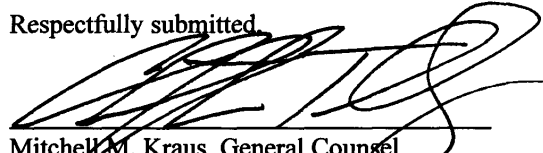
See Attachments 2A-B, 3A-B, and 4A-B. In each of these cases, the claims in question were arbitrated pursuant to Article I, §11 of the *New York Dock* Conditions. As previously stated, these

are representative examples of how Article I, Section 11 of the *New York Dock* conditions has been consistently interpreted by Carriers and by Rail Labor Organizations. Thus, CP's position should be rejected on the additional ground that it contradicts the longstanding understanding of Article I, Section 11 by both the Carrier and Labor community.

III. Conclusion

For the reasons stated above, the Board should grant TCU's Petition to Intervene in this proceeding. Further, for the reasons stated above, the Board should reject CP's argument – as presented on page 2 of its September 24 Motion to Supplement the Record – that Petitioner's request for arbitration is untimely under Article I, section 11 of the *New York Dock* Conditions.

Respectfully submitted,



Mitchell M. Kraus, General Counsel
Christopher Tully, Assistant General Counsel
TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION
3 Research Place
Rockville, Maryland 20850-3279
(301) 948-4910

*Attorneys for Respondent Transportation•
Communications International
Union*

Dated: January 27, 2003

In the Matter of the Arbitration between
RAILWAY EMPLOYES' DEPARTMENT,
AFL-CIO

and

CHICAGO AND WESTERN INDIANA
RAILROAD COMPANY

OPINION AND AWARD

This is an arbitration under Article I, Section 11 of Appendix C-1 issued by the Secretary of Labor on April 16, 1971, in accordance with the authority granted him by Public Law 91-518, the Rail Passenger Service Act of 1970. A "dispute or controversy with respect to the interpretation, application or enforcement" of a provision of said Appendix C-1, not Sections 4 or 12 of said Article I, being in existence, the parties on November 16, 1972, entered into an Arbitration Agreement convening an arbitration committee as therein provided. Mr. H. E. Crow was designated by the Carrier as its member, Mr. C. E. Wheeler was designated by the Organization as its member, and Mr. David Dolnick was designated as the chairman and neutral member of the committee.

In accordance with the terms of the Arbitration Agreement, the parties exchanged written submissions more than fifteen (15) days prior to the scheduled hearing date, as therein provided, and the neutral committee member received copies.

TCU
ATTACHMENT 1

A hearing was held on Friday, January 5, 1973, at the office of the Railway Employees' Department, 220 South State Street, Chicago, Illinois. Only the members of the Arbitration Committee were present. Each partisan committee member fully emphasized, discussed and argued his respective position and categorized the allegations in the submissions.

ISSUE:

The parties have defined the dispute in the Arbitration Agreement as follows:

1. Did Carrier furlough Coach Cleaners, Inez Thomas, Acey Cameron, Carman Helper, Frank Matthias Kubal and Carman, Bennie Johnson, effective April 24, 1971, in anticipation of AMTRAK assuming operation of passenger trains effective May 1, 1971, resulting in the closing of Dearborn Passenger Station?
2. If so, should the named employees be afforded the protective provisions set forth in Appendix C-1 of the National Railroad Passenger Corporation Agreement?

BACKGROUND FACTS:

For simplicity and easy reference the Railway Employees' Department, AFL-CIO shall hereinafter be referred to as the "Petitioner," the Chicago and Western Indiana Railroad Company shall hereinafter be referred to as the "Carrier," Inez Thomas, Acey Cameron, Frank Matthias Kubal and Bennie Johnson shall hereinafter be referred to as the "Claimants," and the National Railroad Passenger Corporation shall hereinafter be referred to as "AMTRAK."

It should be noted at the outset that the Arbitration Agreement provides that the Arbitration Committee "shall begin its hearings within thirty (30) days from the date of this agreement unless the parties mutually agree to an extension of such time." The parties did so mutually agree to extend the time for the hearing date and did so mutually agree to January 5, 1973, as the hearing date.

Prior to May 1, 1971, Carrier operated the Dearborn Passenger Station. Passenger trains of the Atchison, Topeka & Santa Fe Railway Company, the Louisville and Nashville Railroad Company, the Grand Trunk Western Railroad Company and Norfolk and Western Railway Company used the facilities of that station for receiving and dispatching of their passenger trains.

Also prior to that date the Carrier employed six (6) Carman, two (2) Carman Helpers (Oilers) and nine (9) Coach Cleaners who serviced the passenger trains of the above named railroads. All such employees were represented by the Petitioner.

On or about April 24, 1971, the Norfolk and Western Railway Company ceased using the Dearborn Passenger Station for its commuter service. By Bulletin No. 1, dated April 16, 1971, Carrier abolished one Carman Job, one Carman Helper Job (Oiler) and two Coach Cleaners, and by Bulletin No. 2, of the same date, advised the Claimants that they were furloughed at the "end of tour of duty on Friday, April 23, 1971."

All passenger trains operating in and out of the Dearborn Passenger Station, except the Norfolk and Western Commuter, were taken over by AMTRAK on May 1, 1971, and diverted to the Union Station, also in Chicago, Illinois. Norfolk and Western Commuter trains now terminate and start about one-half of a city block - about 300 feet - south of the former terminal. As of May 1, 1971, the Dearborn Passenger Station ceased operations and is closed. The positions of the other 13 employees of

-4-

that Station, who were represented by the Petitioner, were terminated effective May 1, 1971. All of them were afforded protective benefits provided for in Appendix C-1. Claimants now seek protective benefits provided for in the Rail Passenger Service Act of 1970, and in Appendix C-1.

POSITION OF THE PARTIES:

Petitioner

It is the position of the Petitioner that the closing of the Dearborn Passenger Station was a "transaction" as defined in Article I, Section 1(a) of Appendix C-1. Claimants, contends the Petitioner, were furloughed in anticipation of the said "transaction" - the closing of the Dearborn Passenger Station. The "Norfolk and Western removed its commuter train because of, and with full knowledge it must do so because of the notice that Dearborn Station would be closed as of May 1, 1971." Further, the Carrier has not met its burden of proving "that something other than the discontinuance of rail passenger service affected" the claiming employees.

With respect to time limits, Petitioner argues that the Claimants were not obliged to submit the dispute within 20 days from the date of their furlough or from the date the Carrier first denied their claims. Article I, Section 11 of Appendix C-1 merely provides that a dispute may not be submitted until at least 20 days have lapsed since the parties have come to an impasse.

Carrier

Carrier first contends that the claims "should be dismissed solely under the time limit provisions." The claims were originally presented on June 15, 1971. They were denied by the Carrier on June 23, 1971. No further presentation was made by the Petitioner until September 7, 1972,

more than a year thereafter. Article I, Section 11 of Appendix C-1 contemplates that the Petitioner was obliged to request arbitration "within 20 days after the dispute arises" which is June 23, 1971. This, the Petitioner did not do.

Even if this is not the intent of Article I, Section 11 of Appendix C-1, Article V, Paragraph (c) of the August 21, 1954, National Agreement is applicable, continues the Carrier. That rule provides that all claims are "barred unless, within 9 months from the date" of denial by the highest designated officer, proceedings are instituted before the appropriate board agreed to by the parties. This the Petitioner did not do.

The provisions in Article V, Paragraph (c) of the August 21, 1954, National Agreement are applicable because Appendix C-1 "does not supersede either protective agreements or collective bargaining agreements of any kind."

In any event, argues the Carrier, "Claimants were not affected by AMTRAK, but were furloughed due to a decline in Carrier's business." Their positions were not "abolished" within the definition in Article I, Section 1(c) of Appendix C-1. Also the furloughs were made because of "fluctuations and changes in volume or character of employment brought about by other causes . . . not within the purview of" the scope and purpose of Appendix C-1.

DISCUSSION AND OPINION:

We shall first discuss and dispose of the procedural issue. Article I, Section 11(a) provides, in part, the following:

"11. ARBITRATION OF DISPUTES - (a) In the event Railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application

or enforcement of any provision of this Appendix, except Sections 4 and 12 of this Article I, within 20 days after dispute arises, it may be referred by either party to an arbitration committee"

The common and ordinary meaning of that language is obviously clear and meaningful. If the parties are unable to settle a "dispute or controversy with respect to the interpretation, application or enforcement of any provision of this Appendix, . . . within 20 days after the dispute arises" they may refer it to an arbitration committee. They may not refer it to the arbitration committee before the said settlement period has lapsed. By no means of any recognized rules of contract interpretation can that language be construed to mean that referral to the arbitration committee must be made within 20 days after the dispute arises.

Time limit rules in Article V, Paragraph (c) of the August 21, 1954, National Agreement are not here applicable. It should be noted first that arbitration provided for in Article I, Section 11(a) is confined to the "interpretation, application or enforcement" of the provisions of Appendix C-1, the issue before this Arbitration Committee. No violation of any rule in the schedule agreement is involved, which this committee would, in any event, have no right or authority to adjudicate. Procedural time limits provided for in Article V, Paragraph (c) of the August 21, 1954, National Agreement apply only to the interpretation and application of rules in the schedule agreement and all amendments and appendices thereto. Appendix C-1 is not an amendment to the schedule agreement or to any national agreement. It is a separate and distinct document arising out of the Rail Passenger Service Act of 1970, and deals exclusively with protective benefits to employees affected by an AMTRAK transaction.

Secondly, Appendix C-1 nowhere contemplates that the time limit provisions in said National Agreement should be applicable. Article I, Section 3 of Appendix C-1 reads:

"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 there shall be no duplication or pyramiding of benefits to any employees, and, providing further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits."

Clearly, this language does not provide for the valid applicability of the time limit rules in the National Agreement of August 21, 1954. It merely retains all other job security and protective conditions contained in other agreements, but without duplication or pyramiding. In this sense, Appendix C-1 does not supersede other protective agreements. Neither does it supersede the schedule agreement. The latter contains rules for hours, wages and working conditions not provided for in Appendix C-1. They, obviously, remain valid until changed, amended or deleted under the Railway Labor Act, as amended. Article I, Section 11, however, alone covers the procedural rules for determination of disputes arising out of the interpretation, application or enforcement of said Appendix C-1.

Notwithstanding the lack of contractual time limits, or any statute of limitations, no party may present a claim or process a dispute whenever it meets his desire. Every dispute should be handled expeditiously. Otherwise, the doctrine of laches may be invoked. In any event, it is implicit in the agreement between the parties that the processing of claims and grievances be handled within a reasonable time. What is a "reasonable time" depends on each particular case.

Disputes arising under Appendix C-1 were new and novel immediately after the effective date of May 1, 1971. Nonetheless, Claimants and the Petitioner presented the claims promptly. Petitioner first wrote to the Carrier on May 4, 1971, and a conference was held on June 3, 1971. Petitioner again wrote Carrier on June 15, 1971. After receiving Carrier's letter of June 23, 1971, declining the claim, Petitioner wrote Carrier on July 16, 1971, that the declination cannot be accepted.

Between July 16, 1971, and September 7, 1972, when Petitioner wrote requesting a conference, the Petitioner was active in attempting to resolve the dispute. Petitioner made a serious effort to get the Norfolk and Western to employ the Claimants. When it became apparent that this could not be accomplished, Petitioner wrote to the Carrier for a conference and later requested arbitration under Article I, Section 11 of Appendix C-1.

Under all of the circumstances surrounding this dispute, we are obliged to conclude that extenuating circumstances exist and that the dispute was presented for arbitration within a "reasonable time" after it arose. The claims are not barred because of laches.

Was the furloughing of the Claimants a "transaction" within the definition of Article I, Section 1(a) of Appendix C-1? We believe it was and so conclude. AMTRAK took over the passenger service of all trains leaving and terminating in Carrier's passenger station, except that of the Norfolk and Western, on May 1, 1971. All such trains were diverted to the Union Station effective on that date. On and after May 1, 1971, no passenger trains arrived or departed from Carrier's passenger station. It has remained closed since that date. Carrier has employed no one represented by the Petitioner since that date.

The Rail Passenger Service Act of 1970 (Public Law 91-518) was enacted late in 1970. Carrier and the railroad companies knew for many months prior to May 1, 1971, that Carrier's passenger station was to cease operations on that date. Because Norfolk and Western concluded to continue its commuter service, and because it knew that the passenger station could no longer service its trains after May 1, 1971, it made arrangements to withdraw from that station and to service its own trains. The primary reason for the earlier withdrawal of Norfolk and Western was the discontinuance of Intercity Rail Passenger Service by the other railroad companies and the abandonment of the passenger station. Carrier and the Norfolk and Western knew long prior to April 16, 1971, that the passenger station would cease operating on May 1, 1971. Norfolk and Western ceased using Carrier's passenger station because it was to close on May 1, 1971. And the closing was precipitated by AMTRAK taking over the intercity rail passenger service. It follows, therefore, that the furlough of Claimants on April 24, 1971, one week before the passenger station ceased operating, was a "transaction" within the meaning and intent of Article I, Section 1(a) of Appendix C-1.

In an affidavit filed by the Secretary of Labor in a proceeding in the United States District Court for the District of Columbia, he said the following:

" . . . The Railpax Conditions simply require an employee to identify the transaction and the facts upon which he relies in his claim that he was affected by a transaction. The burden is then on the railroad to prove that factors other than 'a'-transaction affected the employee . . . It must show affirmatively that something other than any transaction affected the employee. Further, it is intended that a claiming employee shall prevail if it is established that a discontinuance had an effect upon the employee, even if other factors may also have affected the employee . . . "

All that the Carrier has shown is that the furlough took place before AMTRAK took over the rail passenger service and before the passenger station was closed. But the discontinuance of the rail passenger service "had an effect upon the" Claimants "even if other factors" - the withdrawal of Norfolk and Western on April 24, 1971 - "may also have affected" them. Thus, the Carrier has not met the burden of proof as declared by the Secretary of Labor.

Carrier has cited and has relied on the findings in AMTRAK Board of Arbitration Number 15 wherein the Referee held "that a furloughed employee does not meet the definition of a dismissed employee as defined in Article I, Section 1(c)." That conclusion was in answer to Issue No. 4, which reads as follows:

Under Section 6 of Article I of Appendix C-1, it is the position of the Employee that an employee will be entitled to receive dismissal benefits at any time during the protective period when such employee is in a furlough status and could be in active service on the working list if passenger service had not been discontinued.

All that the Referee in that case held was that an employee must be a "dismissed employee" to be entitled to protective benefits set forth in Article I, Section 6 of Appendix C-1, and that such "protective benefits do not require the Carrier to speculate on which furloughed employees might have been working at some future date had the Carrier not joined Amtrak."

There is no speculation here about which of the Claimants "might have been working at some future date." None of them will be working for the Carrier on any future date. They are "dismissed employees," the same as the other 13 who were terminated on May 1, 1971, and who were

afforded protective benefits provided for in Appendix C-1. It is not the purpose or intent of Appendix C-1 to deprive an employee of protective benefits where the primary reason for his furlough was due to a discontinuance of Intercity Rail Passenger Service pursuant to the Rail Passenger Service Act of 1970.

AWARD

1. Carrier furloughed Coach Cleaners Inez Thomas, Acey Cameron, Carman Helper Frank Matthias Kubal and Carman Bennie Johnson effective April 24, 1971, in anticipation of AMTRAK assuming operation of passenger trains effective May 1, 1971, and which resulted in the closing of the Dearborn Passenger Station.

2. The above named furloughed employees shall be afforded protective benefits provided for in Appendix C-1 issued by the Secretary of Labor on April 16, 1971, and contained in the National Railroad Passenger Corporation Agreement, all pursuant to the provisions of the Rail Passenger Service Act of 1970 - Public Law 91-518.

3. The Carrier is directed to comply with this Award on or before February 26, 1973.

Executed at Chicago, Illinois, this 25th day of January, 1973.

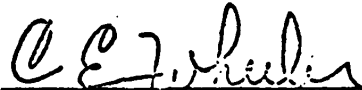


DAVID DOLNICK, Chairman and Neutral Member



H. E. CROW, Carrier Member

Carrier dissents



C. E. WHEELER, Petitioner Member



NORFOLK
SOUTHERN

Norfolk Southern Corporation
223 East City Hall Avenue
Norfolk, Virginia 23510-1728

NS SYSTEM BOARD #98

REC'D

OCT 20 1997

G. C. Edwards
Assistant Director
Labor Relations
(757) 629-2436

SUFFOLK, VA

September 24, 1997

PB-CLK-NYD(CMC)-Boling, P. K.
SSN 412-68-6009

Ms. P. K. Boling
RR 4, Box 125
Rutledge, TN 37861

Dear Ms. Boling:

This is in response to your request for benefits of the New York Dock protective conditions as a result of the coordination of certain crew calling work at Knoxville, Tennessee into the Centralized Crew Management Center (CMC) at Atlanta, Georgia, on or around July 30, 1997.

Our investigation reveals that when the crew calling work was transferred from Knoxville, you were entitled to bid on a position at the Crew Management Center in Atlanta. Since you failed to follow your work by obtaining a position at the new location, you are not a displaced employee and, therefore, not entitled to benefits under the terms of the New York Dock conditions.

Your request for entitlement to benefits is without merit and is respectfully declined.

Very truly yours,

G.C. Edwards

TCU

ATTACHMENT 2A



AFL-CIO, CLC

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION

DAVID L. STEELE
General Chairman

C. LESLIE GILBERT
General Sec'y-Treas.

Norfolk Southern System Board of Adjustment No. 96

November 17, 1998

File Nos. 97096-KNX-P-S (G. J. Andrews, et al)
97077-KNX-P-SR (B. A. Moore)
98013-CIN-P-SR (E. M. Rains)
98014-CIN-P-SR (J. H. Decker)

Mr. H. R. Mobley
NS Director Labor Relations
c/o Mr. G. C. Edwards
223 East City Hall Avenue
Norfolk, Virginia 23510-1728

Dear Mr. Edwards:

This is in reference to your letter dated November 4, 1998, PB-CLK-NYD (CMC) - Andrews, G. J., et al, referring to the conference held between the parties on October 8, 1998, during which the above captioned claims were discussed.

As I understand the gravamen of your position, if an employee affected by a New York Dock (NYD) transaction is able, through the normal exercise of seniority, to displace to a position not requiring a change in residence, then the Carrier is refusing to certify (with a showing of affect) that employee as a "displaced employee" and is denying such employee entitlement to a "displacement allowance."

Moreover, since each Claimant failed to displace or bid a position requiring a change in residence with the same daily rate of pay as their previous assignment, the Carrier does not consider such employees as being placed in a "worse position relative to their compensation."

An additional argument raised in your letter is that since the Carrier has been denying employees their statutory rights under NYD for over sixteen (16) years, the Organization is in someway barred from progressing the instant dispute.

TCU

ATTACHMENT 2B



2484 Pruden Blvd • P.O. Box 280 • Suffolk, VA 23439 • (757) 539-4877



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Mr. H. R. Mobley
Page 3
November 17, 1998

produces less compensation, which does not require a change in residence. If, at the time he is first adversely affected by the coordination or at any later time within the period of protection under Section 6(a), he fails to exercise his seniority rights to secure an available position which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to take or retain, he shall thereafter be treated for the purposes of Section 6 as occupying the position which he elects to decline.

DECISION: The question is answered in the negative. The employees involved are entitled to displacement allowances determined by the application of the above findings to the facts in their respective cases. [emphasis added]

* * *

Herein, Referee Bernstein found that for an employee to be considered displaced he or she must be able to displace to a position, even one "which does not require a change in residence." Only after exhausting such availability would the employee then be required to displace to another location requiring a change in residence if there existed a position that was available in the normal exercise of seniority.

Clearly, once affected by the transaction and able, in the normal exercise of seniority, to displace to another position that does not require a change in residence, the affected employee is protected for the enumerated period of time. That protection is not compromised if the employee is subsequently displaced or dismissed by carrier actions under Collective Bargaining Agreement applications, i.e. job abolishments.

Also provided to the Carrier was the February 14, 1986 decision of Charles Rehms involving Union Pacific, Western Pacific, Sacramento Northern v. UTU (FD 28250) wherein he was asked twelve questions over the application of NYD. Importantly, Question No. 5 was:

* * *

When shall employees be required to move their residence to preserve their full guarantee?

Mr. H. R. Mobley
Page 4
November 17, 1998

In response Charles Rehmus observed:

Under Section 5(a) of the New York Dock Conditions a displaced employee is not required to change his place of residence to minimize a carrier's protection obligation.

* * *

In these and many other arbitral decisions it has been universally held that employees follow the normal exercise of seniority rights as a condition of entitlement to a displacement allowance. In the cited cases of this dispute, each Claimant followed those normal seniority rights. As such, denial of their NYD protection is totally insupportable.

Turning to your final argument, employees displacing to positions not requiring a change in residence with lower daily rates are not entitled to a displacement allowance, I refer you to the decision of George Roukis in TCU v. NS Case No. 1, Award No. 1 (April 19, 1989). In that dispute the Carrier argued that daily rate of pay was dispositive of whether or not an employee has been placed in a worse position relative to compensation.

* * *

In disagreeing with this Carrier's application, George Roukis held that:

...the Board concurs with the Organization's interpretation that the word "position" as contained in Section 1(b) of the New York Dock Conditions connotes status, situation or posture rather than a specific job or assignment.

* * *

...Article I, Section 1(b) compels us to conclude that using a dispositive standard herein, rate(s) of pay is too restrictive and inconsistent with the contemplated purposes of The New York Dock Conditions.

* * *

Pursuant to Article I, Section 5(a), an employee displaced by a transaction who is unable to secure a position producing compensation, not rate of pay, equal to or exceeding the compensation he received in

Mr. H. R. Mobley
Page 5
November 17, 1998

the position from which he is displaced shall be paid a monthly displacement allowance during the protective period. Said allowance shall equal the difference between the monthly compensation in the retained position and the average monthly compensation of the position from which displaced.

* * *

Also see Arbitration Board No. 284 pursuant to Section 8 of the Oklahoma Conditions between TCU vs. Western Maryland (September 9, 1964) wherein it was held by Francis Robertson that:

It will be noted that the words "worse position" as they first appear in the language of the Conditions are in line with the provisions of the statute. There can be no doubt that as the word position is used in the statute it is not synonymous with job or assignment but rather connotes status, situation or posture. ...Hence in referring to an employee's position with respect to compensation and rules governing work conditions it is apparent that in this context the word "position" cannot be intended to mean a specific job or assignment. Hence it is clear that what the Commission was seeking to accomplish in imposing the Oklahoma Conditions was to assure an affected employee that this employment status insofar as compensation and working conditions were concerned would be preserved to him for the four years protective period.

* * *

Quite clearly, the elemental entitlement to NYD and the basis upon which the displacement allowance is calculated is not a matter which requires reiteration. Each of the Claimants were affected by the Carrier's consolidation and were required to exercise their seniority. This they all accomplished in accordance with the terms of the collective bargaining agreement. These facts are not in dispute.

Mr. H. R. Mobley
Page 6
November 17, 1998

Although the Carrier has attempted to portray each Claimant's displacement as a voluntary act, the facts contradict that illusion. Each Claimant exercised seniority rights under a purely involuntary circumstance prompted by Carrier's initial action. Let us at least recognize that indisputable fact.

As the matter now stands, the Claimants are all entitled to a displacement allowance under the strict dictates of NYD—a fact the Carrier continues to ignore. Therefore, I will contact your office as soon as possible with the Organization's list of arbitrators to serve as a NYD § 11 Committee neutral member. At that time, please also be prepared to discuss and identify those individuals whom you have stated were denied their displacement allowances for the past sixteen (16) years so that we may arrange to have the § 11 Committee address that issue.

Very truly yours,



D. L. Steele
General Chairman

cc: Mr. R.F. Lee, DC #22
Mr. V. R. Rister, DC #562



CSX RAIL TRANSPORT

D. R. Hutson
Division Manager
Corbin Division

P.O. Drawer 1500
Corbin, KY 40701-3500
(606) 523-3243

June 22, 1988

File: CO-C-101

Mr. F.B. Arn
Local Chairman, TCU
3440 Meadowlark
Edgewood, KY 41018

Dear Sir:

This refers to your letter of June 7, 1988, Item 1897, received on June 10, 1988, filing claim on behalf of Clerk G.L. Wimsatt, ID Number 180300, for New York Dock benefits, effective December 21, 1987, based on his actual earnings for the twelve (12) month period immediately preceding that date.

You are contending that Mr. G.L. Wimsatt's average monthly earnings should be \$3,503.97 per month instead of \$2,425.43 per month as outlined in Director Labor Relations, R.P. Byers letter of March 9, 1988 to Mr. G.L. Wimsatt.

Clerk G.L. Wimsatt was affected on December 21, 1987 as a result of an October 24, 1987 agreement covering the transfer, coordination and otherwise reorganization of certain clerical functions, which were being performed for CSXT by employees located on C&O Western Division District No. 7, at Cincinnati, Ohio with work being performed for CSXT by employees located on L&N District No. 12 Roster at Corbin, Kentucky. During a portion of the twelve month period prior to December 21, 1987, Clerk Wimsatt was a non contract official and was relieved of his responsibility on this position effective with close of business September 30, 1987. He, therefore, at that time, exercised his seniority and returned to Cincinnati on a clerical position. Wages of non contract positions are not applicable under New York Dock provisions of coordination agreements, therefore, it was necessary to compute the test period averages for the clerical employees immediately above and below Clerk Wimsatt on the seniority roster. These earnings were averaged and were included with his actual earnings subsequent to October 1, 1987. This method then furnished his TPA figures under the New York Dock benefits to which he was entitled.

TCU
ATTACHMENT 3A

In view of the foregoing, your claim is not supported by the agreement rules or any other rules and guidelines except for under Finance Docket No. 28250, and therefore, is declined in its entirety.

Yours truly,

DH Bush

D.H. Bush
Manager Division Administration

WGB/mm

EMPLOYEES' EXHIBIT *H*
PAGE *8* OF *18* PAGES

O SYSTEM BOARD OF ADJUSTMENT

Transportation-Communications International Union

DWIGHT D. VANCE
GENERAL CHAIRMAN

AFL-CIO, CLC

10610 TRADE ROAD
RICHMOND, VIRGINIA 23236-3041

(804) 379-3220
FAX (804) 379-3376

September 25, 1991
File: 666-1162

PATRICK E. MURPHY
ASSISTANT GENERAL CHAIRMAN-
GENERAL SECRETARY-TREASURER

281-146
NEW YORK DCK
WIMSATT

RECEIVED
INTERNATIONAL
PRESIDENT'S OFFICE

OCT 4 1991

Mr. G. Frederick Leif
Senior Director, Employee Relations
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

Dear Sir:

This is in regard to the unresolved issue at dispute concerning Mr. G. L. Wimsatt, identified by my file: 666-1162, your file: 88-0869. Please be advised that pursuant to Article I, Section 11, of the New York Dock Protective Conditions it is my intention to arbitrate this matter.

Mr. Carl Brockett, International Vice-President, TCU, has been appointed as the Member of the Arbitration Committee to represent the Employees in this dispute.

The question at issue is:

"What is the proper method for computing test period averages when the test period includes both agreement and non-agreement earnings?"

* * *

Further, be advised that Mr. Brockett will contact you within ten days regarding the Carrier's appointed Member of the Arbitration Committee. Mr. Brockett will also discuss the choosing of the neutral member of said committee as provided for in Section 11 of the New York Dock Conditions.

Sincerely,

Dwight D. Vance

Dwight D. Vance
General Chairman

cc: R. Scardelletti, IP ✓
C. Brockett, IVP
F. Arn, DC

TCU

ATTACHMENT 3-B



a proud past... a bold future



UNION PACIFIC

Labor Relations Department · One Market Plaza, Room 304 · San Francisco, California 94105
Fax 415-541-1087

SENIOR MANAGER
BRUCE FELD
(415) 541-2871

June 17, 1997

IF REPLYING, REFER TO FILE: NYD-217, Morrison

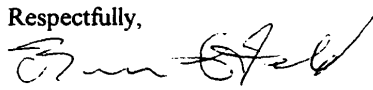
Mr. R. F. Davis
President, Allied Services-TCU
53 West Seegers Road
Arlington Heights, Illinois 60005

Dear Mr. Davis,

This refers to your letter dated June 2, 1997, concerning claim of P. J. Morrison for New York Dock labor protection. You contend that as a result of the return by Nora Elmore to the Denver Locomotive Plant, and the presence of three clerks at the Plant, that Claimant incurred a reduction in his overtime opportunities which, as you allege, are merger related. You imply, but do not state, your reference is to the UP-SP merger.

You have failed to specify any evidence that Claimant has been adversely affected as a result of the merger. In that regard you have not specified facts insofar as the amount of overtime allegedly lost resulting from the merger. It is well established that overtime in general may fluctuate among railroad employees. Accordingly, the claim is denied.

Respectfully,



Bruce S. Feld

cc: S. L. Wimmer

TCU
ATTACHMENT 4A



Transportation • Communications International Union – AFL-CIO, CLC



ROBERT F. DAVIS
President

TED P. STAFFORD
General Secretary-Treasurer

ROBERT B. TYNER, JR.
Executive Vice President

File: 365-TPA(Morrison)

November 19, 1997

Mr. Bruce S. Feld, Senior Manager
Labor Relations
Union Pacific Railroad
One Market Plaza - Room 304
San Francisco, CA 94105

Dear Mr. Feld:

This will have reference to the claim filed in behalf of Mr. Patrick J. Morrison, who was affected as a result of the UP/SP merger, which is identified as your file NYD-217, Morrison.

In your letter of June 17, 1997, and during several conversations that we have had about this issue, you have maintained that no evidence has been offered to support our contention that Mr. Morrison was affected by the merger. It is quite obvious that you did not consider everything that was contained in my original claim on this issue.

Mr. Morrison was a steno clerk at the Denver Locomotive Plant. At the same time, Ms. Nora Elmore held the position of chief clerk at the same location. On or about October 1, 1995, Ms. Elmore was relocated to a position as secretary to various carrier officials in the Mechanical Department at the carrier's Lincoln Street building. Coincident with this, Mr. Morrison was assigned as chief clerk at the Locomotive Plant. He was required to perform the duties of both the chief clerk's position as well as his former steno clerk position. This necessitated a great deal of overtime, which he worked.

On about February 3, 1997, Ms. Elmore's secretary position was abolished due directly to the merger of the UP/SP. She was reassigned to the chief clerk's position at the Locomotive Plant, and Mr. Morrison resumed his former position as steno clerk. Mr. Morrison lost not only the chief clerk's rate of pay, but also the overtime that he had worked for approximately sixteen (16) months. Had there been no merger between the UP/SP, Mr. Morrison would have continued to hold the position of chief clerk, being paid at the higher rate, and would have continued to work the overtime he had been working.

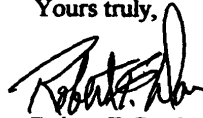
TCU ATTACHMENT 4B

Mr. Bruce Feld, Senior Manager
365-TPA (Morrison)
Page Two

Clearly, Mr. Morrison was affected by a transaction related to the merger of the UP/SP. Accordingly, I am once again requesting that you compute Mr. Morrison's test period average covering the period of February 4, 1996 through February 3, 1997, and further, that the carrier process for payment and pay Mr. Morrison what he was shorted as a result of this. Finally, that Mr. Morrison be allowed to claim his TPA for the duration of his New York Dock protective period which would have begun February 3, 1997.

If the carrier is unwilling to resolve this matter, you may consider this as the Union's demand that this case be arbitrated in accordance with the dispute procedures in NYD-217. Your prompt reply will be appreciated.

Yours truly,

A handwritten signature in black ink, appearing to read "Robert F. Davis", is written over the typed name.

Robert F. Davis, President

cc: P. J. Morrison