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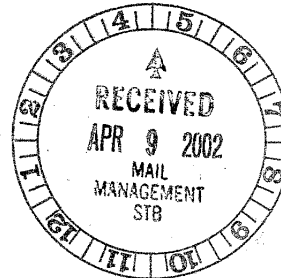
April 9, 2002

PID# 0101922002

BY HAND

**SURFACE
TRANSPORTATION BOARD**

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 715
Washington, D.C. 20423



Re: Finance Docket No. 33942 (Sub-No. 1)
USX Corporation -- Control Exemption -- Transtar, Inc.

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of the Petition for Review Of An Arbitration Award of Tracks Traffic and Management Services, Inc. ("TTMS"). I also enclose a diskette containing a copy of the petition in Word 97 format.

My firm's check covering the filing fee for this arbitration review proceeding (\$150.00) was enclosed with my letter dated March 19, 2002 (which transmitted for filing TTMS' Motion For An Extension Of Time).

An additional copy of the petition is enclosed for acknowledgment of receipt. Please date-stamp the copy and return it to our messenger. Thank you for your attention.

Very truly yours,

Krista L. Edwards

Krista L. Edwards

Attorney for Tracks Traffic and
Management Services, Inc.

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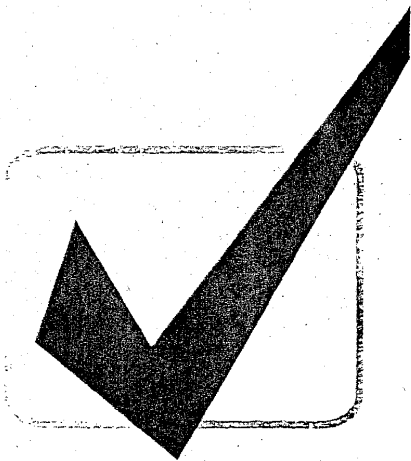
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cc: Mitchell M. Kraus

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**SURFACE
TRANSPORTATION BOARD**



ORIGINAL

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33942 (Sub-No. 1)

USX CORPORATION--CONTROL EXEMPTION--TRANSTAR, INC.

PETITION FOR REVIEW OF AN ARBITRATION AWARD

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33942 (Sub-No. 1)

USX CORPORATION--CONTROL EXEMPTION--TRANSTAR, INC.

PETITION FOR REVIEW OF AN ARBITRATION AWARD

Tracks Traffic and Management Services, Inc. ("TTMS"), pursuant to 49 C.F.R. § 1115.8, requests that the Board review an arbitration award rendered under Article I, § 11 of the *New York Dock* conditions (the "Fletcher Award"; reproduced as Attachment 1). The award addresses issues of general importance concerning the interpretation of the Board's protective conditions and, in particular, the circumstances in which a carrier is required to treat employees as "displaced employees" within the meaning of the conditions.

STATEMENT OF THE CASE

TTMS is a wholly owned subsidiary of Transtar, Inc. ("Transtar"), a subsidiary of United States Steel Corporation (formerly known as USX Corporation). TTMS performs certain clerical functions (including payroll accounting) for Transtar's transportation subsidiaries (five rail carriers and two water carriers) and for three former Transtar subsidiaries, including, as pertinent here, the Bessemer and Lake Erie Railroad Company ("BLE"). TTMS has approximately 83 agreement employees, all represented by the Transportation Communications International Union ("TCU"), the respondent in this arbitration review proceeding.

The Transtar Reorganization. The Board's November 30, 2000 decision in the above-captioned control proceeding exempted from the prior approval requirements of 49 U.S.C.

§§ 11323-25 the acquisition by USX Corporation of control of Transtar, Inc. ("Transtar") and five of the eight rail carriers then owned by Transtar (hereinafter, "the Transtar reorganization").

At the time, Transtar was a subsidiary of Transtar Holdings, LLC, an affiliate of Blackstone Capital Partners, LLP, which had acquired control of Transtar and its transportation subsidiaries from USX in 1988. The Board's November 30, 2000 decision authorized the parties to enter into and consummate a Reorganization and Exchange Agreement, with the effect of restoring USX's control of five of its former rail carrier subsidiaries and divesting Transtar of ownership and control of the other three rail carrier subsidiaries (including BLE). As anticipated by the applicants, the Board imposed its standard *New York Dock* protective conditions for the benefit of affected rail carrier employees.

The Transtar reorganization necessitated certain changes in the handling of centralized administrative and support functions for the Transtar carriers, as provided in the Reorganization and Exchange Agreement. Under common control, the Transtar subsidiaries had centralized and consolidated various administrative and support functions; as pertinent here, certain clerical functions were performed on behalf of all of the Transtar carriers by BLE. The Reorganization and Exchange Agreement provided that these clerical functions would be transferred from BLE to another Transtar subsidiary (TTMS), which would perform the same services for the remaining Transtar carriers and, pursuant to a services agreement, for BLE and the other former Transtar subsidiaries. The Agreement also provided that the Transtar reorganization would not necessitate the physical relocation of employees, because TTMS and BLE are headquartered in the same office building.

The New York Dock Implementing Agreement. Prior to consummating the exempted transaction, TTMS and BLE reached a voluntary implementing agreement with TCU to

govern the transfer of clerical employees from BLE to TTMS and the realignment of clerical positions on BLE. The implementing agreement (reproduced as Attachment 2) required TTMS to recognize TCU as the representative of the transferring BLE employees, to adopt the terms of the BLE/TCU labor agreement, and to establish the same or equivalent clerical positions to perform the transferred clerical work (Article II). The agreement established a bidding and "prior rights" procedure (Article I) designed to afford BLE employees who were performing the transferred work the opportunity to "follow" their position/work to TTMS or, in many cases, the option to remain with their position/work on BLE. Moreover, the agreement established rates of pay for the TTMS clerical positions that were the same as -- and in several cases, higher than -- the pay rates for the comparable BLE positions. All transferring employees were guaranteed full credit for their prior service as BLE employees and were to be ranked on a new TTMS clerical seniority roster in accordance with their seniority ranking on the BLE/TCU clerical roster (Article II). As pertinent here, the agreement also required the carriers, on written request, to furnish so-called "test period average" ("TPA") data, computed in accordance with Article I, § 5 of *New York Dock*, to employees who would be affected by the transaction (Article VII).¹

TTMS, BLE, and TCU signed the implementing agreement on December 22, 2000. On January 3, 2001, in anticipation of consummation of the Transtar reorganization, the process of bidding on positions began. When the bidding closed on January 11, 2001, every

¹ The generally used term "test period average" or "TPA" refers to the data generated in one step of the computation of a displacement allowance under Article I, § 5(a). Pursuant to § 5(a), a "displaced employee" (defined in Article I, § 1(b)) who is entitled to a monthly displacement allowance (in the circumstances mandated by § 5) is to be paid, for the duration of his protective period (as determined by § 1(d)): "a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced," computed as further prescribed in § 5(a) (see note 6 below).

bidder had obtained a position -- 83 with TTMS and 29 with BLE. All but one of the affected employees used their "prior rights" in the bidding process, and all but four obtained their first choice of positions.

At the close of business on March 23, 2001, the parties to the Transtar reorganization consummated their corporate transactions in accordance with the Board's exemption decision. The next business day, in accordance with the *New York Dock* implementing agreement, the 83 BLE employees who had elected to follow their work to TTMS became TTMS employees. The transferring employees reported to work in the same building and, with few exceptions, continued to perform the same clerical functions that they had performed prior to March 23, 2001. Several of the transferring employees began working at higher pay rates than they had earned as BLE employees; the others continued working under an identical compensation package.

The Dispute Over Claims For New York Dock Displacement Allowances.

The dispute that is the subject of this proceeding arose within months following consummation of the Transtar reorganization, when a number of the affected clerical employees began filing claims for *New York Dock* displacement allowances with TTMS and BLE. The claimants had obtained their TPA data (which the agreement obligated BLE and TTMS to provide) and were seeking benefits for selected months in which their actual earnings fell short of their TPAs. TTMS denied the claims on the grounds that the claimants had not been "placed in a worse position" as a result of the Transtar reorganization and otherwise were not eligible for displacement allowances under *New York Dock*. Like the other transferring employees, the claimants worked under the same or better compensation packages, were subject to the same labor agreement terms, and were performing the same clerical work that they performed as BLE employees.

The claimants' actual earnings occasionally were falling below their TPAs, but for reasons having nothing to do with the Transtar reorganization or the transfer to TTMS. Simply put, the claimants' earnings occasionally fell below their TPAs because TPA comparisons are based on monthly earnings and some calendar months (e.g., February) are shorter than the "average" month. All other things being equal, an employee who is paid at an hourly or daily rate necessarily will earn less than his average monthly compensation in months with fewer than the average number of workdays. This is a function of simple arithmetic, affording no evidence that an employee actually has been adversely affected by a transaction.²

Soon after TTMS denied the first round of displacement allowance claims, TCU appealed on behalf of the claimants. In the discussions and correspondence that followed, TTMS learned for the first time that TCU took the position that the parties' voluntary implementing agreement committed TTMS to treat all of the employees who had transferred to TTMS (that is, all of TTMS' clerical workforce) as "displaced employees" within the meaning of *New York Dock*. TTMS (and BLE) strongly disagreed, pointing out that such a commitment would have amounted to "automatic certification" of affected employees, something that had never been proposed, much less negotiated. As far as the carriers were concerned, the implementing agreement in no way

² Based on a Monday-through-Friday work schedule (the schedule for nearly all TTMS clerical employees) the average month has 21.75 workdays (261 workdays per year divided by 12 months per year = 21.75 workdays per month). Because the standard calendar includes between 20 and 23 workdays in a month, short months, as well as long months, occur for all employees, whether or not they are affected by a Board-authorized transaction. About half of the months in a given year have fewer than the "average" (21.75) number of workdays. For example, the year 2001 had five months with 21 or fewer workdays. Thus, all employees working a Monday-through-Friday work schedule were likely to experience five months in 2001 when their earnings were below their monthly averages for the year.

expanded employees' entitlement to monetary benefits under established *New York Dock* eligibility standards, which the claimants did not satisfy.

The Arbitration Proceeding. The parties agreed to submit their dispute to arbitration pursuant to Article I, § 11 of *New York Dock*. They agreed upon the selection of John C. Fletcher as neutral chairman and (after unsuccessfully attempting to reach agreement on a single formulation of the issues in dispute) agreed that each party would propose its own question or questions to be decided in arbitration. The parties filed and exchanged written submissions in advance of the arbitration hearing, which was held on January 29, 2002. The parties' pre-hearing submissions are reproduced as Attachments 3 (TTMS) and 4 (TCU).³

Both parties framed the dispute by reference to Article VII of their implementing agreement, governing, *inter alia*, the provision of TPA data. Article VII provides:

ARTICLE VII - FILING CLAIMS FOR PROTECTIVE BENEFITS

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who, pursuant to this agreement:

1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPA's will be calculated in accordance with Article I, Section 5 of *New York Dock*, and will be furnished within sixty (60) days after the date an employee submits a written request for same.

Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of *New York Dock*, must submit claims for these benefits to the officer designated

³ *New York Dock* Article I, § 11 provides for arbitration before a "Committee" of three arbitrators, including a neutral chairman. The parties in this case agreed that the Chairman would render the award. BLE was not a party to the arbitration, but agreed to be guided by the outcome in its handling of similar claims by BLE employees who did not transfer to TTMS. To TTMS' knowledge, TCU's claims against BLE remain unresolved.

by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.

It is understood that the sixty-day time limit for filing initial claims for displacement or dismissal allowances will commence on the date the carrier furnishes TPA's to affected employees.

TCU proposed that the arbitrator address, *inter alia*, whether Article VII "recognize[d] affected employees by providing them with a test period average (TPA) and an entitlement to New York Dock protective benefits when they: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE." Attachment 4, at 1. TCU asserted that the parties to the implementing agreement intended to recognize as a "displaced employee" any employee whose position was abolished in connection with the transaction (unless the employee failed to accept a new position with BLE or TTMS). TCU contended that this understanding was implicit in the requirement that "affected" employees be given TPA data on request. On that basis, TCU asserted that TTMS was required to compensate each transferring employee for the difference between his actual monthly earnings and his pre-transaction TPA, even though the transaction had no impact (or only a positive effect) on the employees' compensation packages (including rates of pay) and benefits.

TTMS proposed a single question for arbitration: whether Article VII conferred "automatic certification" that "affected" employees "would be eligible for monthly displacement or dismissal allowances under *New York Dock* following the transaction, without regard to whether they met the definition of a 'displaced' or 'dismissed' employee under *New York Dock*, or were otherwise adversely affected by the transaction." *Id.* TTMS asserted that the parties' implementing agreement was not intended to modify the eligibility criteria for *New York Dock* monetary benefits and, more specifically, that neither BLE's agreement to provide TPA data nor

any other provision of the agreement was intended to permit employees to collect displacement allowances without first establishing that they were "displaced employees," that is, that they had been "placed in a worse position" within the meaning of Article I, § 1(b). Both parties cited and relied on arbitration awards construing the *New York Dock* conditions.

The Fletcher Award. On February 28, 2002, Mr. Fletcher issued his award sustaining the union's claim. The arbitrator began by observing the "somewhat circular nature of this dispute" and by framing what he considered the "central issues" in the dispute (Award at 13-14) (emphasis in original):

Were claimants 'affected' by the Transtar reorganization under the December 22, 2000 Implementing Agreement, also 'displaced' or 'dismissed' within the intent and meaning of Article I, Sections 5 and 6 of *New York Dock* conditions, and if so, are they entitled to applicable monthly displacement allowances (when total compensation falls below test period average) *even though* they were awarded positions equivalent in rate of pay [to] those they held prior to the transaction?

Mr. Fletcher went on to observe that there was no dispute between the parties that employees whose positions were abolished were "affected" and that the real dispute concerned whether they were "adversely affected," that is, whether they were "displaced employees" or "dismissed employees" within the meaning of *New York Dock*. *Id.* at 14.

Mr. Fletcher agreed with TTMS that Article I, § 5 of *New York Dock* applies only to an employee who is shown to be a "displaced employee" within the meaning of Article I, § 1(b), that is, an employee who has been "placed in a worse position with respect to his compensation and rules governing his working conditions" as a result of a transaction. But he rejected TTMS' contention that the claimants, having obtained all but identical positions on TTMS, were not in a "worse position" within the meaning of § 1(b). Acknowledging that "this is where the tail chasing comes in," referee Fletcher assumed that the TPA calculation furnished the

"only road leading to a definitive determination" whether a particular claimant was "placed in a worse position with respect to compensation and/or rules governing working conditions." *Id.* (emphasis in original). According to the award, TPAs "represented the *only* means by which Claimants, whom the Chairman already determined were 'affected' by the March 23, 2001 transaction, could also determine whether or not they were harmed (or 'placed in a worse position with respect to compensation') by it." *Id.* at 15 (emphasis in original).

The arbitrator considered it significant that the carriers had agreed to furnish TPA data on-demand. This agreement, the award assumes, showed that the parties "anticipated that at least some (if not all) transferring employees would be 'displaced' under Article I, § 5 of *New York Dock* and therefore entitled to occasional displacement allowances." *Id.* Otherwise, the award assumes, "the authors of the applicable Implementing Agreement would have found it unnecessary to stipulate any means by which 'affected' employees could obtain TPA's in the first place," and the provision for TPA data would have been "meaningless." *Id.*

Finally, the arbitrator addressed the computation of displacement allowances for transferring employees, concluding that they are entitled to receive displacement allowances based on any TPA shortfall, even though their new positions carry equivalent rates of pay. He acknowledged that the "typical 12-month average occasionally results in a 'windfall' during 'short months,'" but dismissed this "reality" as "actually irrelevant." Award at 16. "For better or worse," he reasoned, "that is how the system works." *Id.*

On the basis of this reasoning, the Fletcher Award answered TCU's proposed questions, declaring, in pertinent part, "that Claimants whose positions were abolished as a direct consequence of the Transtar reorganization on March 23, 2001 were 'affected' by that transaction," and that "affected Claimants are presumed to be displaced employees in any month

in which their compensation falls below their TPA, assuming that they have made themselves available for service in accordance with all other applicable provisions of [the parties' *New York Dock* implementing agreement]." Award at 17. This appeal followed.

ARGUMENT

Under the Board's settled standard, review of an arbitration award is appropriate when the award presents "recurring or otherwise significant issues of general importance" regarding interpretation of the employee protective conditions. *Chicago & North Western Transportation Co.--Abandonment*, 3 I.C.C.2d 729, 736 (1987) ("*Lace Curtain*"), *aff'd sub nom. International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988); *see also, e.g., Rio Grande Industries, Inc. etc.--Control--Southern Pacific Transportation Co.*, Finance Docket No. 32000 (Sub-No. 11), 1996 STB LEXIS 135, decision served April 29, 1996, Lexis op. at *15 ("We find that the award is reviewable on its merits under *Lace Curtain* because it involves an important and recurring issue of the proper calculation of the test period averages for dismissal or displacement allowances for employees under all of our labor protective conditions."); *Grand Trunk Western R.R.--Merger--Detroit & Toledo Shore Line R.R.--Arbitration Review*, Finance Docket No. 28676 (Sub-No. 2), 1996 WL 77881 (I.C.C.), decision served Feb. 26, 1996 (as corrected March 14, 1996), WL op. at *2, 11 (reviewing arbitration award because the appeal "raises a significant issue of how provisions of an implementing agreement are to be interpreted in light of the New York Dock conditions on which the Agreement is based"), *aff'd sub nom. United Transportation Union v. STB*, 114 F.3d 1190 (6th Cir. 1997).

An award that misinterprets the employee protective conditions should be reviewed and set aside in order to "protect the integrity" of the conditions. *Norfolk & Western Ry. and New York, Chicago & St. Louis R.R.--Merger, Etc. (Arbitration Review)*, Finance Docket No. 21510 (Sub-No. 4), decision served July 27, 1993, slip op. at 5, 7 (reversing arbitration awards that "fundamentally misinterpret and fail to draw their essence from" the protective conditions), *petition for review denied sub nom. United Transportation Union v. ICC*, 43 F.3d 697 (D.C. Cir. 1995); *Atlantic Richfield Co., et al.--Control--Butte Anaconda & Pacific R.R., et al. (Arbitration Review)*, Finance Docket No. 28490 (Sub-No. 1), decision served March 2, 1988, slip op. at 6, 7 (arbitrator "misinterpreted the scope of labor protection imposed in the control proceeding," and therefore his award "failed to draw its essence from the conditions imposed by this agency"), *aff'd sub nom. Employees of Butte, Anaconda & Pacific Ry. v. United States*, 938 F.2d 1009 (9th Cir. 1991); *Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Ry.*, 6 I.C.C.2d 352, 353 (1990) (referee "incorrectly interpreted the language of" the *New York Dock* conditions).⁴

The Fletcher Award should be reviewed -- and set aside -- under these standards. TTMS specifically requests that the Board review the Fletcher Award in order to address what it means to be "placed in a worse position" within the meaning of Article I, § 1(b) of the *New York Dock* conditions and, more to the point, whether an employee may qualify as a "displaced

⁴ See also, e.g., *Baltimore & Ohio R.R.--Exemption--Abandonment (Arbitration Review)*, Finance Docket No. 31566, decision served December 3, 1990, slip op. at 3 ("where an arbitrator has issued a decision based on a critically erroneous interpretation of our labor protective conditions or one of our decisions, . . . we are permitted (if not required) to reverse the award"); *Union Pacific Corp., et al.--Control--Missouri Pacific Corp., et al. (Arbitration Review)*, Finance Docket No. 30000 (Sub-No. 47), decision served June 14, 1989 (arbitrator may have required employees to meet an incorrect burden of proof).

employee" eligible to receive a displacement allowance under *New York Dock* based solely on the fact that his actual earnings in a given month fall short of his pre-transaction TPA. In this connection, TTMS also requests that the Board decide whether TTMS' obligations under the protective conditions were altered by the carriers' agreement to furnish TPA data on demand.

There can be no doubt that these questions present "recurring or otherwise significant issues of general importance" (*Lace Curtain*, 3 I.C.C.2d at 736) warranting the Board's review. On TTMS alone, the Fletcher Award would require the payment of tens of thousands of dollars in monetary benefits each year to employees who, by any reasonable construction of the phrase, were not "placed in a worse position" as a result of the transaction. If enforced, the award will require TTMS to make what can only be considered windfall payments now and for the next five years whenever a given month is shorter than average -- something that obviously has nothing to do with the Transtar reorganization. If extended to other carriers and transactions, the award would dramatically expand the reach of the *New York Dock* benefits scheme, subjecting carriers to claims for displacement allowances by individuals who have never been considered to be *New York Dock* "displaced employees."⁵

⁵ If extended to other carriers and employees, the rule adopted in the Fletcher Award -- that an affected employee becomes a "displaced employee" entitled to a displacement allowance if his post-transaction compensation in any month falls below his TPA -- would impose enormous costs on the industry. Nearly all employees (like the claimants in this case) will experience occasional "short months" simply because the number of available workdays in a month varies by the calendar. But the "short month" phenomenon is only one of the reasons why employees regularly experience non-transaction-related fluctuations in monthly compensation. Employees whose work is closely tied to business levels (such as employees in the operating crafts) and employees whose work is seasonal or otherwise varies with weather or climate conditions (such as many maintenance of way employees) regularly experience even more frequent (and far larger) fluctuations in monthly earnings.

Moreover, it is well understood that the formula for computing displacement allowances in Article I, § 5(a) (which is not in issue here) tends to magnify the effect of normal monthly
(continued ...)

I. The Fletcher Award Misconstrues The *New York Dock* Conditions By Concluding That An Employee Who Transfers To A Position Performing The Same Work, At The Same Location, And Under The Same Compensation and Benefits Package And Labor Agreement Qualifies As A "Displaced Employee" If His Actual Monthly Earnings Occasionally Fall Below His "Test Period Average" Earnings.

The question of adverse effect -- in the language of the conditions, whether an employee is a "displaced employee" (Article I, § 1(b)) or a "dismissed employee" (Article I, § 1(c)) -- is a basic, threshold inquiry under the *New York Dock* benefits scheme. As pertinent here, Article I, § 5(a) of the conditions, governing the computation and payment of monthly displacement allowances, applies only to an employee who is first determined to be a "displaced employee." Once an employee attains displaced status, he may be eligible for a displacement allowance, if he satisfies the other requirements of the provision:

So long after a *displaced employee's* displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced

(Emphasis added.)⁶

(... continued)

earnings fluctuations, producing large displacement allowances for employees whose monthly compensation is subject to wide variation. By relaxing the standard under which employees are determined to be "displaced employees" entitled to displacement allowances, the Fletcher Award would permit more employees to take advantage of this favorable formula.

⁶ Section 5(a) continues (additional emphases supplied):

Each *displaced employee's* displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement

(continued ...)

Article I, Section 5 thus incorporates by reference the requirements of 1(b), which defines a "displaced employee" 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 conditions." The sequence of determinations is clear: an employee is not entitled to a displacement allowance unless he is first found to have been placed in a "worse position" as a result of the transaction; such an employee is classified as a "displaced employee" and is then, and only then, eligible for a displacement allowance computed in accordance with § 5(a).⁷

It may seem paradoxical that only now -- more than twenty years after the *New York Dock* conditions were adopted and after thousands of displacement allowance claims have

(... continued)

as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a *displaced employee's* compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

⁷ A parallel two-step analysis applies when an employee claims a "dismissal allowance" under § 6. An employee is eligible for such an allowance only if he is a "dismissed employee," defined (in Article I, § 1(c)) as an employee who, "as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction." An employee so classified is entitled to a "dismissal allowance" computed in accordance with § 6(a) of the conditions or, at his option, may resign and receive a lump-sum separation allowance computed in accordance with Article I, Section 7.

been handled by scores of rail carriers -- is the Board called upon to answer so basic a question of *New York Dock* construction as what it means to be a "placed in a worse position" for purposes of Article I, § 1(b). But the requirement seldom has required adjudication precisely because it is so straightforward, and, TTMS submits, because carriers and most of the labor organizations have shared a common and common-sense understanding of the requirement. We believe that most of the industry shares our understanding that an employee is not "placed in a worse position" if he obtains a position performing the same work, at the same location, at the same rate of pay, and under the same labor agreement terms and conditions -- even though such an employee, like virtually all railroad employees, predictably and periodically will experience months in which his actual earnings fall below his average monthly earnings.

If, as the Fletcher Award would allow, carriers had been subject to displacement allowance claims whenever their protected employees experienced regular, calendar-related short-falls from their pre-transaction average monthly earnings, the issues presented here surely would have found their way to the Board (or more likely, the ICC) long ago. For as long as railroads have been consolidating their operations under *New York Dock*, there have been employees -- like the claimants here -- who are "affected" but in no way "adversely affected." The fact of the matter is that the claims sustained in the Fletcher Award were unprincipled and opportunistic grabs for monetary benefits that a whole generation of *New York Dock*-protected employees and their unions, with few exceptions, have not seen fit even to assert.

They succeeded here only because the Fletcher Award, through self-described "circular" reasoning, misconstrued the requirements it purported to apply.

To a point, the Fletcher Award recognizes and purports to follow the sequence of determinations mandated by the language and structure of the protective conditions. The arbi-

trator correctly concludes, as TTMS had maintained, that an employee is not entitled to a displacement allowance under Article I, § 5 unless he is first found to have been placed in a "worse position" as a result of the transaction. Award at 14 ("True enough, according to the pertinent definition provided in *New York Dock*, displaced employees are those who, as a result of a transaction, are placed in a worse position with respect to compensation and/or rules governing working conditions.").

But the Fletcher Award proceeds to disregard the protective conditions' language and structure by assuming that the "worse position" determination can be made -- and, indeed, must be made -- by comparing the employee's actual earnings with his TPA. *Id.* ("However (and this is where the tail chasing comes in), the *only* road leading to a definitive determination of *that* question [that is, whether the employee is in a "worse position"], is in the calculation of test period averages.") (emphasis in original); *id.* at 15 (TPAs represented the "*only* means" by which "affected" employees "could also determine whether or not they were harmed (or 'placed in a worse position with respect to compensation') by it.") (emphasis in original).

This is an unsustainable, admittedly circular proposition, which owes nothing to the language or purposes of the protective conditions. The plain language of the conditions contemplates that TPA data -- far from being the "only road" or "only means" for determining "displaced employee" status -- will not even be computed until after an employee has been determined to be in a "worse position" within the meaning of Article I, § 1(b). And twenty years of industry practice under the conditions leaves no doubt that the contemplated analysis works. Employees who truly are adversely affected by a regulated transaction can -- and regularly do -- establish their status as displaced employees without resort to TPA data. *See Wisconsin Central Ltd.--Purchase Exemption--Soo Line R.R. Line Between Superior and Ladysmith, WI (Arbitra-*

tion Review), Finance Docket No. 31922 (Sub-No. 1), served Sept. 20, 1994 (*"Wisconsin Central/Soo Arbitration Review I"*) (requesting comments on issue whether carrier is required to furnish TPA data on demand), served April 8, 1995 (*"Wisconsin Central/Soo Arbitration Review II"*) (affirming arbitration award holding that Article I, § 4 does not require provision in arbitrated implementing agreement requiring carrier to furnish TPA data on demand); *see also Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1), served June 11, 2001, slip op. at 34 n.34 (declining to modify regulations to require carriers to furnish TPA data on demand; holding that issue should be resolved through negotiation).

Mr. Fletcher apparently assumed that resort to TPA data was necessary in this case because, as no one disputed, the employees who transferred to TTMS experienced no real adverse effect: transferring employees continued to perform the same work in the same locations at the same or higher rates of pay. But that reasoning collapses on itself. The fact that the claimants suffered no real adverse effect is a reason to conclude that they are not displaced employees, not a reason to use TPA shortfalls as a surrogate for adverse effect. For reasons we have explained, the formula mandated by Article I, § 5 for computing the amount of a displaced employee's displacement allowance does not and necessarily cannot function as a means for determining whether an employee has been adversely affected in the first place. Because it compares actual monthly earnings with average monthly earnings, the formula inevitably will yield occasional TPA shortfalls, making ordinary monthly fluctuations in earnings appear to be evidence of reduced compensation.

The simple fact is that the claimants were not in any way adversely affected by the Transtar reorganization. The arbitrator's determination to the contrary rests on a construction of the *New York Dock* conditions that is clearly erroneous and should not stand.⁸

It bears repeating that this error has real, immediate, and substantial monetary consequences. Mr. Fletcher acknowledges that his award confers a "windfall" on transferring employees (Award at 16); each of TTMS' agreement employees is invited to claim a displacement allowance whenever, for the duration of his protective period, his actual monthly earnings fall below his TPA, even though the shortfall is purely a function of the fact that particular months

⁸ The Fletcher Award relies heavily on a May 1, 1999 award ("the Sickles Award") rendered in Article I, § 11 arbitration between Burlington Northern Santa Fe and TCU (reproduced as Exhibit 11 to TCU's prehearing submission (Attachment 4)). The Sickles Award was never appealed to the Board; to our knowledge, has never previously been followed; and, for the reasons we have suggested, misconstrues the *New York Dock* conditions. The reasoning followed in other arbitration awards is sounder and more to the point. See Award, *International Ass'n of Machinists & Aerospace Workers and CSX Transportation, Inc.*, February 5, 1993 (Scheinman, Arb.) (Exhibit I to TTMS' prehearing submission (Attachment 3)) (denying claims for displacement allowance of employees who failed to demonstrate that they were placed in a "worse position" with respect to compensation; fact that post-transaction earnings were below TPA was not evidence that claimants failed to obtain positions "with compensation equal to the position from which they were displaced"); Award, *Consolidated Rail Corp. and International Ass'n of Machinists & Aerospace Workers*, April 17, 1995 (Peterson, Arb.) (Attachment 5) (fact that earnings fluctuated in months following transaction did not demonstrate that employees were in a worse position; denying claims for displacement allowances for claimants who had failed to show that they had been unable to obtain positions producing compensation equal to or exceeding compensation of positions held prior to transaction); Award, *Brotherhood of Maintenance of Way Employes and Consolidated Rail Corp.*, Oct. 9, 1992 (Marx, Arb.) (Attachment 6), at 4-5 (monthly comparison of actual and test period earnings is appropriate in computing displacement allowance for "employees who have been clearly determined to be 'displaced employees' in a 'worse position.' But this monthly test does not apply in considering whether employees are determined to be in a 'worse position' so as to qualify for New York Dock in the first instance."); Award, *Brotherhood of Maintenance of Way Employes and Soo Line R.R.*, April 28, 1992 (Peterson, Arb.) (Attachment 7), at 11-13 (carrier is not required to furnish TPA data on demand to employees whose positions are abolished in connection with transaction; whether employee is adversely affected depends on position he is able to obtain in exercise of seniority following abolishment of position), *aff'd*, *Wisconsin Central/Soo Arbitration Review II*.

regularly are shorter than the “average” month. The award treats the unfairness as “actually irrelevant,” a manifestation, “[f]or better or worse,” of “how the system works.” *Id.* This is clearly wrong.

The protective conditions are to be construed in accordance with their design and purpose: to protect “only against those losses that are caused by the transaction.” *American Train Dispatchers Ass’n v. CSX Transportation, Inc. (Arbitration Review)*, 9 I.C.C.2d 1127, 1134-35 (1993) (rejecting literal construction of Article I, § 5(a) that would result in inclusion of transaction-related overtime in TPA; “[t]he loss of transaction-related overtime, whether compulsory or voluntary, is not a protected harm, because it is not within an employee’s normal earnings expectations”), *petition for review denied sub nom. American Train Dispatchers Ass’n v. ICC*, 54 F.3d 842 (D.C. Cir. 1995) (“*ATDA v. ICC*”); *see also ATDA v. ICC*, 54 F.3d at 850 (“Section 1(b) thus reflects an intention underlying the conditions to ensure that employees are no worse off (at least during the protective period) after a consolidation than they would be *had the consolidation never taken place.*”) (emphasis in original). *New York Dock* should not be construed in a way that requires carriers to pay arbitrary “bonuses” or “windfalls” to affected employees. *Id.* (“Neither the regulatory scheme nor the history of *New York Dock* suggests that a six-year windfall is consistent with the purposes of the labor conditions. Indeed, § 5(a) itself indicates that the displacement allowance was not intended to confer a windfall on affected employees.”) If sustained, the Fletcher Award would do just that; it would require TTMS (and, by extension, any number of other carriers who have carried out transactions subject to the Board’s conditions) to compensate employees on the basis of monthly earnings fluctuations that occur and will continue to occur without regard to the implementation of Board-authorized

transactions. The result reached in this arbitration is not, and has never been, "how the system works."⁹

II. The Carriers' Agreement To Furnish TPA Data On Demand Does Not Justify The Result Reached In This Case.

As we have explained, the Fletcher Award rests on a fundamental misreading of *New York Dock* and, for that reason alone, should be reviewed and set aside in order to protect the integrity of the protective conditions. Our position in this appeal is in no way undercut, as TCU may attempt to argue, by the fact that the award also purports to construe the parties' implementing agreement. In the first place, the Fletcher Award's supposed interpretation of the parties' implementing agreement turns out to be little more than an adoption of the (erroneous) construction of *New York Dock* advanced in the Sickles Award (see note 8, above), and is therefore entitled to no deference.

In any event, we believe that the arbitrator's construction of the parties' agreement was patently wrong and only compounded the circularity of his *New York Dock* analysis, furnishing a further ground for reviewing and vacating the award.¹⁰

⁹ The arbitrator assumed that this unfairness "does cut both ways," that is, that an employee who is displaced into a lower rated position would not receive a displacement allowance in any month in which his actual earnings exceeded his TPA, even if the excess was attributable to overtime work. Award at 16. But that is not how it works. Article I, § 5(a) provides for the computation both of "average monthly compensation" and "average monthly time paid" for the "test period" and expressly requires the carrier to compensate a displaced employee for hours worked in excess of his "average monthly hours paid." *New York Dock*, Article I, § 5(a) ("if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.").

¹⁰ To the extent that this dispute concerns interpretation of the parties' implementing agreement, it nevertheless presents an issue of general importance concerning the protective conditions and industry practice under them that warrants the Board's review. *Cf. Norfolk Southern Corp.--Control--Norfolk & Western Ry. and Southern Ry.*, Finance Docket No. 29430 (continued ...)

The contractual dispute in this case concerned the significance of the carriers' agreement to furnish TPA data on demand to affected employees. TCU took the position that the agreement was conclusive of its claim, that is, that the agreement to furnish TPAs amounted to a "recognition" that affected employees were entitled to be treated as "displaced employees" for purposes of collecting displacement allowances in months in which their actual earnings fell below their TPAs.

TCU conspicuously did not call the supposed arrangement "precertification" or "automatic certification," the labels customarily given to such arrangements in the industry. This was not because it intended a different result. More likely, it chose a different label to downplay the obvious negative inference: if the parties had intended to provide for "precertification" or "automatic certification" in this case, they could have expressed that intention explicitly in terms well understood in the industry. Indeed, the ICC long ago observed that "[p]roviding TPAs to employees plainly does not constitute 'precertification.'" *Wisconsin Central/Soo Arbitration Review I*, 1994 WL 508804, *4. TCU also may have been attempting to avoid obvious inconsistency with the position that it was taking (in comments filed on its behalf by the Rail Labor Division of the Transportation Trades Department ("RLD") in the Board's Ex Parte No. 582 rulemaking proceeding. Even as the union was insisting that the carriers' agreement to furnish

(... continued)

(Sub-No. 21), served Dec. 15, 1999 (in response to TCU's petition for review of arbitration award rendered under Article I, § 11, Board invites public comments addressing specific questions concerning construction of *New York Dock* provisions, industry practice under the provisions, and meaning and effect of provision of voluntary implementing agreement between TCU and Norfolk Southern). The ICC and Board previously have entertained public comments concerning the provision of TPA data. See *Wisconsin Central/Soo Arbitration Review*; *Major Rail Consolidation Procedures*, slip op. at 34.

TPA data on demand amounted to "recognition" that affected employees were "displaced employees," TCU (through RLD) was advocating that the Board modify its rules to mandate the provision of TPA data and, in defense of its proposal, was insisting that the provision of TPA data did not amount to "pre-certification."¹¹

TTMS maintained that it had not agreed to treat affected employees as "displaced employees" (or otherwise to grant "automatic certification" to transferring employees) and that the TPA provision was incorporated into the agreement at TCU's request.

The Fletcher Award does not squarely endorse either party's construction, although in practical effect it decides the issue in TCU's favor. The arbitrator reasons that, by operation of the conditions, an employee is not entitled to a displacement allowance unless he is a "displaced employee" within the meaning of Article I, § 1(b). But he goes on to find that a TPA shortfall, standing alone, proves that an employee is in a "worse position" for purposes of satisfying Article I, § 1(b).

The award purports to find support for that proposition in the bare fact that the carriers agreed to furnish TPA data. According to the award, the provision would be "meaningless" if a comparison of actual and TPA earnings was not intended to serve as proof of an

¹¹ See Comments of Rail Labor Division Transportation Trades Department, AFL-CIO In Response To Notice Of Proposed Rulemaking, Ex Parte No. 582 (Sub-No. 1), filed Nov. 17, 2000 (excerpt reproduced as Attachment 8), at 12-13 ("Neither the calculation of the TPA, nor the furnishing of a TPA to an employee, constitutes a determination that a transaction-related adverse effect has occurred, and is not 'pre-certification' of an adverse effect. The TPA merely provides the means for the employee to help determine whether there has been an adverse effect and to quantify the severity of the adverse effect for a given month. The TPA also enables the employee to fulfill the obligation to work the highest-rated position available to the employee in the normal exercise of his/her seniority."); *accord* Comments of Rail Labor Division Transportation Trades Department, AFL-CIO, Ex Parte No. 582 (Sub-No. 1), filed May 16, 2000 (excerpt reproduced as Attachment 9), at 25.

employee's "worse position" and "unnecessary" if the parties had not "anticipated that at least some (if not all) transferring employees would be 'displaced.'" Award at 15. As the arbitrator saw it, the very fact that the parties provided for furnishing TPA data necessarily shows that the parties understood that such data, standing alone, could be used to establish that an employee was in a "worse position." *Id.*

This proposition is a *non sequitur*, and it is plainly wrong. The Fletcher Award assumes, in effect, that the carriers would not have agreed to the disputed provision unless they understood that it would cost them money and produce a windfall for employees. The far more logical inference to be drawn is that the provision of TPA data was understood to be an economically insignificant item. This is the reading consistent with TTMS' version of the negotiating history -- that the carriers acceded to the union's request precisely because the provision of TPA data would *not* impose a significant burden or expense on the carriers or otherwise alter the basic operation of the protective conditions.

Certainly the provision did not reflect, as the award supposes, a shared understanding that transferring employees would be entitled to protective benefits. *New York Dock* implementing agreements routinely prescribe claim procedures (such as time limits and prescribed benefits forms) to be used in processing claims for protective benefits; to our knowledge it has never been suggested, much less held, that the inclusion of such terms supports an inference in favor of the claimant in a later arbitration proceeding. The notion that the parties to a *New York Dock* implementing agreement would not have bothered with such terms unless they understood that some employees would have occasion to invoke them -- much less that the employees' claims would be meritorious -- is nonsensical.

The arbitrator also reasoned that the fact that the implementing agreement expressly provided that certain affected employees would not be considered "displaced" or "dismissed" supports "a reasonable inference that remaining employees 'placed in a worse position with respect to compensation' are." Award at 15. The point of this argument escapes us. No one disputes that an employee who *is* placed in a "worse position with respect to compensation" is a "displaced employee" (though not a "dismissed" one). It adds nothing to suggest that other terms of the implementing agreement might be consistent with this uncontroversial proposition.¹²

Although it reaches its result via a different path, for all practical purposes, the Fletcher Award effectively holds that the agreement to furnish TPA data amounts to "automatic certification" (or, as TCU chose to put it, "recognition") of "displaced employee" status. The award contemplates that the TPA comparison, rather than the mere furnishing of TPA data, will be determinative of "displaced employee" status. But the comparison contemplated by the Fletcher Award -- under which, as we have explained, a "short month" shortfall alone establishes that an employee is in a "worse position" -- inevitably leads to the same outcome: the employee is

¹² To the extent that the arbitrator is trying to glean something more from the fact that the implementing agreement provides that certain affected employees would not be considered "displaced" or "dismissed," he completely misses the mark. The arbitrator apparently is referring to the fifth paragraph of Article II of the implementing agreement, which, *inter alia*, provides that incumbent employees who decline to bid on a position will not be considered adversely affected ("displaced" or "dismissed") by the transaction. This provision simply incorporates (into a term covering such employees' rights and obligations under applicable protective schemes, including *New York Dock*) well-settled understandings concerning the obligation of affected employees to accept available work opportunities as a precondition of eligibility for *New York Dock* monetary benefits. The fact that the agreement expressly recognizes that some employees might forfeit their eligibility for *New York Dock* monetary benefits certainly does not suggest that the parties intended to pre-qualify all others.

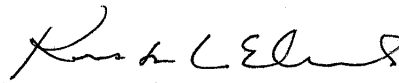
deemed to be a "displaced employee" and is eligible for monthly displacement allowances, for the duration of his protective period, whenever his actual earnings fall below his TPA.

The Board should review the Fletcher Award in order to set aside this distorted analysis and to consider and settle, once and for all, recurring questions concerning the significance of TPA data under *New York Dock* and of their provision under a voluntary *New York Dock* implementing agreement.

CONCLUSION

For the foregoing reasons, the Board should review and set aside the Fletcher Award.

Respectfully submitted,



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Dated: April 9, 2002

Attachments

1. Award, *Tracks, Traffic & Management Services, Inc. and Transportation Communications International Union*, February 28, 2002 (Fletcher, Arb.)
2. Implementing Agreement Between Bessemer and Lake Erie Railroad Co., Tracks, Traffic and Management Services, Inc., and Transportation Communications International Union, dated December 22, 2000
3. Submission of the Carrier (with attached arbitration award; other exhibits omitted)
4. Employees' Ex Parte Submission (with attached arbitration award; other exhibits omitted)
5. Award, *Consolidated Rail Corp. and International Ass'n of Machinists & Aerospace Workers*, April 17, 1995 (Peterson, Arb.)
6. Award, *Brotherhood of Maintenance of Way Employees and Consolidated Rail Corp.*, Oct. 9, 1992 (Marx, Arb.)
7. Award, *Brotherhood of Maintenance of Way Employees and Soo Line R.R.*, April 28, 1992 (Peterson, Arb.)
8. Comments of Rail Labor Division Transportation Trades Department, AFL-CIO In Response To Notice Of Proposed Rulemaking, Ex Parte No. 582 (Sub-No. 1), filed Nov. 17, 2000 (excerpt)
9. Comments of Rail Labor Division Transportation Trades Department, AFL-CIO, Ex Parte No. 582 (Sub-No. 1), filed May 16, 2000 (excerpt)

in the matter of the
New York Dock Arbitration
between

TRACKS TRAFFIC AND MANAGEMENT SERVICES, INC.

AND

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

12-22-2000 Implementing Agreement

**Decision and Award
of
John C. Fletcher, Arbitrator
Chairman and Neutral Member
NYD Arbitration Panel**

February 28, 2002

Background

On December 29, 1988, the United States Steel Corporation ("USX") sold majority ownership of its ancillary transportation companies (including eight rail carriers and two water carriers) to the Blackstone Group¹ ("Blackstone"), a Wall Street investment firm. Blackstone in turn formed Transtar, Inc. ("Transtar"), a holding company designated to oversee operations of its new transportation acquisitions, among which was the Bessemer and Lake Erie Railroad ("B&LE"). Subsequent to the transaction, Transtar consolidated all eight railroad accounting departments into one facility at Monroeville, Pennsylvania, and as a consequence thereof, entered into a number of *New York Dock* Implementing Agreements with (among others) the B&LE,

¹ Minority ownership of the combined Blackstone properties was retained by USX.

awarding protective benefits to clerk employees represented by the TCU ("the Organization") who were required to transfer to Monroeville to follow their work.

On October 4, 2000, Transtar's owners (Blackstone and USX) advised the Surface Transportation Board of their intent to alter their prior holding arrangement, whereby Blackstone would relinquish ownership of Transtar, in exchange for 100% ownership of four Transtar subsidiaries, including the B&LE. According to the proposed change, USX would then assume 100% ownership of Transtar and its remaining transportation companies.

On October 10, 2000, the B&LE advised the Organization that because ownership of the Transtar companies was subject to change in accordance with the above proposal, it was anticipated that a significant number of its clerical employees would be "transferred" to a USX subsidiary to handle accounting and clerical functions identical to those performed under the former arrangement.² The company designated to manage clerical work for the "new" Transtar was Tracks Traffic and Management Services, Inc. ("TTMS" or "the Carrier").

On November 22, 2000, the Surface Transportation Board approved the owners' "Petition for Exemption" under Finance Docket No. 33942, and accordingly, Carrier entered into an Implementing Agreement with the Organization on December 22, 2000 containing the following pertinent provisions:

² The record establishes that this "transfer of work" did not require affected employees to relocate, as all work remained in Monroeville.

ARTICLE I - TRANSFER OF EMPLOYEES AND WORK

On Wednesday, January 3, 2001, BLE will post a special bulletin advertising all of the proposed BLE and TTMS positions listed in Attachment "A" hereto, consistent with the requirements of Rule 30(a) of the BLE-TCIU collective bargaining agreement, for seniority bid by only those employees holding permanent or temporary positions within the Monroeville headquarters, including those on leave of absence from such positions.

...

Incumbents will have preferential rights to select their respective assignments and will be assigned thereto regardless of seniority. Employees presently holding a BLE position listed in attachment "A" shall have prior rights to follow their position/work to TTMS or remain with their position/work on BLE, provided they indicate their desire to use their prior rights as their first preference on their bid.

ARTICLE II - EFFECTS OF TRANSFER

...

Notwithstanding the provisions of Article II of the February 7th Agreement, BLE employees entitled to preservation of employment who do not select their incumbent position and who refuse transfer assignment with TTMS (a position not requiring a change in residence) subsequently becoming furloughed will not be considered as affected by this transaction and will have their present protective entitlement under the February 7th Agreement suspended until they are recalled to regular position in accordance with the agreement rules. Furthermore, such employees will not be considered "dismissed" or "displaced" employees and they will not be entitled to the protective arrangement attached to this Agreement (Emphasis added).

...

ARTICLE V - ELECTION OF BENEFITS

Section 1 - Employees affected by this transaction will be entitled to the employee protective conditions set forth in *New York Dock*, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of *New York Dock*.

...

ARTICLE VII - FILING CLAIMS FOR PROTECTIVE BENEFITS

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who, pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPA's will be calculated in accordance with Article I, Section 5 of *New York Dock*, and will be furnished within sixty (60) days after the date an employee submits a written request for same.

Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of *New York Dock*, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.

Article I, Sections 5 and 6 of *New York Dock* referenced above (and relevant definitions contained therein) state in pertinent part:

Definitions - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means 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 conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of abolition of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period)...

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences...

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of 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 retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline...

6. Dismissal allowances - A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction...(Emphasis added)

In accordance with approval of the above proposed transaction and in preparation for its future implementation, the Carrier posted a "Special Advertisement" on January 3, 2001, advising employees represented by the Organization, *inter alia*, as follows:

In accordance with the December 22, 2000 Implementing Agreement, Monroeville clerical positions will be abolished as of the close of business on the day that the reorganization transaction will be completed.

New positions will be established on the B&LE and TTMS effective the day following the date of the transaction. Those positions are advertised on the attached pages ...

...

Also attached is a four page listing of incumbents as of 12 noon today of the existing positions. The incumbents have a "prior right" to bid to those B&LE and/or TTMS positions shown in the same box as their current position.

According to facts not in dispute, 112 employees were affected, 29 of whom remained with the B&LE, and 83 of whom elected transfer to TTMS.³ All remained on their former positions until the transaction was completed.

The record establishes that, the transaction was executed on March 23, 2001, and in accordance with Article VII of the applicable Implementing Agreement, "several dozen" employees whose positions had been abolished requested TPA calculations. (See Carrier submission at page 7.) Pertinent to the circumstances at issue here, is the fact that a number of them also submitted claims for displacement allowances, on the basis that their compensation in some months subsequent to the transaction fell below their test period averages. Carrier, however, contended that Claimants were not adversely affected by the transaction (and were therefore not entitled to the displacement allowances claimed) on the basis that in most cases they were awarded positions in the same location equivalent to those they held prior to the reorganization. In contrast, the Organization argued that Article VII of the December 22, 2000 Implementing Agreement, in referring to "affected employees", implied across-the-board *New York Dock* protection for all [displaced] employees whose jobs were abolished as a result of the Transtar reorganization, and as such, claims for displacement allowances were justified in each

³ It is not disputed that only one bidder out of the 112 employees affected chose to leave her "home pool", and all but four employees were awarded their first bid choice.

subsequent month that total monthly compensation fell below their TPA. As resolution of the matter could not be reached on the property, it was submitted to the Chairman for disposition.⁴

Statements of the Issue

The Carrier frames the issue before the Chairman as follows:

Under the terms of Article VII of the Implementing Agreement dated December 22, 2000, when the Carrier agreed to provide TPA information to the employees who would be "affected" by the transaction, did this constitute an automatic certification that these employees would be eligible for monthly displacement or dismissal allowances under *New York Dock* following the transaction, without regard to whether they actually met the definition of a "displaced or dismissed" employee under *New York Dock*, or were otherwise adversely affected by the transaction?

The Organization frames the issue before the Chairman as follows:

Did Article VII of the parties' December 22, 2000 Implementing Agreement recognize affected employees by providing them with a test period average (TPA) and an entitlement to *New York Dock* protective benefits when they: 1) follow their position' work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE; and,

Did Article VII also recognize BLE employees dismissed by the transaction and unable to follow or remain with their position/work on either company as affected and provide them with NYD protection in accordance with Article I, Section 5 of *New York Dock* [and];

If the answer to either Question No. 1 or No. 2 is in the affirmative, will the carriers now be required to accept the election of benefits by all employees desiring same and make each whole for all benefits from the date they were initially affected under either Section 5 or 6 of *New York Dock*, if submitting claims for such within sixty (60) days following the date of this Section 11 [Committee's] decision?

⁴ The B&LE is not a party to this arbitration, but has agreed to resolve identical pending claims in accordance with the findings of the Chairman in this case.

Positions of the Parties

At the outset, Carrier argues that the December 22, 2000 Implementing Agreement contains two eligibility criteria for employees claiming displacement allowances under Article VII. First, according to Carrier, the employee must be "affected" by the transaction, and secondly must be "entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of *New York Dock*." On this point, Carrier argues that Article VII, relied upon by the Organization in support of its claim, was intended to function as a *time limit* rule with respect to the filing of claims for displacement allowances, and neither expressed nor implied that each and every employee touched by the transaction at issue was entitled to *NYD* protective benefits as a result thereof. Carrier maintains that in order for the "affected" Claimants to qualify for displacement allowances under Article I, Section 5, the Organization was contractually obligated to demonstrate that they were somehow *adversely* affected, and on this point, Carrier steadfastly denies that they were. Carrier insists that, "Main office employees who hold essentially the same position and wage rate after the transaction as they held before the transaction [are] not 'displaced' in the eyes of *New York Dock*, and they are [therefore] not eligible for a displacement allowance" (Carrier submission at page 12, emphasis added). In support, Carrier cites a February 5, 1993 *NYD* decision (IAM v. CSX Transportation, Scheinman), which stated in pertinent part:

Carrier [argues] that Claimants are not entitled to protective benefits under *New York Dock*. It asserts that Claimants were not "displaced" or "dismissed" employees as defined under *New York Dock* conditions.

In support of its position, Carrier points out that subsequent to the transaction, the three (3) Claimants worked regularly in positions paying the same

rate of pay and covered by the same working agreement as the positions they occupied prior to the transaction. As such, it maintains that Claimants have not suffered any real loss of earnings or worsening of their employment subsequent to the transaction.

...

After a careful review of the record evidence, this Board is convinced that the claim must be sustained, in part.

The question at issue in this dispute is whether Claimants suffered an "adverse effect", as defined under the relevant provisions of *New York Dock*. If so, they are entitled to protective benefits. On this there is no dispute.

The burden of showing such entitlement to protective benefits is upon the Organization in that it must demonstrate that Claimants were placed in a worse position by the actions of the Carrier.

Under the facts presented here, the record indicates that the Organization failed to establish that Claimants Jackson and Allen were not successful applicants for regular Machinist positions advertised on August 29, 1990. Jackson and Allen were awarded these positions on September 4, 1990. There is no evidence to suggest that Claimants Jackson and Allen failed to obtain a position with compensation equal to the position from which they were displaced.

...

The claims on behalf of Jackson and Allen must fail.

On the above findings, Carrier therefore concludes that "employees who essentially stay on the same position at the same wage rate are not in a worse position and, therefore, are not eligible for *NYD* benefits" (Carrier submission at page 14).

With respect to TPA's supplied at the request of employees whose positions were abolished as a consequence of the transaction at issue, Carrier asserts that they, in and of themselves, constituted no inherent acquiescence on its part that concomitant displacement allowances were due. In contrast, Carrier argues that it was obligated to furnish TPA's upon

request under Article VII of the controlling Implementing Agreement, and simply did so "without making any promise whatsoever of automatic certification [or] first requiring employees to show proof of eligibility for benefits" (Carrier submission at page 18). Carrier reiterates that in this case, "affected" Claimants were not "*adversely* affected", in that they were awarded positions comparable (or better) in terms of wage rate to those they held prior to the transaction. As such, Carrier argues that they are not entitled to "windfall" compensation afforded under furnished TPA's during shorter work-day months when total compensation falls below that average.

For the foregoing reasons, Carrier urges the Chairman to support its position and deny the instant claim in its entirety.

The Organization argues that the inclusion of express language referring to "affected" employees in Article VII of the controlling Implementing Agreement indicates an intent on the part of its authors to provide *New York Dock* protection to all employees whose positions were abolished as a result of the transaction executed on March 23, 2001. In other words, according to the Organization, once Claimants' positions were abolished, they automatically became "affected" [displaced] according to Article VII of the Implementing Agreement, and are therefore entitled to protective benefits afforded under Article I, Section 5 of the *New York Dock* conditions. The Organization also points out that Article II of the same Implementing Agreement expressly identifies factors impacting potential *forfeiture* of *NYD* protection by "affected" employees, and therefore reasons that, "It was understood that employees not availing themselves of the opportunity to continued employment (either TTMS or B&LE) were

arbitrarily placing themselves in a dismissed status [thereby forfeiting benefits]. The affect and entitlement to the protective scheme was clearly contemplated by Article II ..." (Organization submission at pages 14 and 15).

Contrary to Carrier's position, the Organization further argues that "affected" employees need not be immediately *adversely* affected in terms of earnings in order to qualify for displacement allowances, and cites a March, 1988 *NYD* decision (*UP/MP v TCU*), wherein Referee La Rocco observed as follows:

As the Organization points out, the words "adversely affected" do not appear within the four corners of the *New York Dock* Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented..

The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the *New York Dock* Conditions. (Emphasis added)

The Organization further cites a May, 1999 *NYD* decision (*BNSF v. TCU*), wherein Referee Sickles determined in pertinent part as follows:

The initial issue that must be addressed - because it is central to the other issues raised - is the interpretation of the word "compensation" as it is used in Sections 1 and 5 of the *New York Dock* conditions. Both parties have cited numerous arbitration awards on this issue, and the cited awards are contradictory.

The decisions submitted by the Carrier hold that an employee moved, following a transaction, to a new position at the same rate of pay is in no worse position with regard to his compensation - essentially equating "rate of pay" or "hourly rate" with "compensation". The decisions submitted by the Organization give a more expansive definition to the term "compensation", specifically stating that it includes overtime pay.

We are inclined to adopt the more expansive definition. Clearly if the ICC had intended "hourly pay" or "rate of pay" to be the criterion for assessing an adverse impact on employees affected by a transaction, they would have used one of those phrases in drafting the *New York Dock* conditions. By using "compensation", the ICC must have had in mind elements in addition to straight hourly wages. The word "compensation" is broad enough to include shift differentials, allowances, overtime, and other elements of pay, in addition to the contractually provided hourly rate...

It is interesting to note that the broader definition of "compensation" could conceivably mean that an employee moved to a lower-rated job with a lower hourly rate of pay following a transaction may not be entitled to protective benefits under *New York Dock*. Such an employee could receive allowances or a shift differential or sufficient overtime to more than make up the deficit in hourly wages. Using the Carrier's definition, this employee would be in a "worse position" because his rate of pay would be lower. Using our definition, this employee would not be entitled to a displacement allowance.

...

We also reject the Carrier's argument that fluctuations in earnings are normal and, therefore, an occasional drop in earnings does not mean an employee is "displaced". We find that the *New York Dock* conditions require a monthly determination for the duration of the protective period as to whether an individual employee is in a "worse position" with respect to compensation, i.e., if his monthly earnings are less than his monthly average compensation in the test period.

Therefore, the Carrier must compute TPA's for each claimant. This amount must include all overtime worked during the test period and during the protective period. In any month that a claimant's compensation falls below his TPA, the Carrier must pay a displacement allowance. The only exception that would allow a denial of the displacement allowance is if a claimant refuses to work overtime for which he is qualified and consequently does not work enough hours in the month to match his TPA for hours paid.

According to the Organization, Referee Sickles confirmed its position that TPA's are necessary to any determination that an employee has (or has not) been "placed in a worse position with respect to compensation" by a transaction to the extent that he is entitled to displacement allowances under Article I, Sections 5 or 6 of *New York Dock* conditions. Accordingly, the Organization reasons that Article VII of the December 22, 2000 Implementing Agreement expressly provided for calculation of TPA's in order to protect those whose positions were abolished, from any future reduction in earnings as a direct consequence. The Organization concludes that this "commitment via Article VII" clearly reveals the parties' mutual intent to extend *New York Dock* protection to all affected employees, including Claimants in this case.⁵

For the foregoing reasons, the Organization urges the Chairman to sustain the claim in its entirety.

Discussion and Analysis

After carefully considering the entire record and the arguments of the parties, the Chairman is convinced that the Organization should prevail. Noting the somewhat circular nature of this dispute, the Chairman concludes that the central issues here are these: Were Claimants "affected" by the Transtar reorganization under the December 22, 2000 Implementing Agreement, also "displaced" or "dismissed" within the intent and meaning of Article I, Sections 5

⁵ Interestingly, the Organization asserts that the Carriers did not provide TPA's to three janitors at Monroeville on the basis that they were not "affected by the transaction" and were therefore not covered under the December 22, 2000 Implementing Agreement.

and 6 of *New York Dock* conditions, and if so, are they entitled to applicable monthly displacement allowances (when total compensation falls below test period average) *even though* they were awarded positions equivalent in rate of pay those they held prior to the transaction?

As to the first question, chasing one's tail would be somewhat understandable were it not for prior thoughtful and credible guidance on this very issue. Essentially, the Chairman is asked to determine whether or not an "affected employee" under the December 22, 2000 Implementing Agreement is also a "displaced employee within the intent and meaning of *New York Dock* conditions (and therefore entitled to displacement benefits under Article I, Section 5 thereof). At the outset, the Chairman is convinced that it was the stated intent of the Organization's negotiators that any employee whose position was abolished as a result of the Transtar reorganization on March 23, 2001 was to be considered "affected" by that transaction. Why else would the Organization insist in the negotiations that all employees be given a TPA, which the Carrier agreed to do.

Upon the whole of the record, Carrier appears to concede this point, as it only argues that they must also have been *adversely affected* in order to also be considered "displaced". True enough, according to the pertinent definition provided in *New York Dock*, displaced employees are those who, as a result of a transaction, are placed in a worse position with respect to compensation and/or rules governing working conditions. However (and this is where the tail chasing comes in), the *only* road leading to a definitive determination on that question, is in the calculation of test period averages. In this case, as required by Article VII of the Implementing

Agreement, Carrier did so. Now however, Carrier insists that the entire exercise was essentially meaningless (regardless of actual subsequent compensation relative to their TPA's) because Claimants were awarded positions similar if not identical in rate of pay to those they held prior to the transaction. The Chairman is not persuaded that Carrier's contentions accurately reflect the result of the bargain it made with the Organization. As if it did accurately reflect its bargain with the Organization it would render a negotiated condition meaningless.

The Chairman confirms Referee Sickles' conclusion that Carrier was indeed obligated to compute test period averages (upon request) under Article VII, and moreover be governed by those findings. After all, under the December 22, 2000 Implementing Agreement, TPA's represented the only means by which Claimants, whom the Chairman already determined were "affected" by the March 23, 2001 transaction, could also determine whether or not they were harmed (or "placed in a worse position with respect to compensation") by it. Careful review of the Implementing Agreement language persuades the Chairman to conclude that the parties indeed anticipated that at least some (if not all) transferring employees would be "displaced" under Article I, Section 5 of *New York Dock* and therefore entitled to occasional displacement allowances. Otherwise, in the view of the Chairman, the authors of the applicable Implementing Agreement would have found it unnecessary to stipulate any means by which "affected" employees could obtain TPA's in the first place. Moreover, Article II of that Agreement specifically identifies "affected" employees *who are not* considered "displaced" or "dismissed", supporting a reasonable inference that remaining employees "placed in a worse position with respect to compensation" are.

Having determined that the Claimants in this case were *both* "affected" and "displaced" under *New York Dock* conditions by the March 23, 2001 transaction, the question remaining before the Chairman goes to how their TPA's should properly be applied. The Chairman affirms the findings of Referees La Rocco and Sickles on this point. Indeed, as Referee Sickles pointed out, if the ICC had intended "comparable rates of pay" to be the standard for determining whether or not an employee was "placed in a worse position" as a result of a transaction, it would have so stated. Instead, "compensation" is the *only* criteria expressed, and as such, *all* components thereof are applicable when computing and applying TPA's. The reality that this typical 12-month average occasionally results in a "windfall" during "short months" is actually irrelevant. For better or worse, that is how the system works, and as Referee Sickles astutely observed, the knife *does* cut both ways. Should an employee assigned to a lower rated position receive overtime or other arbitraries warranting compensation in excess of his TPA in any given month, he is not entitled to additional displacement allowance solely on the basis of his reduced rate of pay.

For the foregoing reasons, the claim is sustained.

AWARD

The questions at issue as proposed by the Organization are answered in the affirmative to the extent that Claimants whose positions were abolished as a direct consequence of the Transtar reorganization on March 23, 2001 were "affected" by that transaction, and test period averages should be provided by the Company upon request in accordance with Article VII of the December 22, 2000 Implementing Agreement. Moreover, affected Claimants are presumed to be displaced employees in any month in which their compensation falls below their TPA, assuming that they have made themselves available for service in accordance with all other applicable provisions of that Agreement.



John C. FLETCHER, Chairman and Neutral Member

Dated at Mount Prospect, Illinois, February 28, 2002

IMPLEMENTING AGREEMENT

between

BESSEMER AND LAKE ERIE RAILROAD COMPANY

and

TRACKS, TRAFFIC AND MANAGEMENT SERVICES, INC.

and the employees of the Bessemer and Lake Erie Railroad Company represented by

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

WHEREAS, the Surface Transportation Board (STB), in a decision published in the Federal Register on November 30, 2000 (Finance Docket No. 33942), has exempted from prior approval the acquisition by USX of control of Transtar and the following rail carriers currently owned 100% by Transtar:

Birmingham Southern Railroad Company (BS)
Elgin, Joliet and Eastern Railway Company (EJE)
Lake Terminal Railroad Company (LT)
McKeesport Connecting Railroad (MCK)
Union Railroad Company (URR);

and the acquisition and control by Transtar Holdings, L. P. (formerly Blackstone Transportation Partners, L. P.) of the following rail carriers:

Bessemer and Lake Erie Railroad Company (BLE)
Duluth, Missabe and Iron Range Railway Company (DMIR)
Pittsburgh and Conneaut Dock Company (PCD);

and has imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District Terminal, 360 ICC 60 (1979) (New York Dock conditions), as a condition of this transaction; and

WHEREAS, the BLE *has* advised the Transportation Communications International Union (TCIU), consistent with Article I, Section 4 of the New York Dock conditions (NYD), of *its* desire to coordinate certain clerical work in the areas of Payroll, Tax, Financial Services, General Accounting, Benefits Administration, Engineering, Transportation, Mechanical, Marketing, Asset Management, MIS, and Revenue Accounting into Tracks, Traffic and Managements Services, Inc. (TTMS), a Transtar subsidiary, at Monroeville, PA; and

WHEREAS, the parties signatory hereto desire to reach an Implementing Agreement satisfying and consistent with Article I, Section 4 of the NYD conditions with respect to the transaction described in this Agreement;

NOW, THEREFORE, IT IS AGREED, among BLE, TTMS and TCIU as follows:

ARTICLE I - TRANSFER OF EMPLOYEES AND WORK

On Wednesday, January 3, 2001, BLE will post a special bulletin advertising all of the proposed BLE and TTMS positions listed in Attachment "A" hereto, consistent with the requirements of Rule 30(a) of the BLE-TCIU collective bargaining agreement, for seniority bid by only those employees holding permanent or temporary positions within the Monroeville headquarters, including those on leave of absence from such positions. Employees desiring these positions must file their bid with the designated official by 12 noon on Thursday, January 11, 2000.

Incumbents will have preferential rights to select their respective assignments and will be assigned thereto regardless of seniority. Employees presently holding a BLE position listed in Attachment "A" shall have prior rights to follow their position/work to TTMS or remain with their position/work on BLE, provided they indicate their desire to use their prior rights as their first preference on their bid. (Employees holding positions listed in Attachment "A" for which there will be comparable TTMS and BLE positions, who wish to take full advantage of their prior rights, should indicate the TTMS position as their first preference on their bid and the BLE position as their second preference, or vice versa.) A special bid form will be provided for this bidding. Once TTMS and BLE positions *have been* filled by employees using their prior rights, the remaining unfilled positions will be awarded to the senior bidders for these positions, from among the employees who elected not to use their prior rights in this bidding process, *or who did not have any prior rights to use. An employee's prior rights will be based on the position he or she is holding at 12 noon on the date the special bulletin is posted.*

Employees who could not avail themselves of this bidding process as a result of being on a leave-of-absence will have the right to reconstruct to the extent that their seniority and the provisions above entitled them. Such employees will be entitled to all the rights and benefits available to employees in active service on the effective date of this Agreement.

The new assignments will be effective on the day following the date the owners

(USX and Transtar Holdings, L. P.) finalize this transaction.

If no bids are received for proposed TTMS positions, the positions shall be offered to qualified BLE employees, in seniority order, who were not the successful bidders for any of the advertised BLE or TTMS positions. In the event the positions remain unfilled because the BLE employees decline to transfer, TTMS may fill the positions in accordance with Rule 30.

If no bids are received for proposed BLE positions, the positions shall be filled by assignment in seniority order.

ARTICLE II - EFFECTS OF TRANSFER

On the effective date of the transfer of TCIU-represented BLE employees to TTMS pursuant to this agreement, TTMS will recognize TCIU as the duly accredited representative of these employees. At the same time, TTMS and TCIU will adopt the existing BLE-TCIU collective bargaining agreement as the exclusive agreement concerning the rates of pay, rules and working conditions of TTMS's employees represented by TCIU. That agreement will remain in effect until changed or modified by TTMS and TCIU in accordance with the provisions of the Railway Labor Act, as amended.

BLE employees who transfer to TTMS pursuant to the terms of this agreement will become TTMS employees, covered by the TTMS-TCIU collective bargaining agreement, and will cease to be BLE employees. Transferring employees will be placed on a new TTMS clerical seniority roster, using their seniority date on the BLE system clerical roster, and their names will be removed from the BLE system clerical seniority roster.

Transferring employees will be credited with all prior service attained under the BLE-TCIU agreement for vacation, sick leave, protected status under the February 7, 1965 Mediation Agreement (Case No. A-7128), and any other benefits which are granted on the basis of qualifying years of service, in the same manner as though all such time had been accrued under the TTMS-TCIU Agreement.

Transferring employees who are entitled to preservation of employment under the February 7, 1965 Agreement will retain their protected status under the TTMS-TCIU Agreement. Their protected rate will be the protected rate they held as a BLE employee immediately prior to their transfer.

Notwithstanding the provisions of Article II of the February 7th Agreement, BLE employees entitled to preservation of employment who do not select their incumbent position and who refuse transfer assignment with TTMS (a position not requiring a change-in-residence) subsequently becoming furloughed will not be considered as affected by this transaction and will have their present protective entitlement under the February 7th Agreement suspended until they are recalled to a regular position in accordance with agreement rules. Furthermore, such employees will not be considered "dismissed" or "displaced" employees and they will not be entitled to the protective arrangement attached to this Agreement.

BLE employees who fail to bid so as to follow their position/work to TTMS or remain with their position/work on BLE in Monroeville will not be considered "dismissed" or "displaced" employees and they will not be entitled to any protective benefits under New York Dock.

ARTICLE III - AMENDMENTS TO FEBRUARY 7, 1965 AGREEMENT

Section 1 - On the effective date of this implementing agreement, Article I, Section 3, of Mediation Agreement, Case No. A-7128, dated February 7, 1965, as amended, between BLE and TCIU, is further amended to read as follows:

In the event of a decline in **B&LE's** business in excess of 10% in any calendar month, as determined by comparing **B&LE's and DM&IR's** combined monthly gross operating revenue with B&LE's gross operating revenue base (adjusted for inflation), B&LE may furlough protected employees at any time during that month (subject to the advance notice requirements of the current schedule agreement) below the number of employees entitled to preservation of employment under this agreement, to the extent of one percent for each one percent said decline exceeds 10%.

Following any such force reduction, B&LE will make similar decline-in-business determinations in succeeding months, for as long as these protected employees remain furloughed. If the determination for a succeeding month shows a lesser decline in business, B&LE will recall protected employees to the extent indicated by the formula, within 15 calendar days. Upon complete restoration of B&LE's business, or when the measured decline in business no longer exceeds 10%, B&LE will recall the remaining protected employees within 15 calendar days.

"Gross operating revenue" as used herein shall be determined on the basis of the operating revenues reportable on ICC Form 210 (Results of Operations) under regulations in effect as of October 9, 1985.

B&LE's "gross operating revenue base" as used herein means the average of BLE's and DM&IR's combined monthly gross operating revenues for the period 1978 through 1982, adjusted for inflation.

Adjustments to B&LE's gross operating revenue base for inflation shall be made semi-annually (January 1 and July 1 of each year) based on the Consumer Price Index for Urban Wage Earners and Clerical Workers - United States (CPI-W) published by the Bureau of Labor Statistics. B&LE's gross operating revenue base shall be increased (or decreased) by one percent for each one percent increase (or decrease) between the average Consumer Price Index for the period between 1978 through 1982 (241.8) and the Consumer Price Index for the current month.

If, at some future date, the government ceases to calculate or publish the CPI-W, or this index becomes otherwise unavailable, the parties will attempt to negotiate a replacement consistent with the intent of this Agreement. If unable to mutually agree upon a replacement within a reasonable amount of time, the dispute will be subject to interest arbitration under Section 7 of the Railway Labor Act, which may be invoked by either party and to which procedure both parties hereby consent and agree.

Section 2 - On the effective date of this implementing agreement, with respect to TTMS and TCIU, Article I, Section 3, of Mediation Agreement, Case No. A-7128, dated February 7, 1965, as amended, is further amended to read as follows:

In the event of a decline in TTMS's business in excess of 10% in any calendar month, as determined by comparing the combined monthly gross operating revenues of the following railroads: BS, EJ&E, LT and URR, with TTMS's gross operating revenue base (adjusted for inflation), TTMS may furlough protected employees at any time during that month (subject to the advance notice requirements of the current schedule agreement) below the number of employees entitled to preservation of employment under this agreement, to the extent of one percent for each one percent said decline exceeds 10%.

Following any such force reduction, TTMS will make similar decline-in-business determinations in succeeding months, for as long as these protected employees remain furloughed. If the determination for a succeeding month shows a lesser decline in business, TTMS will recall protected employees to the extent indicated by the formula, within 15 calendar days. Upon complete restoration of TTMS's business, or when the measured decline in business no longer exceeds 10%, TTMS will recall the remaining protected employees within 15 calendar days.

Gross operating revenue" as used herein shall be determined on the basis of the operating revenues reportable on ICC Form 210 (Results of Operations) under regulations in effect as of October 9, 1985.

TTMS's "gross operating revenue base" as used herein means the average of the combined monthly gross operating revenues for the period 1978 through 1982, adjusted for inflation, of the following railroads: BS, EJ&E, LT and URR.

Adjustments to TTMS's gross operating revenue base for inflation shall be made semi-annually (January 1 and July 1 of each year) based on the Consumer Price Index for Urban Wage Earners and Clerical Workers - United States (CPI-W) published by the Bureau of Labor Statistics. TTMS's gross operating revenue base shall be increased (or decreased) by one percent for each one percent increase (or decrease) between the average Consumer Price Index for the period between 1978 through 1982 (241.8) and the Consumer Price Index for the current month.

If, at some future date, the government ceases to calculate or publish the CPI-W, or this index becomes otherwise unavailable, the parties will attempt to negotiate a replacement consistent with the intent of this Agreement. If unable to mutually agree upon a

replacement within a reasonable amount of time, the dispute will be subject to interest arbitration under Section 7 of the Railway Labor Act, which may be invoked by either party and to which procedure both parties hereby consent and agree.

ARTICLE IV - PENSION CREDIT

Continuous service for pension purposes under the Transtar, Inc. Non-Contributory Pension Plan and the United States Steel Corporation Plan for Employee Pension Benefits (Revision of 1950) shall be determined under the rules of the Plans. BLE employees who become TTMS employees pursuant to this implementing agreement shall not be deemed to have broken continuous service for pension purposes simply as a result of the change in their employing company.

ARTICLE V - ELECTION OF BENEFITS

Section 1 - Employees affected by this transaction will be entitled to the employee protective conditions set forth in New York Dock, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of New York Dock.

Section 2 - Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, he shall elect between the benefits under New York Dock 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 (regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of his protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

ARTICLE VI - TREATMENT OF BENEFITS

Where required by law or regulation, applicable federal, state, local and Railroad Retirement taxes will be withheld on the taxable portions of all benefit payments.

ARTICLE VII - FILING CLAIMS FOR PROTECTIVE BENEFITS

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who, pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPA's will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits a written request for same.

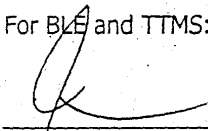
Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.

It is understood that the sixty-day time limit for filing initial claims for displacement or dismissal allowances will commence on the date the carrier furnishes TPA's to affected employees.

* * * * *

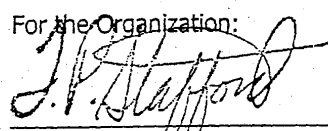
This agreement constitutes an Implementing Agreement, fulfilling the requirements of Article I, Section 4 of the New York Dock conditions.

For BLE and TTMS:

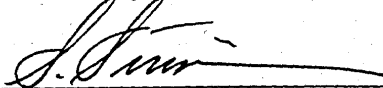


J. F. Ingham, Sr. Director Labor Relations

For the Organization:

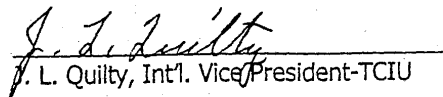


T. P. Stafford, President-ASD



S. Siriano, Vice President-ASD

APPROVED:



J. L. Quilty, Int'l. Vice President-TCIU

December 22, 2000
T:\versionfinal.nyd.TTMS Inc.

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Side Letter #1

December 22, 2000

Gentlemen:

The parties have agreed that TTMS and TCIU will adopt the existing collective bargaining agreement (CBA) between the Bessemer and Lake Erie Railroad Company (B&LE) and the Transportation Communications International Union (TCIU) as the exclusive CBA concerning the rates of pay, rules, working conditions, rights, privileges and benefits (including pension and health and welfare benefits) of TCIU-represented employees of TTMS. In the future application of this agreement, all existing references to the B&LE in this CBA shall be read and understood to mean TTMS.

The adoption by TTMS of this CBA will in no way affect the independent nature of the B&LE/TCIU CBA covering TCIU-represented B&LE employees.

Agreements in effect prior to the effective date of this Agreement, including National Agreements in connection with Wages, Vacations, Holidays, Personal Days, Job Stabilization, and other National Agreements to which the Organization and B&LE were party, as well as the contents of agreed-upon circulars, Memorandum Agreements and Letters of Agreement not in conflict with this Agreement, shall also be adopted by TTMS and continue to remain in effect unless and until changed in accordance with the Railway Labor Act.

Any dispute arising under the provisions of this implementing agreement, excepting those disputes which are properly referable to a New York Dock arbitration committee, will be handled pursuant to Section 3 of the Railway Labor Act.

This will confirm our commitment that TTMS will adopt the terms of the next national agreement between TCIU and the railroads represented by the NCCC, with respect to wages and rules.

Respectfully,



J. F. Ingham
Senior Director Labor Relations

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

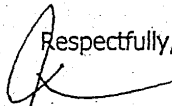
Side Letter #2

December 22, 2000

Gentlemen:

This will confirm our understanding that Tracks, Traffic and Management Services, Inc. ("TTMS") is an "employer" as defined under 45 U.S.C.A. § 231. Accordingly, TTMS employees will be covered by the Railroad Retirement Act of 1974, as amended.

Respectfully,



J. F. Ingham
Senior Director Labor Relations

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Side Letter #3

December 22, 2000

Gentlemen:

This will confirm that following the effective date of this transaction, BLE and TTMS will separately continue to preserve the "protected" rates of the "red-circled" employees listed below, under the same terms and conditions established when these rates were first preserved.

Red-Circled Employees as of December 11, 2000

Name	Position	Base Rate	Protected Rate
T. Boguslawski	Hd. Invoice Proc.	\$155.61	\$156.38
M. E. Cox	**Chief Clerk	\$148.71	\$148.79
T. A. Smathers	Steno Clerk-Machine Operator	\$145.53	\$146.13
C. C. Weismann	Control Clerk	\$145.53	\$146.13
D. R. Bruce	Rate Clerk	\$153.10	\$153.84*
M. A. Myerburg	Record Clk-K.P.	\$143.20	\$143.76
D. J. Curry	Cust. Svce. Rep.	\$148.71	\$155.61

* Mr. Bruce is also eligible for a further allowance based upon his having at least three years experience in the rate area, and having passed a traffic management test(s).

* * * * *

Respectfully,

J. F. Ingham
Senior Director Labor Relations

The Bessemer and Lake Erie Railroad Company

135 Jamison Lane
P. O. Box 68
Monroeville, PA 15146

Side Letter #4

December 22, 2000

Gentlemen:

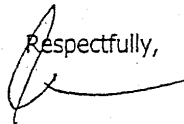
On January 18, 1999, nine clerical employees transferred from Union Railroad to BLE under New York Dock. On April 23, 1999, BLE confirmed that it would provide Sickness and Accident Benefit coverage to those employees "for a period of up to six years of Bessemer employment, or the equivalent length of their individual Union Railroad service, whichever is less." The employees were listed as follows:

JoAnne Anthony	Michael Fisher
Ralph DiVincenzo	Ruby Greiner
Karen Farren	Pat Schartner
Mary Moyer	Martina Phillips
Jane Foshee	

Ms. Greiner has since retired, and Ms. Phillips' coverage has expired account her BLE service has exceeded the length of her prior URR service.

This will confirm that following the *effective date of this transaction*, BLE and TTMS will separately continue to provide such S&A Benefit coverage to the remaining seven employees under the same terms and conditions as established in the April 23, 1999 commitment.

Respectfully,



J. F. Ingham
Senior Director Labor Relations

**Before A
Neutral Referee Appointed
Under Article 1, Section 11
Of the *New York Dock Conditions***

John C. Fletcher, Referee

**In the Matter of the Arbitration Between:
Tracks Traffic and Management Services, Inc.,
and
Transportation Communications International Union**

SUBMISSION OF THE CARRIER

W. G. Sjöberg
Director Labor Relations
TTMS
P.O. Box 68
Monroeville, PA 15146

STB Finance Docket No. 33942
Hearing Location: Chicago, IL
Hearing Date: January 15, 2002

TTMS'S QUESTION AT ISSUE:

Under the terms of Article VII of the Implementing Agreement dated December 22, 2000, when the Carrier agreed to provide TPA information to the employees who would be "affected" by the transaction, did this constitute an automatic certification that these employees would be eligible for monthly displacement or dismissal allowances under *New York Dock* following the transaction, without regard to whether they actually met the definition of a "displaced or dismissed" employee under *New York Dock* or were otherwise adversely affected by the transaction?

(See Carrier's Exhibit A, Page 2 of 2)

ORGANIZATION'S QUESTIONS AT ISSUE:

- 1) Did Article VII of the parties' December 22, 2000 Implementing Agreement recognize affected employees by providing them with a test period average (TPA) and an entitlement to *New York Dock* protective benefits when they: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE; and,
- 2) Did Article VII also recognize BLE employees dismissed by the transaction and unable to follow or remain with their position/work on either company as affected and provide them with *NYD* protection in accordance with Article I, Section 5 of *New York Dock*?
- 3) If the answer to either Question No. 1 or No. 2 is in the affirmative, will the carriers now be required to accept the election of benefits by all employees desiring same and make each whole for all benefits from the date they were initially affected under either Section 5 or 6 of *New York Dock*, if submitting claims for such within sixty (60) days following the date of this §11 Committee's decision?

(See Carrier's Exhibit B, Page 2 of 2)

TTMS'S STATEMENT OF FACTS:

Although this dispute will undoubtedly turn on the interpretation of a routine *New York Dock* Implementing Agreement that is barely one year old, its

history reaches to the late 19th century and the very birth of the American steel industry.

The combined efforts of the early giants, including Carnegie, Rockefeller and J. P. Morgan, resulted in the establishment of United States Steel Corporation (hereinafter referred to as USX for ease of consistency), the epitome of a "vertically integrated" company. USX endeavored to control its own destiny by operating its own coal and iron ore mines and limestone quarries to supply its vast steel mills. Further, in order to assure its transportation needs would be met, it built or acquired its own railroads, a barge line and a Great Lakes shipping line; it also owned and operated dock facilities across the Great Lakes and the Gulf of Mexico for loading and unloading raw materials.

That comprehensive and exclusive ownership and control continued for nigh onto a hundred years. It ended abruptly, however, on December 29, 1988 when USX, in a successful effort to obtain cash, sold a majority ownership of its transportation companies to the Blackstone Group, a Wall Street investment firm. Transtar, Inc. was then formed as a holding company to oversee the operations of the individual transportation companies that USX had spun off (including eight rail carriers and two water carriers).

In order to take advantage of the benefits that would arise from consolidating accounting functions performed by six separate railroad accounting departments at five different locations, Transtar caused the Bessemer and Lake Erie Railroad to enter into several *New York Dock* pattern Implementing Agreements that brought TCU, USWA and UTU-represented clerks to Monroeville,

Pennsylvania from five outlying properties. Working as TCU-represented BLE employees in the Monroeville headquarters, those employees performed accounting clerical work for all of Transtar's transportation companies.

On October 4, 2000 Transtar's owners (Blackstone and USX) advised the Surface Transportation Board (STB) that they were working on a new arrangement whereby Blackstone Holdings would relinquish ownership in Transtar, but would assume 100% ownership of four Transtar subsidiaries, including BLE. USX would assume 100% ownership in Transtar and would thereby regain full ownership of the remaining seven Transtar companies. USX would no longer own any part of BLE, and Blackstone would no longer hold any ownership in Transtar or its remaining subsidiaries.

As a result of the impending split-up of the companies between Blackstone Holdings and USX (Transtar), the clerical work that had been consolidated in Monroeville needed to be divided up in a new fashion.

On October 10, 2000 BLE advised TCU that because ownership of the 11 Transtar companies was about to be divided up, a large number of TCU-represented clerical employees would need to be transferred from BLE (soon to be a Blackstone company) to a company that would remain under Transtar's (USX) ownership (see Carrier's Exhibit C, Page 1 of 2). The Transtar company designated to perform that clerical work was Tracks Traffic and Management Services, Inc. (hereinafter referred to as TTMS).

The parties (BLE, TTMS and TCU) met several times in late 2000 in a good faith effort to develop a voluntary Implementing Agreement that would be

ready in time for the anticipated transaction that would split-up the ownership of the companies. The agreement was expected to be simpler than most inasmuch as no employees would be relocated and all of the current jobs would be preserved as the same or equivalent positions, provided business remained at the same level.

In order to expedite reaching a voluntary Implementing Agreement, the carriers (BLE and TTMS) sweetened their proposal by raising the daily wage rates on a number of positions (see Carrier's Exhibit D, Pages 2-5). Without making any promise to pre-certify employees for *New York Dock* benefits eligibility, the carriers further enhanced their proposal by agreeing to provide Test Period Average (TPA) information to virtually all headquarters TCU-represented employees, without first requiring those employees to demonstrate that they were adversely affected. Upon receipt of a written request, BLE or TTMS would "furnish a test period average to all employees who, pursuant to this (implementing) agreement:

- 1) follow their position/work to TTMS;
- 2) transfer to TTMS;
- 3) or remain with their position/work on BLE."

In addition, BLE agreed that it would also..."on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company." (See Carrier's Exhibit E, Page 7 of 11)

On November 22, 2000 the Surface Transportation Board, under Finance Docket No. 33942, approved the owners' petition for exemption (see Carrier's Exhibit F, Page 2 of 5).

The parties signed the voluntary Implementing Agreement on December 22, 2000. In accordance with that agreement and in preparation for the actual transaction, BLE proceeded to canvass the employees. BLE posted a "Special Advertisement" on January 3, 2001 (see Carrier's Exhibit D, Page 1 of 5) advising all concerned that the Monroeville Headquarters clerical positions would "be abolished as of the close of business on the day that the reorganization transaction will be completed." The notice further advised that "New positions will be established on the BLE and TTMS effective the day following the date of the transaction."

All such new BLE and TTMS positions were listed on the special advertisement and employees were invited to submit their bids. The manner in which those jobs were listed, however, was the result of considerable effort by the parties during the negotiations to develop the Implementing Agreement. Article I - Transfer of Employees and Work states in pertinent part as follows:

"Incumbents will have preferential rights to select their respective assignments and will be assigned thereto regardless of seniority. Employees presently holding a BLE position listed in Attachment "A" shall have prior rights to follow their position/work to TTMS or remain with their position/work on BLE, provided they indicate their desire to use their prior rights as their first preference on their bid. (Employees holding positions listed in Attachment "A" for which there will be comparable TTMS and BLE positions, who wish to take full advantage of their prior rights, should indicate the TTMS position as their first preference on their bid and the BLE position as their second preference, or vice versa.) A special bid form will be provided for this bidding. Once TTMS and BLE positions have been filled by employees using their prior rights, the remaining unfilled positions will be awarded to the senior bidders for these positions, from among the employees who elected not to use their prior rights in this bidding process, or who did not have any prior rights to use. An employee's prior rights will be based on the position he or she is holding at 12 noon on the date the special bulletin is posted."

(See Carrier's Exhibit E, Page 2 of 11)

Employees have a basic right under *New York Dock* to follow their work; that right can, and frequently does, conflict with the basic seniority rights of senior employees under the collective bargaining agreement. The parties here overcame that difficult problem by designating pools of similar jobs such that employees could follow their work within their respective home pools without fear that senior employees from another pool(s) would outbid them.

Regardless of seniority, employees were granted "prior rights" to the jobs in their own pool; they were assured of a job in their home pool and could not be outbid by anybody from outside their pool. If they would choose not to exercise their prior rights in their home pool, and instead would bid to another pool, they could be outbid by any prior rights employee in that other pool, or by any senior qualified employee on the roster.

That canvassing/bidding process was remarkably successful. It resulted in 83 BLE employees choosing to transfer to TTMS, and 29 employees choosing to remain with BLE. Only one bidder out of 112 chose to leave her home pool, and she obtained her first choice of jobs nonetheless. The Implementing Agreement made a job available to every covered employee, and all but four employees got their first choice of jobs.

The bidding was closed on January 11, 2001 and all employees were informed of the result of their bid. The employees were told which company they would be employed by after the transaction, and what job they would be holding. In the meantime, however, employees were to remain on their existing BLE job until the transaction would be completed. The transaction was eventually

completed as of the close of business on Friday, March 23, 2001 (see Carrier's Exhibit G).

Following the March 23, 2001 transaction, several dozen TTMS employees requested their TPA information, which the company provided. A number of those employees then began filing claims each month for a displacement allowance. Their claims were denied by TTMS account the employees did not meet the eligibility requirements established under *New York Dock*; none could demonstrate that they had been adversely affected. Several TCU-represented BLE employees filed similar claims; those claims were all denied by BLE.

The Organization appealed these *NYD* claims of both TTMS and BLE employees, contending that the Claimants were not obligated to demonstrate that they were adversely affected. According to the Organization, the Claimants needed to show only that they were "affected." The Organization based that argument entirely on their interpretation of Article VII of the Implementing Agreement, which reads as follows:

"Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of *New York Dock*, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made."

(See Carrier's Exhibit E, Page 7 of 11)

The Organization argues that because that single sentence did not contain the modifier "adversely" in front of the word "affected," employees did not need

to demonstrate that they were adversely affected in order to be eligible for displacement allowance payments. TTMS disagrees.

The claims were appealed to and denied by the Carrier's highest operating officer designated to hear such appeals. Being unable to resolve the dispute on the property, the parties agreed to develop and submit a joint question to arbitration before this parties pay *New York Dock* § 11 Committee of Arbitration¹. However, the parties were unable to agree upon a single question to be submitted, so each party is submitting its own question(s) for consideration and decision by the neutral member.

* * * * *

POSITION OF THE CARRIER: For each of the reasons described below, TTMS respectfully requests that this Committee of Arbitration answer the Carrier's Question at Issue in the "Negative."

I.

Article VII of the Implementing Agreement contains not one but TWO eligibility criteria. First, an employee must be "affected" by the transaction. Second and more importantly, the employee must be "entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of *New York Dock*."

II.

Employees are not entitled to a displacement allowance under Article I, Section 5 of *New York Dock Conditions* unless they are displaced and are unable to obtain a position producing

¹ During the development of the Implementing Agreement, Transtar's Sr. Director Labor Relations John F. Ingham represented both TTMS and BLE; those companies are no longer affiliated. The parties have since agreed that this dispute will be resolved between TCU and TTMS by this Committee of Arbitration. In turn, BLE will be guided by the decision rendered here.

compensation equal to or exceeding compensation from the position from which displaced.

III.

Article VII of the Implementing Agreement contains no language whatsoever that would provide for "automatic certification" of employees.

IV.

The resolution of the prior rights issue, the wage increases offered by the Carriers, the Carriers' agreement to provide TPA information upon request, and the avoidance of parties pay NYD § 4 arbitration all combined to serve as a substantial quid pro quo for reaching settlement on the Implementing Agreement.

V.

Personal notes of unilateral assumptions made by Organization representatives during negotiations do not represent a meeting of the minds of all the parties, and they do not rise to the level of an arbitrable bilateral agreement.

* * * * *

- I. Article VII of the Implementing Agreement contains not one but TWO eligibility criteria. First, an employee must be "affected" by the transaction. Second and more importantly, such employee must be "entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock."

As the "moving party" in this dispute, the Organization was responsible for citing the rule(s) that they allege to have been violated. Both in their written correspondence and in their Questions at Issue posed here, they cited Article VII of the Implementing Agreement which reads as follows:

"Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made."

(See Carrier's Exhibit E, Page 7 of 11)

* * * * *

Plainly, the parties intended for that provision to serve as a time limit rule. Qualified employees who wish to file a claim for *NYD* benefits are required under that provision to "submit claims for these benefits...within sixty (60) days following the end of the month for which claim is made."

That provision, nevertheless, answers the question of just exactly who can become qualified. Clearly, that answer is not everybody who was "affected" by the transaction, as the Organization has argued.

The Organization has simultaneously argued that ALL employees were "affected" by the transaction. As example, the Organization argues that senior employees who chose to stay on their own job at BLE were affected because they now have fewer jobs to displace to should they themselves be displaced in the future. Applying the Organization's ridiculous interpretation would force the Carriers to treat dozens of employees who stayed on their own jobs at their own pay rate (including those employees who received a wage increase as a result of the Implementing Agreement) the same as if they had been displaced and forced to take a position producing less compensation.

The second requirement contained in Article VII (albeit steadfastly ignored by the Organization) is that in order to be eligible for *NYD* benefits, employees

must demonstrate that they are entitled to such benefits under *New York Dock*.

More specifically, Claimants had to be affected employees "**who are entitled** to a monthly displacement or dismissal allowance **under Article I, Section 5 or 6** of *New York Dock...*" (emphasis added)

In essence, the Organization seeks to have this Committee of Arbitration strip Article VII of its true meaning so that it no longer contains the two common sense requirements agreed upon by the parties; it would instead devolve into some grandiose imperative erroneously declaring that all "Employees affected by this transaction...are entitled to a monthly displacement or dismissal allowance..."

However, that is not what the parties agreed to. The Organization's spin should be flatly rejected by this Committee.

The overly broad statement wished for by the Organization would result in the very "automatic certification" that is at the heart of this dispute. Employees might have been "automatically certified" for *NYD* benefits under the Organization's imagined version of the agreement. However, employees most assuredly are NOT "automatically certified" under the agreement the parties signed. They do not become entitled to *NYD* benefits unless and until they can demonstrate that they are "entitled...under Article I, Section 5 or 6 of *New York Dock...*"

The parties did not mutually agree that all "affected" employees would be automatically certified for *New York Dock* benefits. Accordingly, TTMS respectfully requests this Committee of Arbitration to read the Agreement as the

parties wrote it, and to enforce it by answering the Carrier's question in the "Negative."

* * * * *

II. Employees are not entitled to a displacement allowance under Article I, Section 5 of New York Dock Conditions unless they are displaced and are unable to obtain a position producing compensation equal to or exceeding compensation from the position from which displaced.

New York Dock Conditions, Article I, Section 5. Displacement allowances -

(a) reads, in pertinent part as follows:

"So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced."

(See Carrier's Exhibit H, Page 3 of 11)

* * * * *

It is self-evident from this provision that an employee is not eligible for a displacement allowance unless s/he was "displaced" to a post-transaction position producing compensation that does not equal or exceed the compensation s/he received from his/her pre-transaction position.

Main office employees who hold essentially the same position and wage rate after the transaction as they held before the transaction were not "displaced" in the eyes of *New York Dock*, and they are not eligible for a displacement allowance.

That concept has been thoroughly reviewed by *NYD* § 11 Committees of

Arbitration before. As example, please see below, in pertinent part, the February 5, 1993 decision of Referee Scheinman in a dispute between IAM and CSX Transportation where three machinists had sought protective benefits as a result of a *New York Dock* transaction:

"In all, the Organization submits that Claimants are displaced employees adversely affected by the transaction. As such, it submits, they are entitled to New York Dock protective benefits.

Accordingly, and for the foregoing reasons, the Organization asks that the grievance be sustained in its entirety.

Carrier, on the other hand, argues that Claimants are not entitled to protective benefits under New York Dock. It asserts that Claimants were not "displaced" or "dismissed" employees as defined under New York Dock conditions.

In support of its position, Carrier points out that subsequent to the transaction, the three (3) Claimants worked regularly in positions paying the same rate of pay and covered by the same working agreement as the positions they occupied prior to the transaction. As such, it maintains that Claimants have not suffered any real loss of earnings or worsening of their employment subsequent to the transaction.

Carrier disputes the Organization's assertion that the figures presented by the Claimants indicate that their earnings were less following the transaction. It maintains that Claimants held positions which produced comparable earnings and had not been worsened as a result of the transaction.

Accordingly, and for the foregoing reasons, Carrier argues that Claimants are not entitled to protective benefits.

After a careful review of the record evidence, this Board is convinced that the claim must be sustained, in part.

The question at issue in this dispute is whether Claimants suffered an "adverse effect," as defined under the relevant provisions of New York Dock. If so, they are entitled to protective benefits. On this there is no dispute.

The burden of showing such entitlement to protective benefits is upon the Organization in that it must demonstrate that Claimants were placed in a worse position by the actions of the Carrier.

Under the facts presented here, the record indicates that the Organization failed to establish that Claimants Jackson and Allen were not successful applicants for regular Machinist positions advertised on August 29, 1990.

Jackson and Allen were awarded these positions on September 4, 1990. There is no evidence to suggest that Claimants Jackson and Allen failed to obtain a position with compensation equal to the position from which they were displaced.

The claims on behalf of Jackson and Allen must fail.

In summary, and for the foregoing reasons, we find the answer to the question posed that:

1. Claimants Jackson and Allen are not entitled to protective benefits."

(See Carrier's Exhibit I, Pages 3-5)

Like other *NYD* § 11 Committees of Arbitration, that committee determined that employees who essentially stay on the same position at the same wage rate are not in a worse position and, therefore, are not eligible for *NYD* benefits. In fact, that is how the language of *New York Dock* defines eligibility for such benefits.

Ironically, the Organization fully recognizes here that its members are NOT eligible for such benefits under strict *New York Dock*; that is why they have relied so heavily upon their theory that the Implementing Agreement used the term "affected" instead of "adversely affected." The Catch 22 for them, however, is that the term "adversely affected" does not appear in the actual *New York Dock Conditions* either. That term is commonly used because it is a convenient shorthand for the situation described at length in Article I, Section 5 (*supra*).

Even though the local Implementing Agreement (like the original *New York Dock Conditions*) did not use the full colloquialism "adversely affected," it did require employees to meet the eligibility requirements of *New York Dock*. Those

requirements include being placed in a worse position, and hence, Claimants are ineligible unless they can demonstrate that, indeed, they were placed in a worse position, a.k.a. "adversely affected."

The bulk of the claims here were apparently filed in the hope of obtaining a windfall payment for each month that contains fewer workdays than the average days worked per month during the test period. Because compensation calculations under *New York Dock* are based on monthly earnings, short months (such as February) can cause employees to appear to be in a worse position when, in fact, they may be in the very same position they have been in all along. Such short months simply do not permit employees to work as many days as they worked per month on average during the test period.

The average month has 21.75 workdays (261 workdays per year divided by 12 months per year = 21.75 work days per month). Because the standard calendar provides employees with anywhere from 20 to 23 work days in a month, short months, as well as long months, occur for all employees whether they are displaced or not. Statistically speaking, about half the months in a given year have fewer than 21.75 workdays; as example, the year 2001 had five months containing 21 or fewer workdays. Thus, all employees, displaced or not, on a Monday thru Friday work schedule were likely to encounter five months in 2001 when their earnings were below their monthly average taken over 12 months.

Railroaders who are paid twice a month have long experienced pay period disparities; the first half (1st - 15th) can have as few as 10 work days (such as April, 2001), and the second half (16th - 31st) can have as many as 12 work days (such

as August, 2001). There is no causal nexus between the STB-approved transaction of March 23, 2001 and those half-month shortfalls or the routine shortfalls that occur as a result of short months.

Short months have been a fixture in the calendar for over 2,000 years; they were integral to the Julian calendar that was originated in 48 BC, and they were preserved when the Gregorian calendar was introduced in 1582 AD. It is astounding, therefore, that employees would suddenly blame the Owners' March 23, 2001 transaction for their earnings shortfall occurring in the shorter months. Certainly, this Committee should not be awarding windfall payments to such Claimants on the basis of their false logic that they must have been "adversely affected by the transaction" simply because their compensation in such short months was less than their 12-month test period average.

The upshot of all this is that employees should find nothing unusual with their earning less in February than they earned on average during their individual 12-month test period. Employees who are short on earnings in short months when compared to their monthly earnings averaged over 12 months are not "adversely affected" by a transaction; like most American workers, they simply experience a short month.

In order to be eligible for *NYD* displacement allowance benefits, Article VII of the Implementing Agreement required that an employee be BOTH "affected" AND that s/he be "entitled...under Article 1, Section 5...of *New York Dock*." Employees are NOT entitled under Article 1, Section 5...of *New York Dock* unless they are displaced and are unable to obtain a position producing compensation

equal to or exceeding compensation from the position from which displaced. Claimants who because of the fewer workdays available during a short month sustain a shortfall in earnings when compared to their 12-month test period average are plainly NOT adversely affected by the transaction.

Accordingly, TTMS respectfully requests again that this Committee answer the Carrier's Question at Issue in the "Negative."

* * * * *

III. Article VII of the Implementing Agreement contains no language whatsoever that would expressly provide for "automatic certification" of employees.

Although both the Carrier's Question at Issue and the Organization's Questions at Issue refer ONLY to Article VII, it might be helpful to review the rest of the Implementing Agreement in an attempt to discern the parties' joint intent. In fact, though, such a review will confirm that nowhere in the Implementing Agreement is there any language whatsoever that would automatically certify employees to be eligible for *New York Dock* displacement or dismissal allowances.

If the parties had intended to automatically certify all employees, they could have easily stated such intent in the agreement. The Carrier NEVER HAD such an intent; the Carrier NEVER STATED such an intent; and the Carrier NEVER AGREED to the inclusion of such intent in the Implementing Agreement. In view of the anticipated stability of jobs and rates, the Carrier repeatedly stated from the outset that it did not envision that ANY employees would become eligible for displacement or dismissal allowances.

On October 27, 2000 the Carrier hosted two informational meetings on

company time to inform the employees about progress to date of the reorganization, and the Carrier's plans for the future. Virtually all TCU-represented headquarters employees attended one of those sessions; the TCU District Chairman attended both sessions. The Carrier's Senior Director Labor Relations addressed both sessions with prepared remarks and then answered questions that had been received by e-mail from the employees. As noted in the script, the Carrier specifically addressed *NYD* eligibility as follows:

12. "The coordination of this work is expected to be subject to *New York Dock* Conditions, although **we do not anticipate that any employees will suffer any compensable adverse effect.** Nevertheless, we will calculate Test Period Averages for all transferring employees. If they believe that they were adversely affected, such as being forced to a lower paying job, they will be free to file claims for a monthly displacement allowance. Again, we do not envision that to be very likely. Employees are generally eligible for compensation for up to six years under *New York Dock*. That eligibility period is less in the case of employees who have less than six years of service at the time of the coordination." (emphasis added)

(See Carrier's Exhibit J, Pages 3-4)

* * * * *

The Carrier specifically stated that it did **not** expect any employees to "suffer any compensable adverse effect." Accordingly, the Carrier had no obligation under *New York Dock* to calculate their test period averages. Without making any promise whatsoever of automatic certification, the Carrier agreed to provide such information upon request without first requiring employees to show proof of eligibility for benefits.

Inasmuch as the Carrier said all along that nobody was expected to suffer any compensable adverse effect, and Article VII did not make any offer of "automatic

certification," TTMS respectfully requests that this Committee answer the Carrier's Question at Issue in the "Negative."

IV. The resolution of the prior rights issue, the wage increases offered by the Carriers, the Carriers' offer to provide TPA information upon request, and the avoidance of parties pay NYD § 4 arbitration all combined to serve as a substantial quid pro quo for reaching settlement on the Implementing Agreement.

The Organization argued in conference that the reason they signed the Implementing Agreement was because they believed that employees were being automatically certified; they then would ask "Why else would we (the Organization) have signed it?" In fact, there were several good reasons for the Organization to sign the agreement.

A. First, signing the Agreement resolved a very difficult problem for the Organization; how should jobs be awarded where the prior rights of junior employees were about to crash head-on with the strict seniority rights of senior employees. The Carriers worked diligently with the Organization in a joint effort to honor the incumbents' basic right under NYD to follow their work; the parties designated specific pools of similar jobs such that employees could follow their work within their respective home pools without fear that senior employees from another pool(s) would outbid them. The canvassing/bidding process that was jointly developed by the parties worked extremely well. Only one bidder out of 112 chose to leave her home pool, and she obtained her first choice of jobs nonetheless. The Implementing Agreement was an unqualified success; it resulted in making a job available for every covered employee, and all but four employees got their first

choice of jobs. The Implementing Agreement gave the Organization exactly what they wanted with regard to jobs.

B. The Implementing Agreement provided beneficial adjustments to the wage rate schedule. Several rates were increased, and although two rates were decreased, the successful prior rights bidders were permitted to retain their existing higher rates. Overall the wage rate adjustments were all positives and no negatives for the Organization.

Enclosed as Carrier's Exhibit D is the four-page chart listing the BLE clerical jobs and wage rates that were in place before the transaction. Side-by-side on the same chart were listed the BLE and TTMS jobs and wage rates to be established the day following the anticipated transaction. As noted, eight positions enjoyed rate increases ranging from \$2.51 per day to \$6.90 per day and totaling \$33.24 per day. Two positions were rationalized downwards (one BLE for \$6.90 per day, and one TTMS for \$4.39 per day) for a total reduction of \$11.29 per day. However, because the Carriers had pledged to protect prior rights bidders from suffering any pay decrease in such circumstances, the Carriers have not yet enjoyed any savings.

Taking into consideration the high cost of the Carriers' portion of Railroad Retirement Tier I and Tier II taxes, the net effect of those rate changes cost the Carriers in excess of \$10,000 per year.

C. Finally, by reaching a direct settlement on an Implementing Agreement, the Organization avoided the work in preparing for and participating in costly parties pay NYD \$4 arbitration. Such arbitration would undoubtedly result in no better a package than they were able to negotiate on their own; there was no

opportunity for added real estate benefits, moving expenses, temporary living expenses, etc., since nobody was going to be relocated. The agreement they got was already the best they could hope for.

* * * * *

In summary, there were a number of valuable benefits obtained by the Organization when they signed the Implementing Agreement. The Carrier had every reason to believe that there was a meeting of the minds on the terms of the Implementing Agreement exactly as they were written, and those terms obviously did not provide for "automatic certification" of all employees.

* * * * *

V. Personal notes of unilateral assumptions made by Organization representatives during negotiations do not represent a meeting of the minds of all the parties, and they do not rise to the level of an arbitrable bilateral agreement.

Finally, the Organization's Vice President has by correspondence (Carrier's Exhibit K, Page 2 of 4) asserted that his personal notes from the negotiations "reflected" that employees who remained with BLE on their original positions would be recognized as affected by the transaction and provided with a TPA and NYD entitlement. That may well be what the Vice President's notes indicate; the Carrier cannot say since the notes were not shared during the negotiations or anytime since. However, the Organization's description of those notes is not reflective of any remarks the Carrier can recall. In any event, the "notes" were not incorporated into the Implementing Agreement.

The Implementing Agreement that was reviewed and signed by all the parties provides only that TPA information will be provided to employees who make a request. The automatic certification for *NYD* entitlement sought by the Organization exists only in those unilaterally developed notes, if anywhere, and not in the written agreement signed by the parties. That written agreement is what is under review here, and it contains no such provision for automatic certification.

One of the primary canons of contract interpretation warns against interpreting an agreement as providing new wages or benefits unless such new wages or benefits are clearly expressed. The Implementing Agreement under review here is completely lacking in any such "clear expression" of joint intent of the parties to automatically certify all Claimants.

For this and all the foregoing reasons, TTMS respectfully requests that this Committee of Arbitration answer the Carrier's Question at Issue in the "Negative."

Finally, with regard to the Organization's Questions:

1) "Did Article VII of the parties' December 22, 2000 Implementing Agreement recognize affected employees by providing them with a test period average (TPA) and an entitlement to *New York Dock* protective benefits when they: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE; and,"

The clear answer to all three sub-parts above is "No." It is true that TTMS and BLE promised to provide TPA information to employees in the three groups

itemized above, but there was no promise whatsoever to provide them with an
"entitlement to New York Dock protective benefits."

* * * * *

The Organization's Second Question at Issue:

2) "Did Article VII also recognize BLE employees dismissed by the transaction and unable to follow or remain with their position/work on either company as affected and provide them with *NYD* protection in accordance with Article I, Section 5 of *New York Dock*?"

The Carrier protested the wording of this question because the Organization's unnecessary use of the word "also" implies that all concerned agree that the answer to one or more of the subparts of the first question is in the affirmative. The Carrier most assuredly believes the answer to all three subparts of Question No. 1 should be in the negative.

Ignoring the conflict presented by the Organization's use of the word "also," the answer to Question No. 2 is in the negative; Article I, Section 5 of *New York Dock* deals only with displaced employees, not dismissed employees.

* * * * *

The Organization's third Question at Issue is:

3) If the answer to either Question No. 1 or No. 2 is in the affirmative, will the carriers now be required to accept the election of benefits by all employees desiring same and make each whole for all benefits from the date they were initially affected under either Section 5 or 6 of *New York Dock*, if submitting claims for such within sixty (60) days following the date of this §11 Committee's decision?

The answer to both Questions No. 1 and No. 2 is in the negative.

Accordingly, Question No. 3 is moot.

* * * * *

CONCLUSION

The Carrier has shown that Article VII of the parties' Implementing Agreement was designed to provide *New York Dock* protective benefits to those employees who were able to demonstrate that they qualified under the respective provisions of the original *New York Dock Conditions*. The Carriers' promise to provide certain employees with their Test Period Average information did NOT constitute any commitment whatsoever to automatically certify such employees as eligible for such benefits.

Employees are not entitled to *New York Dock* displacement allowances unless and until they can show that they were placed in a worse position as a result of the STB-approved transaction. Experiencing lower earnings during various short months is not evidence in and of itself that an employee has been placed in a "worse position."

The Organization had good reasons to sign the Implementing Agreement without the automatic certification that they seek here. The prior rights dilemma was resolved equitably in accordance with each employee's right to follow his/her work and the basic seniority rights employees hold to obtain the job of their choice. Various wage rates were increased resulting in more than \$10,000 in new annual costs to TTMS and BLE. Many employees were given the right to request their TPA information, and the Organization avoided the high cost and hard work involved in parties pay arbitration under §4 of *New York Dock Conditions*.

Lastly, regardless of whether this Committee of Arbitration elects to use the Carrier's Question or the Organization's Question(s), the overriding issue here is

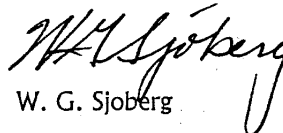
whether or not the parties agreed under Article VII to pre-certify most employees to collect *NYD* protective benefits without their first showing that they were harmed by the transaction. Article VII permits ONLY those employees who are entitled under *New York Dock* to submit claims. Article VII simply does not support the Organization's position.

To find in favor of the Organization would result in a windfall for dozens of employees for every "short" month for up to six years. With wages running in excess of \$150 per day, and most employees falling short of their 12-month average pay by about one day in those short months, the cost could exceed \$100,000. That is not a benefit the employees could have ever hoped to obtain through *New York Dock* §4 arbitration, and it certainly is not a windfall willingly given away by TTMS and BLE simply to get a quicker agreement.

The Organization has rhetorically asked the Carrier "Why would the union sign the Implementing Agreement without this benefit?" Considering the huge cost of what the employees now seek, the more valid question is "Why would the union think that the Carriers would be willing to spend that much when arbitration would never award such a benefit?"

However this Committee chooses to frame the final question(s), the answer, if in keeping with the Implementing Agreement, must reflect that the employees were not "automatically certified" under the terms of Article VII.

Respectfully submitted,


W. G. Sjöberg

NEW YORK DOCK

PARTIES TO DISPUTE:

International Association of Machinists
and Aerospace Workers

vs.

CSX Transportation, Inc.

QUESTION AT ISSUE:

Are Machinists J.G. Walker, J.H. Allen and G.D. Jackson entitled to protective benefits as a result of a New York Dock transaction which involved a transfer of work and Employees from Hamlet, NC to Corbin, KY effective September 4, 1990?

OPINION OF BOARD:

The relevant facts of this case are not in dispute. On December 29, 1982, the Seaboard Coast Line Railroad (SCL) and the Louisville and Nashville Railroad (L&N) merged to become Seaboard System Railroad (SBD). On July 1, 1986, SBD's corporate name was changed to CSX Transportation, Inc.

On June 1, 1990, pursuant to Article 1, Section 4 of New York Dock Conditions, Carrier served notice of its intent to abolish twenty-eight (28) Machinist positions at Hamlet, NC and to establish ten (10) Machinist positions at Corbin, KY. The required Implementing Agreement (No. 5-060-90), as stipulated in Article I, Section 4 of New York Dock Conditions, was reached August 9, 1990. The transaction was implemented effective September 4, 1990.

Claimants were initially advised that their positions were scheduled to be abolished. Prior to that transaction, Carrier placed Claimants in existing vacancies.

As a result of Carrier's action, the Organization filed a

claim alleging that Claimants were entitled to New York Dock protective benefits. Carrier timely denied the claim. Thereafter, it proceeded in the usual manner on the property. It is now before this Board for adjudication.

The Organization maintains that Claimants are entitled to New York Dock protection under Article I, Section 1 (d) which states, in pertinent part:

(d) 'Protective period' means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

The Organization asserts that the above referenced language indicates that Claimants are displaced employees entitled to protection from the dates adversely affected by the transfer of work from Hamlet, NC. While the Organization acknowledges that Claimants were not immediately furloughed as the result of the transaction, it insists that Claimants were affected by the coordination and entitled to protection. Moreover, the Organization insists that the Claimants were only placed in temporary positions, In its view, the fact that Claimants were placed in temporary positions does not free Carrier from its obligation to treat Claimants as displaced employees.

In addition, the Organization points out that Carrier failed to provide a test period average, as required under Article I, Section 5. That language states:

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period).

Despite repeated attempts to obtain the test period average from the Carrier, the Organization insists that it was unable to do so. As such, the Organization maintains, two (2) of the Claimants computed their own test period averages showing that they suffered a loss of pay following the transaction. In its view, these figures are evidence of the adverse affect the transaction had upon Claimants.

In all, the Organization submits that Claimants are displaced employees adversely affected by the transaction. As such, it submits, they are entitled to New York Dock protective benefits.

Accordingly, and for the foregoing reasons, the Organization asks that the grievance be sustained in its entirety.

Carrier, on the other hand, argues that Claimants are not entitled to protective benefits under New York Dock. It asserts that Claimants were not "displaced" or "dismissed" employees as defined under New York Dock conditions.

In support of its position, Carrier points out that subsequent to the transaction, the three (3) Claimants worked regularly in

positions paying the same rate of pay and covered by the same working agreement as the positions they occupied prior to the transaction. As such, it maintains that Claimants have not suffered any real loss of earnings or worsening of their employment subsequent to the transaction.

Carrier disputes the Organization's assertion that the figures presented by the Claimants indicate that their earnings were less following the transaction. It maintains that Claimants held positions which produced comparable earnings and had not been worsened as a result of the transaction.

Accordingly, and for the foregoing reasons, Carrier argues that Claimants are not entitled to protective benefits.

After a careful review of the record evidence, this Board is convinced that the claim must be sustained, in part.

The question at issue in this dispute is whether Claimants suffered an "adverse effect," as defined under the relevant provisions of New York Dock. If so, they are entitled to protective benefits. On this there is no dispute.

The burden of showing such entitlement to protective benefits is upon the Organization in that it must demonstrate that Claimants were placed in a worse position by the actions of the Carrier.

Under the facts presented here, the record indicates that the Organization failed to establish that Claimants Jackson and Allen were not successful applicants for regular Machinist positions advertised on August 29, 1990. Jackson and Allen were awarded these positions on September 4, 1990. There is no evidence to

suggest that Claimants Jackson and Allen failed to obtain a position with compensation equal to the position from which they were displaced.

Moreover, we are persuaded that Allen and Jackson had sufficient seniority to secure regular machinist assignments. They were not retained in service to fill temporary vacancies. They were not subject to displacement by a returning incumbent.

The claims on behalf of Jackson and Allen must fail.

On the other hand, the Organization has met its burden of proving that Walker was not awarded a permanent position. The record evidence demonstrates that Walker was assigned to a temporary vacancy of a senior employee who was off due to personal injury at the time of the transaction. He lacked sufficient seniority to secure a regular assignment on his own. As Walker was retained to fill only a temporary vacancy, he was subject to displacement by a returning incumbent. This action by Carrier placed Walker in a position worse than that he held prior to the transaction. He no longer held a bulletined awarded position. If the employee whose position Walker had filled returned to his position, Walker would have no rights to this position. As such, Walker is entitled to protective benefits.

In summary, and for the foregoing reasons, we find the answer to the question posed that:

1. Claimants Jackson and Allen are not entitled to protective benefits.
2. Claimant Walker is entitled to protective benefits.

Concur

✓
Dissents regarding Claimant Walker

2/11/93
Date

Judith M. Cobble
J. M. Cobble, Carrier Member

M M Jolly (Walker)
Concur
Dissent M M Jolly
Dissents regarding Claimants Jackson and Allen

Date

M M Jolly
M. M. Jolly, Organization Member

2/5/93
Date

[Signature]
Martin P. Scheinman, Esq., Neutral Member

OFFICE OF

MAR 24 1993

DIRECTOR LABOR
RELATIONS
MONROEVILLE, PA

**SUBMISSION OF DISPUTE PURSUANT TO
ARTICLE I, SECTION 11 OF NEW YORK DOCK
JOHN C. FLETCHER, CHAIRMAN AND NEUTRAL MEMBER
January 15, 2002 – Chicago, Illinois**

**TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION (TCU)**

V.

**TRACKS, TRAFFIC MANAGEMENT
SERVICES, INC. (TTMS)
BESSEMER AND LAKE ERIE RAILROAD CO.**

**PARTIES
TO
DISPUTE**

EMPLOYEES' EX PARTE SUBMISSION

Organization's "Questions at Issue":

- 1) Did Article VII of the parties' December 22, 2000 Implementing Agreement recognize affected employees by providing them with a test period average (TPA) and an entitlement to New York Dock protective benefits when they:
1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE; and,*
- 2) Did Article VII also recognize BLE employees dismissed by the transaction and unable to follow or remain with their position/work on either company as affected and provide them with NYD protection in accordance with Article I, Section 5 of New York Dock?*
- 3) If the answer to either Question No. 1 or No. 2 is in the affirmative, will the carriers now be required to accept the election of benefits by all employees desiring same and make each whole for all benefits from the date they were initially affected under either Section 5 or 6 of New York Dock, if submitting claims for these such within sixty (60) days following the date of this § 11 Committee's decision?*

SUBMISSION OF DISPUTE PURSUANT TO
ARTICLE I, SECTION 11 OF NEW YORK DOCK
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January 15, 2002 – Chicago, Illinois

TRANSPORTATION • COMMUNICATIONS
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INTRODUCTION:

THE ACQUISITION

On October 5, 2000, Transtar Holdings, L.P., Transtar, Inc. and USX Corporation petitioned the Surface Transportation Board (STB) for exemption from the prior approval requirements of 49 U.S.C. §§ 11323 - 11325 of a transaction involving the acquisition by USX of control of Transtar and 5 rail carriers currently owned 100% by Transtar (TCU Exhibit 1). The 5 involved rail carriers included: Birmingham Southern Railroad Company (BSRC); Elgin, Joliet and Eastern Railway Company (EJE); the Lake Terminal Railroad Company (LT); McKeesport Connecting Railroad (McKeesport); and the Union Railroad Company (URR). USX also acquired control of 4 other entities: 1) Warrior & Gulf Navigation Company; 2) Mobile River Terminal Company; 3) Fairfield Southern Company; and, 4) Tracks, Traffic and Management Services, Inc. (TTMS), a non-carrier subsidiary of Transtar.

As a result of the transaction, Transtar Holdings ceased control of Transtar and the USX Carriers and became the direct parent, through ownership of 100% of the stock, of the following 3 rail carriers: Bessemer and Lake Erie Railroad Company (BLE); Duluth, Missabe and Iron Range Company (DMIR); and, Pittsburgh & Conneaut Dock Company (P&C). Holdings also became the direct parent, through 100% stock ownership, of 5 other entities: 1) USS Great Lakes Fleet; 2) GLF Credit Corp.; 3) GLF Great Lakes Corp; and two subsidiaries of P&C Dock; 4) Cuyahoga Dock Inc.; and, 5) Mon Valley Railway Company.

THE IMPACT ON TCU EMPLOYEES

Outlined by Transtar and USX in the acquisition filings before the STB was the fact that:

In connection with implementation of the transaction, Petitioners intend to reorganize certain administrative and support functions, as provided in Article VII of the Reorganization and Exchange Agreement; these change will have no effect on transportation services. It is anticipated that ongoing efforts by management to improve the utilization of personnel, operations and facilities of the carriers involved, both separately and in combination, will be continued, including new initiatives in that regard when deemed appropriate by management.

* * *

The transaction will require only limited rearrangement of employees. Certain B&LE employees, who currently perform consolidated functions for the Transtar subsidiaries, will become employees of TTMS, and will continue to perform the same consolidated support functions, including payroll, claims, operating systems, engineering, benefits, and information systems, for both the USX Carriers and the Holdings Carriers. This arrangement will enable the parties to continue receiving the benefits of the consolidated support functions, with the Holdings Carriers purchasing services under the terms of a Services Agreement. The transfer of B&LE employees to TTMS will include approximately 100 employees represented by the Transportation Communications International Union ("TCIU"). Subject to the terms of an implementing agreement with TCIU, TTMS will assume the terms of the existing B&LE/TCIU labor agreement.

LABOR PROTECTION IMPOSED

In their STB acquisition filings, Transtar and USX stated:

Pursuant to 49 U.S.C. §§ 11326(a) and 10502(g), the Board must impose employee protective conditions, for the benefit of the applicants' railroad employees, in approving or exempting a transaction subject to 49 U.S.C. §§ 11324 and 11325. Petitioners anticipate that the Board will impose its standard employee protective conditions, as set forth in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), on its exemption of the proposed transaction.

On November 22, 2000, the STB exempted from the prior approval requirements

of 49 U.S.C. 11323-25 the petitioners' request for acquisition/control in Finance Docket No. 33942 (TCU Exhibit 2). The STB accepted the petitioners' indication that the New York Dock protective conditions were appropriate and imposed such conditions upon the transaction and subsequent actions made pursuant to such authority.

STATEMENT OF FACTS:

In anticipation of STB approval of the petitioners' acquisition and control, Mr. William G. Sjöberg, Director- Labor Relations, Bessemer & Lake Erie Railroad, telephoned Mr. Ted Stafford, President ASD/TCU, in October 2000, indicating that the Carriers desired to create a new company called TTMS to perform railroad accounting work now performed by B&LE. It was agreed that the parties would meet the week of October 18th in Monroeville, Pa, to discuss the matter (TCU Exhibit 3).

Although not required to negotiate any NYD § 4 Implementing Agreement (IA) prior to such time as the STB made its determination in FD 33042 (Nov. 22nd) – the Organization agreed to meet to discuss the matter. Subsequent conferences were held on October 18, November 15, 16, 17 (as well as numerous telephone conversations on November 20, 28, 30; and, December 22) which provided the parties with ample opportunities to submit proposals for specific language later to be incorporated in the IA. Throughout the § 4 process, the Carriers were harmonious in their desire to reach a timely and prompt IA.

The IA was consummated by the parties on December 22, 2000 (TCU Exhibit 4). Pertinent to this dispute are the provisions found in Article VII of the parties' IA dealing with the Carriers providing of test period averages (TPAs) and protective entitlements to

employees affected by the acquisition/control transaction. Article VII states:

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; 3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company. TPA's will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits written request for same.

Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which claim is made.

It is understood that the sixty-day time limit for filing initial claims for displacement or dismissal allowances will commence on the date the carrier furnishes TPA's to affected employees.

As outlined in the following on-property correspondence, the dispute that arose involved the specific language of Article VII of the IA. It is the Organization's position that inclusion of Article VII during the § 4 process implicitly recognized the fact that all B&LE employees were affected by the transaction and were being provided with their respective elective entitlements to NYD. Contrary to our understanding, it is the Carriers' position that inclusion of Article VII did not recognize that any employee was affected by the transaction and that providing TPAs was nothing more than a means to make the IA attractive to the employees. Below are the on-property correspondence which outline the development of this dispute.

On August 28, 2001, IVP James Quilty wrote to Messrs. Jim Street, Transtar (B&LE), and John Ingham, TTMS, stating in pertinent part (TCU Exhibit 5):

This is regarding our conversations of July 24th through 26th involving, among other issues, the explicit provisions of our New York Dock (NYD) Article I, § 4 Implementing Agreement (IA) of December 22, 2000. More specifically, the focus of this letter is the dispute we have over the provisions of Article VII of that IA.

For reference, Article VII states:

In the discussions I pointed out that it is TCU's position that all TCU represented employees of BLE were directly affected by the transaction which coordinated certain clerical work into Tracks, Traffic and Management Services, Inc. I also referenced the negotiations that took place during the §4 process and the actual framing of Article VII which supported my position.

I have since had the opportunity to review my notes of the negotiating sessions leading up to our IA along with the numerous telephone conversation that we had during that process. Gentlemen, my notes reflect that the explicit language of Article VII was fashioned, by your requests, to lessen the impact of a so-called "Sadie Hawkins" rundown process.¹ In exchange for lessening that impact, it was agreed that if employees remained with BLE they would be recognized as affected by the transaction and provided with a TPA and NYD entitlement as stated in Article VII.²

Article VII also plainly stated that BLE employees transferring to TTMS either with work, or by choice, would be provided with their TPAs and NYD entitlement (see items 1 & 2 of IA Article VII).

¹Sadie Hawkins is a term of art which describes the rundown process by which all BLE employees would have had the opportunity to choose the most attractive assignments and exercised their respective seniority displacement rights to that choice.

²Article V of our IA also provided that:

Section 1 – Employees affected by this transaction will be entitled to the employee protective conditions set forth in New York Dock, incorporated and made a part hereof by reference, and the right to elect between available employee protective benefits, as provided in Article I, Section 3 of New York Dock.

As I pointed out to both of you in July, BLE employees that remained with BLE, and former BLE employees presently working for TTMS, have been denied their NYD entitlements in violation of our IA. The reasons given to TCU members by BLE and TTMS in denying their NYD claims contained conflicting reasoning and contradict each other. What bothers me the most is that both BLE and TTMS are ignoring the provisions of Article VII and the good faith bargaining that lead up to its inclusion in our IA – again at your requests.

While employees affected by the coordination may or may not be due displacement allowances in a particular month, they nonetheless are protected under the auspices of NYD and our IA. Article I §§ 1 & 5 of NYD mandate this inescapable fact and each protective period commences at the very first instance of being affected by the transaction (again see IA Articles V & VII).

What you gentlemen have proffered to me in our discussions is that although you have provided each affected employee with a TPA, that fact does not mean that they are entitled to the NYD protection mandated by our IA. This reasoning I find insupportable and contradictory to the clear language of our IA.

The calculation and providing of a TPA to employees was in recognition that each was affected and entitled their respective NYD protective benefit. As I previously stated, a subsequent displacement allowance is made by comparison of the employee's TPA versus what he or her earned in that particular month. If an employee worked up to his or her TPA hours and earned the compensation guarantee, then they are not entitled to a displacement allowance in that month. However, this elemental operation of NYD does not relieve the Carrier from its full term responsibilities to the employee under NYD and our IA.

TPAs are composed of the total compensation and total hours which the employee earned and worked in the prior 12 month period.³ Once that

³The protective period starts from the first instance of being affected (displaced or dismissed) and continues so long after the employee is unable to obtain a position producing total compensation equal to or exceeding the TPA. The protective entitlement is calculated based upon the individual's TPA and the compensation earned in any month. If the compensation is less than his TPA, then he is due the difference. See Article I, § 5 of NYD.

figure is derived, these totals are divided by 12 to calculate a monthly average by which each ensuing month is compared to determine if a displacement allowance is due. When an employee suffers a loss in compensation it is their explicit right to a displacement allowance for that month as dictated by the NYD TPA and our IA.

One reason you have denied our members their NYD protection is because, in your words, they were not "adversely affected" by the transaction. Let me point out that employees affected by a NYD transaction may not suffer an immediate loss in compensation, but that fact does not negate future entitlements. Moreover, your use of the terminology "adversely affected" is also misplaced. See for instance the decision of John LaRocco (FD 30000) in UP/MP v TCU (3-1-88) wherein he observed that:

As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented ... The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.⁴

In all of this, your assertions that providing the TPA to affected

⁴See Docket No. 67 of the Section 13 Committee (WJPA) wherein it was reasoned: "The five year protective period for a displaced employee would make little sense and provide little protection if each subsequent loss of earnings in the period had to be directly related to the coordination."

employees did not also provide them with an entitlement to NYD is both insupportable and a misrepresentation of our IA. It is TCU's position that the IA is clear on this matter. I suggest that you reflect upon the facts surrounding Article VII, and that we arrange to meet once again on this matter with the aim of settling this dispute. [footnotes in original]

On September 7th William Sjoberg, Director Labor Relations TTMS, responded
(TCU Exhibit 6):

Prior to the March 23, 2001 transaction, TCU-represented clerks employed by the Bessemer and Lake Erie Railroad (BLE) performed the headquarters clerical work (primarily accounting) for all 11 Transtar companies. The transaction resulted in BLE and three other companies splitting off from Transtar, and 83 BLE clerks transferring to Tracks Traffic and Management Services Inc. (TTMS), a Transtar company. TTMS provides accounting services for the remaining Transtar companies and it provides some clerical services for the four companies that split away.

As New York Dock coordination go, this should have been simple. No employees were to be relocated, and every employee would have a job after the transaction. The negotiations to develop an Implementing Agreement focused mainly on developing an orderly system whereby employees would be able to move to the job of their choice. We needed a system that would permit employees to "follow their work" in accordance with their incumbency rights under New York Dock, while simultaneously honoring each employee's seniority. Those two goals are not entirely compatible. As example, what were the parties to do if the senior-most employee wanted to take the job held by the junior-most employee, yet that junior employee had a right under NYD to follow his/her work.

Over the course of our negotiations, the parties overcame that problem by pooling similar jobs so that the incumbents in each such pool would be protected for purposes of obtaining a post-transaction job in the same pool. If an employee chose to bid to a different pool, he/she would be at risk of being outbid by a junior employee who was protected account of his/her status as an incumbent of the "different" pool.

The parties were not inexperienced at developing implementing agreements; the Organization recognized that the Carriers could force a prompt parties-pay arbitration under New York Dock if progress were to drag in the voluntary talks, and that such arbitration routinely yields a barebones

award. The Carriers recognized that nonetheless, some incentive would be needed to expedite the process. Accordingly, the Carriers proposed to increase the wage rates for a number of positions and the Organization agreed.

Finally, as you are well aware, carriers in similar circumstances can simply refuse to provide TPA information when claimants are unable to readily demonstrate that there were adversely affected by a transaction. As a further incentive to make the agreement acceptable to your members, the Carrier agreed to provide TPA information to virtually all headquarters TCU-represented employees who requested such information, without requiring such employees to demonstrate that they were adversely affected. On written request, BLE would "furnish a test period average to all BLE employees who, pursuant to this agreement:

- 1) follow(ed) their position/work to TTMS;
- 2) transfer(red) to TTMS;
- 3) or remain(ed) with their position/work on BLE.

In addition, BLE agreed that it would also... "on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company."

At no time during the negotiations to reach an Implementing Agreement did the carriers ever promise, suggest or even imply that our offer to provide TPA information was tantamount to pre-certifying any employees. The commitment to provide TPA information was nothing more than a good will gesture that we felt would be of interest to the employees. It was not a commitment of pre-certification of all headquarters employees; and it certainly was not a six-year commitment by the Carriers to pay over a hundred employees a displacement allowance every month that their earnings would randomly fall short of their TPA.

The Organization responded on October 15th wherein it was pointed out that (TCU

Exhibit 7):

As you are aware, it was the carriers that desired a prompt IA with TCU and pressed for such. Assuredly, the carriers wanted an IA with TCU in place before the closing date of its reorganization for a number of reasons – saving additional expense and avoiding delay being foremost.

It was in this atmosphere the carriers approached TCU and our IA was fashioned. One quid pro quo for TCU's timely handling during the § 4 process was the prompt election of benefits outlined in Article VII of our Agreement and the record bears me out on this. The providing of test period averages (TPA) to all affected employees was in recognition of their displacements and to provide each with an informed source for election of NYD benefits.

Notwithstanding, as the carriers refuse to accept the clear and unambiguous language of our Agreement, we jointly have agreed to establish a NYD § 11 Committee to resolve the matter. It has been agreed that Mr. J. C. Fletcher will serve as the § 11 Committee's Neutral Member with March 21, 2002 agreeable to all parties for its meeting.⁵

Finally, on October 31st the Carriers responded in (TCU Exhibit 8):

The parties have jointly agreed to establish a New York Dock § 11 Committee of Arbitration with Mr. J. C. Fletcher to serve as the Neutral Member. We further agreed to hold the hearing on Tuesday, January 15, 2002 in the Chicago area. Your footnote suggestion that the parties exchange their respective submissions on January 10, 2002 is agreeable to the Carrier.

Based upon your remarks at conference on October 4, 2001, the Carrier felt that the parties would work together to pose the "Question at Issue" addressing eligibility for active employees first. Depending on the resulting answer, a question may or may not need to be framed later to cover inactive employees. In short, I thought that we would simply be resolving whether or not certain TCU-represented employees were automatically certified as displaced employees when the Carrier provided them with their individual test period average information.

It was with some surprise, therefore, that I noted the series of perplexing compound questions that you had posed, and your declaration that those questions constitute "the Organization's Questions at Issue." The Carrier felt that the dispute was, as you stated in the penultimate paragraph (page 4) of your August 28, 2001 letter, over the Carrier's "assertion that providing the TPA to affected employees did not also provide them with an

⁵It is suggested the parties exchange their respective submissions on January 10, 2002. [footnote in original]

entitlement to NYD..." You went on to argue that the Carrier's position was insupportable, etc., and you suggested that "we arrange to meet once again on this matter with the aim of settling this dispute."

Unable to settle this matter in on-property handling the parties mutually agreed to present this matter of interpretation/application to this NYD § 11 Committee.

POSITION OF THE EMPLOYEES:

It is the position of the Employees that the parties' IA explicitly recognizes that all employees of the B&LE and those transferring to the TTMS were affected by the acquisition/control transaction. Moreover, the parties' negotiated IA was crafted in such a manner that all TCU represented affected employees were provided with an elective entitlement to the protective arrangement imposed by the STB.

Contrary to this, the Carriers assert that inclusion of Article VII in the IA: "was *nothing more than a good will gesture that we felt would be of interest to the employees.*" Additionally, the Carriers contend that even though the IA provided TPAs to affected employees, such proviso did not equate to a recognition that such employees were entitled to NYD since they were not "*adversely affected*" as the standard term is understood within NYD. (See TCU Exhibit 6)⁶

Adversely Affected

In regard to the Carriers' contention the affected employees were not adversely affected, the Employees point out to this Committee that nowhere within the four-corners

⁶Carrier has also contended in certain correspondence to individual employees that simply because their earnings fluctuated after the transaction did not justify filing a claim for their displacement allowances.

of NYD can the term "*adversely affected*" be found. The Carriers' secondary argument that merely providing TPAs to affected employees did not, in its view, extend protection to employees that otherwise might not be considered as entitled to NYD protection is disingenuous and counter to the spirit and intent of the parties' IA. This adverse affect argument made by the Carriers must be viewed for what it really is – an attempt to mitigate the commitment made in Article VII of the IA to provide NYD protection for all employees.

As this Committee is aware, there are two usual and customary ways in which employees are affected by a NYD transaction – these are found in Article I, § 1 of NYD wherein it states:

1. Definitions. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "**Displaced employee**" means 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 conditions.

(c) "**Dismissed employee**" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction. [**bold emphasis applied**]

In the transaction under review it was without question that all the B&LE employees were directly affected by the abolishment of their assignments and the transfer of their work to TTMS. As such, TCU took the position that each employee was being displaced

by the transaction and directly affected by either being displaced or dismissed.⁷ Since the rearrangement and realignment of B&LE work contemplated the establishment of an equal number of clerical assignments (at TTMS and B&LE) existing prior to the transaction the IA did not contemplate any dismissed employees.

Article II – Effects of the Transfer of the parties' IA provided that:

Notwithstanding the provisions of Article II of the February 7th Agreement, BLE employees entitled to preservation of employment who do not select their incumbent position and who refuse transfer assignment with TTMS (a position not requiring a change-in-residence) subsequently becoming furloughed will not be considered as affected by this transaction and will have their present protective entitlement under February 7th Agreement suspended until they are recalled to a regular position in accordance with the agreement rules. Furthermore, such employees will not be considered "dismissed" or "displaced" employees and they will not be entitled to the protective arrangement attached to this Agreement.

It was understood that employees not availing themselves of the opportunity to continued employment (either TTMS or B&LE) were arbitrarily placing themselves in a dismissed status.⁸ The affect and entitlement to the protective scheme was clearly

⁷The preamble of the parties' IA provided for the coordination of "certain clerical work in the areas of Payroll, Tax, Financial Services, General Accounting, Benefits Administration, Engineering, Transportation, Mechanical, Marketing, Asset Management, MIS, and Revenue Accounting into TTMS, a Transtar subsidiary, at Monroeville, PA." In all, 83 B&LE employees transferred to TTMS; those employees remaining with B&LE on the newly established assignments found themselves on jobs with markedly different duties and responsibilities than before and with greatly reduced employment opportunities.

⁸The fact that such employees would also suspend their Feb. 7th protective entitlement is in harmony with the decision found in SBA No. 1095 involving these same parties which involved a prior NYD transaction (TCU Exhibit 9). The importance of this background and impact upon this dispute will also be addressed in this submission.

contemplated by Article II – a specific warning was incorporated regarding retention of Feb.

7th protection if employees arbitrarily placed themselves in a dismissed status.

The decision found in UP/MP v. TCU (3-1-88) bears repeating (TCU Exhibit 10):

As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented ... The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.

By providing affected employees with their respective TPAs the IA fully contemplated that each was entitled to their election of NYD benefits if they so desired. Moreover, Article VII made the extension of NYD (via the TPA) mandatory. It was only when the employee was entitled to a displacement allowance was a claim to be filed. That is, if the employee's compensation exceeded their TPA calculation (with associate comparison to the hourly average), then no claim was filed. If, however, compensation was less than the TPA calculation, then the displacement claim was to be made within 60-days.

The IA incorporation specific references to §§ 5 & 6 of NYD – § 5 (a) of NYD

dictates that:

So long after a displaced employee's displacement allowance as he is unable...he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation receive by him in the position from which he was displaced.

As noted by Arbitrator LaRocco, *supra*, an adverse affect may not materialize immediately when a transaction first takes place. It is understood that the earnings of any employee fluctuates from month to month – this is precisely the reason the Interstate Commerce Commission (ICC) fashioned the averages found in §§ 5 & 6. This brings us to an ancillary argument which the Carriers have attempted to inflict upon affected employees; that being that “*fluctuations in gross earnings from month to month do not, in and of themselves, justify a claim for a displacement allowance.*”

In reply to the Carriers' assertion that fluctuating earnings do not justify a displacement claim is the § 11 decision found in BNSF v. TCU (5-1-99). In that decision Neutral Member Joseph Sickles held that (TCU Exhibit 11):

We also reject the Carrier's argument that fluctuations in earnings are normal and, therefore, an occasional drop in earnings does not mean an employee is "displaced." We find that the New York Dock conditions require a monthly determination for the duration of the protective period as to whether an individual employee is in a "worse position" with respect to compensation, i.e., if his monthly earnings are less than his monthly average compensation in the test period.

Therefore, the Carrier must compute the TPAs for each claimant. This amount must include all overtime worked during the test period and during the protective period. In any month that a claimant's compensation falls below his TPA, the Carrier must pay a displacement allowance. The only exception that would allow a denial of the displacement allowance is if a

claimant refuses to work overtime for which he is qualified and consequently does not work enough hours in the month to match his TPA for hours paid.

As a means to minimize the amount of protective benefits it must pay, the Carrier is entitled to require employees to qualify for the available overtime work on the Carrier's time. In the absence of such a requirement, however, the Carrier may not shift the burden onto the claimants if they do not work their TPA hours because there is insufficient overtime for which they are already qualified.

Mirroring the argument proffered by the Carriers in the instant case, it was held by Referee Sickles that compensation and not rate of pay was the determining factor in whether an affected employee was due a displacement allowance.⁹ In holding that each employee was affected by the transaction, BNSF was obligated to compute TPAs for compensation paid and hours worked as requested by the Organization. It was then a simple matter to apply the principles articulated by Referee Bernstein in Docket No. 62 (TCU Exhibit 12) under the Washington Job Protection Agreement (WJPA) to determine whether a displacement allowance was due an employee.

The TPA is the benchmark in the monthly determination of whether or not the affected employee is due any displacement allowance. The purpose of providing a TPA is to determine the extent upon which the employee's monthly displacement allowance is affected by post transaction earnings. NYD requires a monthly determination of the individual's compensation based upon the TPA calculation for the duration of the

⁹The factual circumstances in the BNSF dispute involved employees displacing to assignments with the exact same rate of pay as the assignments vacated. Quite rightly Referee Sickles found that the ICC did not intend hourly pay or rate of pay as the criterion for assessing the impact a transaction had upon employees.

employee's protective period – this procedure is elemental to NYD.

It was for this very reason, and the acceptance that all B&LE employees were being affected by the transaction that prompted the inclusion of Article VII in the IA. If, in fact, Article VII was merely to humor employees or a goodwill gesture the Carriers felt would be of interest to employees, then inclusion of that explicit language in the IA would have form without function.¹⁰

The Employees will now turn to the events surrounding the parties' IA and inclusion of Article VII.

§ 4 Process

As stated in our letter of October 15, 2001 (TCU Exhibit 7) it was the Carriers that pressed for a prompt IA and approached the Organization as early as October 5, 2000.

¹⁰See CSX v. IBEW (10-3-90) wherein Neutral Member J. Fletcher held that:

The language in Section 5(a) has been in place since 1979. And even before that similar, if not identical, language appeared in Section 6 of the May 1936, Washington Job Protective Agreement, which, by all accounts, was the precedent establishing forerunner for the I.C.C.'s earlier, Oklahoma, New Orleans and Southern-Central of Georgia, Employee Protective Conditions, required to be imposed in abandonment and merger transactions by Section 5 (2) (f) [§ 11347) of the Interstate Commerce Act. From time to time negotiators in drafting employee protective and implementing agreements have altered the formula established by WJPA Section 5 and/or sections of I.C.C. employees protective conditions, to suit their situations, but this was not done in the transaction under review here.

The fact that the parties to the Implementing Agreement did not, intentionally or unintentionally, see fit to alter, what others have termed "the straightforward language of Section 5(a)", as it concerns the establishment of Test Period Averages, must be given great weight and precludes subsequent alteration, on our part thru the Arbitration process... (TCU Exhibit 13)

As the Committee is aware, TCU was under no requirement to enter the §4 process until such time as the STB had made its determination in FD 33942, which occurred on November 30, 2000. The Organization did enter into conference discussions regarding the proposed transaction commencing on October 18, 2000.

During the initial conference discussion, it became clear the Carriers had some very pressing reasons in pursuing a timely IA. In their Form 8-K report to the Securities and Exchange Commission (SEC) the Carriers outlined the reorganization of their operations that "*will allow USX and Holdings to follow their independent strategies for the units they will control.*" (TCU Exhibit 14)

At the Closing Date the parties were required to exchange stock (voting and non-voting) to consummate the deal.¹¹ Importantly and the impetus for the Carriers' negotiators to get a prompt IA were certain provisions of the reorganization agreement such as:

o Article XI – conditions of closing – provided for the consummation of all documents of good standing; opinions of counsel; warranties; covenants and agreements; no termination of pension plans or additional liability on USX; execution of documents; exchange of stock; etc.

o Article III – Employee Matters: provides for the continuation of employment for non-union and union employees. Also, (b) CBAs remain in place and USX and Holdings will "continue to provide all employment and entitlements with the terms of such CBAs except as modified by agreement of the parties or by an arbitrator in order to permit the transfer of employees..."

¹¹Closing date was the 2ND Business Day following satisfaction of the conditions set forth in Article XI of the Agreement.

If "Union BLE Transferees have not signed a TCIU Implementation Agreement indicating TCIU approval of the transfer ...as of Closing Date, all pension liabilities and any assets held in trust... will be transferred from the Transtar Inc... to a Spinoff Plan..."

o Article III, Section 3.3 -- Thrift Plans: Transtar will remain sponsor of the Savings Plan for represented employees (the Thrift Plan).

(d) If TCIU Approval has not been obtained by Closing Date... all Transtar assets attributable to Union BLE Transferees will be transferred to the trust association and transferred back after agreement.

o Section 3.4 Insurance and other Welfare Benefits Plans – Transtar will continue all H/W, life and other insurance programs currently provided to employees and retirees of the USX companies.

If TCIU approval not obtained... such will be held in trust until agreement.

Obvious from this and other conditions of the reorganization plan, having an IA in place before the Closing Date alleviated a lot of problems or complication arrangements necessary if TCU was not receptive to the Carriers' overtures. Therefore, the parties held conference discussions; what transpired during those negotiations as well as the ultimate document reflected both the usual *quid pro quo* atmosphere inherent in § 4 negotiations and accommodations insuring timely acceptance by the Employees.

One of the Organization's primary requirements in accommodating the Carriers in a timely IA was the explicit recognition that all B&LE employees at the headquarters facility were affected by the transaction and entitled to NYD protection. From the very first conference discussion (October 18th) the Organization made this condition clear to the Carriers.

Attached as TCU Exhibit Nos. 15 & 16 are notes taken by Sam Siriano, Asst. to the

President/ASD, and TCU IVP Jim Quilty during these negotiations (Siriano notes; Quilty notes).¹²

Siriano Notes

The Siriano notes start on October 18th; they outlined that 118 positions at B&LE will be affected with 88 transferring to the USX side (TTMS) – 27 in a shared area and 61 non shared – with 30 positions to remain on the B&LE. Important is the notation stating TCU's position that an: *"Employee who refused to go or bump – NYD apply – to all employees."*

On page 2 of the notes, TS (Ted Stafford, Pres. ASD) asks: *"Will [employees be] entitled to new 6 year protection – [with choice] of the new or old one [protection]."* John Ingham, on behalf of the Carriers, responds that they will *"furnish new TPA 1st [to affected employees]."*

On page 3 Jim Quilty asks: *"Do you want incumbency?"* To which John Ingham answers that Carriers' wish employees to go to TTMS *"by seniority - when filling jobs under TTMS"*. Amplifying this desire for the incumbents to go to TTMS, Ingham on page 4 states that arrangement would be most appealing and the Carriers were: *"willing to give TPAs - [if employees] bid in position under incumbency rule."* This is again referenced on page 5

¹²Parole evidence *"doctrine does not preclude the admissibility of evidence designed to explain an ambiguity or to establish the meaning of terms or provisions which have a particular trade or occupational meaning."* Bringham Apparel Corp. 52 LA 420, 431 (1969) Arbitrator Anderson. Also see How Arbitration Works, Elkouri and Elkouri, *"...evidence of the precontract negotiations is admissible to aid in the interpretation of the ambiguous language."* (citing Bringham supra)

where Ingham states Carriers have a "*Preference [to] incumbency prior rights.*"¹³

Finally, the Siriano notes conclude on page 6 with the return to the question of applying NYD by Ted Stafford and Jim Quilty asking: "*Does protection overlap?*"¹⁴ And, Quilty asks if the employee is "*Drawing protection from two years - / new TPAs if you have 4 years remaining opt to stay on the 1st or new [and] higher [protective entitlement] opt to elect the 2nd NYD.*" This discussion involves the fact that employees with pre-existing NYD protection and given a new TPA (lower) may wish to stay on that pre-existing or prior NYD protection until it expires and then elect the remainder of the 2nd NYD entitlement until such time as it expires.

This particular question over the application of a secondary entitlement to NYD was subsequently addressed by the Carriers when providing employees with their TPAs and will be discussed later.

Quilty Notes

The Quilty notes reference the November 16th meeting. Reference to the issue before this Committee and the Carriers' commitment to NYD entitlement cited in the Siriano notes is also found on page 1 of the Quilty notes. In his reference IVP Quilty notes that Carriers are "*willing to give TPA [to employees] who bid in job under incumbency*

¹³See TCU Exhibit 5 wherein the Organization references the Carriers' dissatisfaction with a "Sadie Hawkins" rundown process and the importance it placed on avoiding same.

¹⁴This statement refers to the fact that some B&LE employees were already under NYD protection from a prior transaction – see footnote no. 7 and TCU Exhibit 9.

rule.”¹⁵

Additionally, TCU Exhibit 17 is the e-mail sent from District Chairman Bennett to ASD President Stafford which outlines the Carriers’ informational session with the employees held on October 27, 2000. In item no. 3 DC Bennett states that the Carriers committed to TPAs to employees, but “danced” around the issue of employees staying on pre-existing NYD protection when given their option to a new NYD entitlement under the TTMS transaction.

By the commitment of the Carriers via Article VII of the IA as well as the negotiations that lead up to the IA, it is clear that extension of NYD protection to all affected employees was accepted by all parties.¹⁶

Secondary NYD entitlement

Evident from the negotiating record, the issue of NYD entitlement for all B&LE affected employees was put to rest by Article VII. Further, with the initial transfer of employees and work it appeared that the Carriers understood the impact of their negotiations. TCU Exhibit 18 is presented as the proverbial smoking gun.

In addressing the secondary entitlement to NYD and what would become of a pre-existing NYD protective period, the Carriers wrote to employee W. J. Barman on May 15,

¹⁵As the Committee is aware, subsequent negotiations expanded such recognition as found in the final draft of Article VII.

¹⁶As a sidebar, the Carriers did not provide TPAs to 3 janitors at its Monroeville facility. When asked why these 3 employees were excluded, the Carriers asserted that they were not affected by the transaction and therefore under the terms of the IA were not given TPAs.

2001, that:

This letter is in reply to your request for Test Period Average (TPA) information in accordance with the December 22, 2000 Implementing Agreement between the Bessemer & Lake Erie Railroad, Tracks, Traffic & Management Services, Inc., and the Transportation Communications International Union.

Those employees who are still covered under New York Dock (NYD) from an earlier coordination must elect whether to remain under such coverage, or to come under the coverage of the December 22, 2000 Implementing Agreement using the new TPA and the average hours per month set forth above. The maximum duration of coverage under either coordination is six years or the individual employee's length of service prior to the applicable transaction, whichever is least. An employee who chooses to remain covered by a prior NYD transaction will continue to be covered only for his/her eligibility period remaining from such prior transaction. Enclosed is an election form for you use in choosing coverage; please complete and return it within ten (10) days from the date of this letter. [underline added]

Additionally, in another letter to an employees (K. Shepard) dated June 13, 2001 (TCU Exhibit 19) the Carriers wrote:

This is to advise you that your monthly TPA allowance is \$3,330.73 and your monthly average hours worked are 178.71.

You are reminded that the foregoing in dollar amount and hours are not simply a compensation guarantee, but rather such allowance is payable on "so long after a displaced employee's displacement allowance as he is unable, in the normal exercise of seniority rights under existing agreements, rules and practices, to obtain a position producing..." [underline applied]¹⁷

The Employees assert that both of these documents are irrefutable evidence that the Carriers fully understood the application of NYD via Article VII of the IA. Moreover, in view of the negotiating record any contention to the contrary by the Carriers is

¹⁷Carriers are quoting from § 5(a) of NYD.

disingenuous and insupportable on its face.¹⁸

As previously pointed out (footnote no.7) these same parties have previously been involved in § 4 negotiations and arbitration (TCU Exhibit 9). The Carriers are not novices in this arena and were fully aware of what Article VII and their commitment to the Employees entailed.¹⁹ Contentions to the side, the Carriers knew full well what Article VII meant to the negotiations; the ultimate consummation of the IA; and, admission that all B&LE affected employees were entitled to NYD protection.

Therefore, the Employees aver that Article VII was not placed within the IA to humor the employees or as a goodwill gesture by the Carriers. Article VII is what it is – an understanding between the parties under the auspices of § 4 of NYD to provide protective entitlements to all B&LE affected employees.

CONCLUSION:

The Employees have shown by the factual record presented herein that:

1) During the § 4 process the parties agreed that all B&LE employees were displaced as that term is understood within §1 of NYD and affected by the transaction;

¹⁸ See GTW v BRC (1-10-97) (J. Fletcher) wherein it was reasoned: "One of the basic principles of labor relations is that negotiators must be prepared to stand behind their statements."

¹⁹In applying a strict interpretation to a contested provision, Umpire Harry Shulman emphasized that: "The negotiators were not tyros in the art. They were skilled hands who worked hard, intelligently, and alertly. The agreement was not negotiated in a hurry or under pressure. Careful scrutiny was given to the language after agreement was reached on the substance." Ford Motor Co., 1 ALAA ¶167, 126, p. 67, 265 (1945). Also see Carriers' letter of September 7th (TCU Exhibit 6) wherein they admit they "were not inexperienced at developing implementing agreements."

2) Article VII recognized that all B&LE employees were affected and provided each with an election of the NYD protective benefits based upon consideration of their respective TPAs;

3) Employees with pre-existing NYD protection were given the opportunity to retain prior entitlement until expiration and then continue on with the remaining term of the secondary protective period;

4) The straight-forward language of §§ 5 & 6 of NYD renders nugatory the Carriers' excuse that fluctuations in earnings do not provide entitlement to displacement or dismissal allowance;

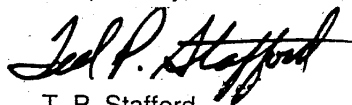
5) The negotiating process gives evidence of the parties' intent in fashioning Article VII;

6) The Carriers' written statements to Claimants attests to the fact that it was fully aware of the application of Article VII NYD entitlement; and,

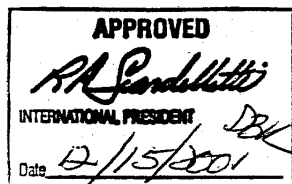
7) Inclusion of Article VII was not to humor or make the IA attractive to the Employees, but a viable provision which mandated the extension of NYD protection to all B&LE employees.

Therefore, the Employees pray this Committee will answer all the "Organization's Questions at Issue" in the affirmative and instruct the Carriers to allow each employee desiring Article VII protection their entitlement making each whole for any loss in displacement or dismissal allowances.

Respectfully,



T. P. Stafford,
President, ASD/TCU





ARBITRATION COMMITTEE

In the Matter of the	)	
Arbitration Between:	)	
	)	OPINION AND AWARD
TRANSPORTATION-COMMUNICATIONS	)	
INTERNATIONAL UNION, (BRAC)	)	
	)	Pursuant to Article I,
Organization,	)	Section 11 of the
	)	New York Dock Conditions
and	)	
	)	
MISSOURI PACIFIC RAILROAD	)	
COMPANY and UNION PACIFIC	)	Case No. 4
RAILROAD COMPANY,	)	Award No. 5
	)	
Carriers.	)	

Hearing Date: November 11, 1987
Hearing Location: Sacramento, California
Date of Award: March 1, 1988

MEMBERS OF THE COMMITTEE

Employees' Member: F. T. Lynch
Carriers' Member: L. A. Lambert
Neutral Member: John B. LaRocco

ORGANIZATION'S QUESTIONS AT ISSUE

- (1) Is James Brewer a displaced employe pursuant to New York Dock?
- (2) Shall Carrier now be required to restore James Brewer's displacement allowance retroactive to the date he was affected by displacement pursuant to Implementing Agreement No. 28?

CARRIER'S QUESTION AT ISSUE

- (1) Is Omaha Clerk J. Brewer entitled to the restoration of New York Dock Conditions under Merger Implementing Agreement No. 28?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (MP) and the Western Pacific Railroad (WP). [ICC Finance Docket No. 30000.] To compensate and protect employees affected by the merger, the ICC 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.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

By stipulation, the Organization and the Carrier filed post hearing letter briefs with this Committee. The Neutral Member received the final correspondence (from the Organization) on February 13, 1988. Thus, this decision is being issued within the Section 11(c) time limitation.¹

II. BACKGROUND AND SUMMARY OF THE FACTS

Pursuant to Section 4 of the New York Dock Conditions, the MP and UP served written notice, dated January 14, 1986, on the Organization of their intent to transfer and coordinate UP

¹All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will only cite one particular section number.

Operation Control Specialists with MP On-line System Support Specialists. On April 16, 1986, the parties entered into Implementing Agreement No. 28 to cover employees affected by the transaction. The Carrier executed the transaction during September, 1986. The work was transferred from Omaha and coordinated with similar work performed at St. Louis.

As part of the coordination, the Carrier abolished Clerk Roth's Operation Control Specialist position effective September 18, 1986. In accord with Implementing Agreement No. 28, Clerk Roth exercised his seniority to displace Claimant from his General Clerk position in the Banking Operation Bureau of the UP Accounting Department. The record is unclear if thereafter a General Clerk vacancy arose or if the Carrier created a new General Clerk position. The evidence, however, strongly suggests that the latter occurred because the Carrier wanted to stop the chain of displacements. Whether old or new, Claimant procured a position with the same job title, identical duties, equal pay rate and same location, bureau, and department as the position from which he was displaced.

On September 23, 1986, the Carrier told Claimant the amount of his protective guarantee under both the New York Dock Conditions and the February 7, 1965 Job Stabilization Agreement so Claimant could elect his protective benefits in compliance with the first proviso of Section 3 of the New York Dock Conditions. The Carrier computed Claimant's test period monthly average

earnings under the New York Dock Conditions to be \$2,670.95 with test period hours of 176.6 per month. Claimant's protected rate under the February 7, 1965 Agreement amounted to \$2,225.22 a month. Since Claimant's General Clerk position carried a monthly rate of \$2,425.18, Claimant chose New York Dock protection.

The Carrier paid Claimant a monthly displacement allowance of \$245.77 for a short period subsequent to the transaction. In early November, 1986, a UP Labor Relations Manager advised Claimant that the Carrier had erroneously provided him with protective benefits under the New York Dock Conditions. The Manager asserted that Claimant had not been adversely affected by the transaction and thus he was not a displaced employee as defined by Section 1(b) of the New York Dock Conditions. The Carrier reverted Claimant's protective status back to the February 7, 1965 Agreement and recovered from his later pay checks the displacement allowance it had earlier disbursed to him.

The primary issue in this case is whether or not Claimant is a displaced employee. In addition, resolution of the main issue involves consideration of several ancillary issues especially since this claim represents a lead case and similar claims are being held in abeyance on the property awaiting the outcome of this dispute. Specifically, the parties have requested this Committee to provide it with general guidelines for handling similar cases, which involve not only the definition of a displaced employee but also test period overtime earnings, the

necessity for an immediate entitlement to protective benefits and the extent to which a New York Dock transaction could possibly affect employees of the merged Carriers.

The definition of a displaced employee is set forth in Section 1(b) of the New York Dock Conditions which reads:

"'Displaced employee' means 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 conditions."

The formula for calculating a displacement allowance and the conditions under which a displaced employee receives the allowance are set forth in Section 5(a) of the New York Dock Conditions as follows:

"So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he

performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position." [Emphasis in text.]

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Claimant obviously fits the definition of a displaced employee since he was displaced by a senior Clerk who was directly affected by the transaction. The Carrier implicitly conceded that Claimant was entitled to a Section 5 displacement allowance inasmuch as it provided him with protective payments after Claimant was displaced.

Initially, the Organization argues that the words "adversely affected" do not appear in the New York Dock Conditions. Even without any difference between Claimant's test period average earnings and his current compensation, Claimant would satisfy the eligibility criteria for being a Section 1(b) displaced employee. Thus, Claimant need not show any adverse effect to be granted protective benefits.

Alternatively, Claimant was harmed by the transaction. Although Claimant attained a job with the same title, pay rate and general duties as his prior position, the transaction placed him in a worse position with respect to his aggregate compensation.

Claimant's test period average earnings were \$245.77 higher per month than the monthly rate of his new assignment. Claimant was affected immediately upon being unable to attain a position producing compensation equal to or exceeding the compensation he had received in the position from which he was displaced. The Carrier improperly equates the term "position" to the word "assignment." Arbitration Board No. 284 (Robertson) ruled that the term "position" is "...not synonymous with job or assignment but rather connotes status, situation or posture." The Board went on to observe that the purpose of protective conditions is "...to assure an affected employee that his employment status insofar as compensation and working conditions were concerned would be preserved to him for the ...protective period..." Therefore, an employee may be placed in a worse position with respect to his compensation or rules governing working conditions even if he obtains a position with the same rate of pay as his former job. See also Public Law Board No. 1409 (Edgett).

The Organization further argues that even if there was a gap between the date of the transaction and the month Claimant incurred a diminution in compensation, the delayed repercussions would be attributable to the transaction. UP/MP v UTU, NYD §11 Arb., Case 3 (Fredenberger, Jr.; 6/24/86). Thus, Claimant need not suffer a decrease in compensation simultaneous with implementation of the transaction to become a displaced employee.

Section 5(a) of the New York Dock Conditions provides that the Carrier shall use Claimant's total compensation during the test period to obtain his test period average earnings. Acknowledging that the formula for calculating the displacement allowance is arbitrary, Arbitration Board No. 284 nonetheless decided that the Carrier must count all earnings derived from a protected employee's employment status. Thus, the Carrier cannot deduct what it calls extraordinary overtime from Claimant's test period average earnings. Even if abnormal overtime compensation were to be excluded from the displacement allowance formula, the Carrier has failed to demonstrate that Claimant received extraordinary overtime during his test period. Instead, subsequent to Claimant's displacement, the Carrier created a new position which was awarded to Claimant. The increase in office manpower eliminated overtime work.

B. The Carrier's Position

While the Carrier admits that Claimant was displaced because of a New York Dock transaction, it vigorously argues that Claimant was not placed in a worse position with regard to either his compensation or rules governing his working conditions. Claimant procured a position with exactly the same rate of pay as his prior job. In essence, nothing changed. He worked an identical job at the same location with the same duties. Claimant worked under the same collective bargaining agreement that he was subject to prior to his displacement. Thus, there was no change

in the rules governing Claimant's working conditions. An employee who is able to exercise his seniority to a position carrying the same or higher rate of pay as the position from which he was displaced is not entitled to a displacement allowance. BRAC v. CUT, Appendix C-1 Arb. (Rohman; 7/13/73); IBEW v. PC, Appendix C-1 Arb. (Rohman; 8/6/74); RED v. AT & SF, Appendix C-1 Arb. (Gilden; 2/25/74). Put simply, Claimant was not adversely affected. For a short time, the Carrier incorrectly provided Claimant with a displacement allowance but as soon as it detected its error, the Carrier promptly recovered the overpayments and accurately reverted Claimant's protection back to the February 7, 1965 Job Stabilization Agreement.

Due to some extraordinary conditions necessitating overtime, Claimant received unusually high earnings during his test period. With its submission, the Carrier submitted a statement from Banking Manager Stogdall attesting that, between January, 1985 and January, 1986, the Banking Bureau was developing a new mechanized system for processing MP employee wage attachments. The installation of the new computer system was made in anticipation of several Accounting Department consolidations. The Manager emphasized that Claimant did not earn any overtime subsequent to his test period demonstrating that the prior overtime compensation was extraordinary and excessive. The ICC did not promulgate the New York Dock Conditions to confer a windfall upon employees. In Docket 137 of the Section 13 Disputes

Committee, Referee Bernstein adjudged that an unusual increase in overtime earnings, directly caused by the impending coordination, are excluded from the total compensation used to determine an employee's test period average earnings. When Claimant's excessive overtime compensation is factored out of the displacement allowance formula, he suffered no loss of earnings.

In a related issue, the Carrier is alarmed by the chain of displacements caused by employees who exercise their seniority. According to the Carrier, a single displacement causes a domino effect creating absurd situations where the Carrier inequitably pays eight (or more), instead of merely one, displacement allowances.

IV. DISCUSSION

To some extent, the parties, especially the Carriers, have combined what is really two separate issues into one issue. To minimize any confusion, the Committee will separately address the following issues. First, was Claimant a displaced employee within the meaning of Section 1(b) of the New York Dock Conditions? Second, if Claimant was a displaced employee, was he entitled to a displacement allowance during any month subsequent to September, 1985?

Section 1(b) lays down a two pronged, cause and effect test for determining if a worker is a displaced employee. The causation step of the test concerns whether Claimant was directly or indirectly affected by a New York Dock transaction. In this

case, the parties concur that Claimant was displaced from his General Clerk position as a result of a transaction. To satisfy the second prong of the test (the effect), an employee must have been placed in a worse position with respect to either his compensation or rules governing his working conditions. It should be noted that the employee need not suffer both a reduction in compensation and be placed in a disadvantageous position with respect to rules covering his working conditions. The employee must only show one or the other. As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented. UP/MP v. UTU, NYD § 11 Arb., Case No. 3 (Fredenberger, Jr.; 6/24/86). The Appendix C-1 arbitration decisions cited by the Carriers are distinguishable since the employees in those cases did not show a reduction in compensation at any time during their protective period. Nonetheless, the critical words "worse position" contemplate that an employee must suffer some detriment to his employment status. The parties' dispute herein centers on whether or not Claimant was placed in a worse position with respect to his compensation. More precisely, the parties disagree over whether or not Claimant's test period average earnings were improperly inflated because he performed overtime service during his test period.

Prior Arbitration decisions differ over what earnings should be included in a worker's test period average earnings calculation. Compare Arbitration Board No. 284 (Robertson) with Section 13 Disputes Committee, Docket No. 137 (Bernstein). Thus, the term "total compensation" appearing in Section 5(a) of the New York Dock Conditions is susceptible to more than one interpretation. However, the term cannot be wholly void of meaning. If the ICC had desire to restrict test period average earnings to an amount less than aggregate earnings, it would have used words such as "straight time wages" or "monthly rate of pay" or "hourly pay rate" or "normal earnings" in lieu of the broad terms "monthly compensation" and "total compensation" which are found in Section 5(a). While test period average earnings cannot be computed solely with straight time earnings, the term "total compensation" in protective arrangements like the New York Dock Conditions has evolved over the years into a meaning slightly at variance with the literal language. As the Section 13 Disputes Committee ruled, excessive overtime earnings directly attributable to the imminent coordination are outside the ambit of total compensation. The exception is narrow. The Carrier bears the heavy burden of proving that the overtime was extraordinary and linked directly to the impending implementation of the transaction. Regular overtime, recurring overtime or casual overtime attached to any assignment is properly included within the test period average earnings. The narrow exception, which

excludes only one type of overtime, is designed to prevent employees from profiting from the transaction. Excessive overtime earnings arising directly from the transaction would not have otherwise accrued to the employee if the Carrier did not implement the transaction. In such instances, the employee would obtain a windfall multiplied by the number of years in his protective period. Whether any overtime which an employee earns during this test period should be included or excluded from the Section 5(a) formula must be decided on a case by case basis using the guidelines discussed above.

In this particular case, the Carrier has not demonstrated that the overtime Claimant performed during his test period arose directly in anticipation of the imminent transaction. When the Carrier initially revoked Claimant's New York Dock protective status, it did not allege a miscalculation in Claimant's test period average earnings. Instead, the Carrier premised the revocation entirely on Claimant's capacity to procure an identical position with a pay rate equal to his prior position. The Carrier focused solely on Claimant's basic monthly pay and wanted to exclude all earnings above that rate. However, as we discussed above, the test period average earnings often will include earnings above and beyond straight time wages. As this case neared arbitration, the Carrier raised the abnormal overtime issue. To buttress its assertion, the Carrier submitted the statement from the Banking Manager. However, his statement

reveals that Claimant's overtime earnings, which were fairly constant during his test period, were neither abnormal nor related to the transaction covered by Implementing Agreement No. 28. The introduction of the computer program was completed by January, 1986, yet Claimant continued to perform overtime service through June, 1986. Indeed, his overtime earnings apparently peaked in March, 1986 when he received overtime pay of \$704.27. As the Manager attested, the workload was greater than the clerical staff could handle during regular work hours. With the addition of another position following Claimant's displacement, the overtime disappeared. Therefore, the most plausible explanation for the test period overtime was a steady workload which employees could not handle without working overtime. Finally, this Claimant did not participate in the transaction covered by Implementing Agreement No. 28 (although he was clearly affected by the transaction). The Carrier has not explained to this Committee how Claimant's test period overtime was due to an impending coordination which did not result in the abolishment of his position. Therefore, an employee can incur a reduction in compensation even if he retains the same job title, same straight time rate of pay and general duties. Arbitration Board No. 289, Docket No. 2 (Bernstein).

Claimant fell squarely within the definition of a displaced employee.

Because we have found that Claimant is a displaced employee, we must address our second issue, that is, whether he is entitled to a displacement allowance. Even if an employee satisfies the definition of a displaced employee, he might not be entitled to a displacement allowance during each month of his protective period. UTU v. C&O/B&O, NYD § 11 Arb. (Prover; 5/18/87).

The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.

The Carrier is concerned about the chain of displacements which, in the long run, steadily expands the pool of employees receiving New York Dock protective benefits. Nothing in the New York Dock Conditions places a cap on the number of employees who might receive displacement allowances. The employee need only

trace his displacement to a Section 1(a) transaction. [See also Section 1(c) which defines a dismissed employee.] The Carriers nonetheless contend that the chain of displacements causes them to disburse an excessive and inequitable number of displacement allowances. We are unpersuaded by this argument. The Carriers are forgetting the source of their problem. It is the Carriers' transaction that disturbs work place tranquility. Absent the transaction, there would not be a chain of displacements. In addition, the bumping which occurs when a transaction is implemented simply reflects the natural operation of the well entrenched seniority principle. The parties recognized, in Article III, Section 3 of Implementing Agreement No. 28, that the effects of a transaction could flow to areas remote from the department where the transaction was actually implemented. Finally, while the chain of displacements may require the Carriers to pay many allowances, the Carriers' liability is not limitless. Should an employee fail to exercise his seniority to an available position producing compensation greater than the position he elects to retain, Section 5(b) of the New York Dock Conditions allows the Carriers to offset the employee's protective guarantee.

TCU and UP/MP
NYD Section 11

Award No. 5
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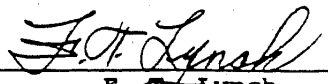
AWARD AND ORDER

The Answer to the First Question at Issue submitted by the Organization is Yes.

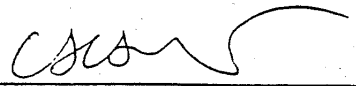
The Answer to the Second Question at Issue submitted by the Organization is Yes.

The Answer to the Question at Issue submitted by the Carrier is Yes.

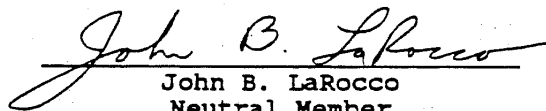
Dated: March 1, 1988



F. T. Lynch
Employees' Member



L. A. Lambert
Carriers' Member



John B. LaRocco
Neutral Member

ARBITRATION PURSUANT TO ARTICLE I, SECTION 11
OF THE NEW YORK DOCK CONDITIONS

In the matter of ICC Finance
Docket No. 32549 between

Burlington Northern Santa Fe
Railway Company

-and-

Transportation-Communications
International Union

DECISION

Before the Arbitration Committee

J. C. Campbell, Organization Member
Dan Kozak, Carrier Member
Joseph A. Sickles, Neutral Member

BACKGROUND INFORMATION

The Interstate Commerce Commission (ICC), the predecessor agency of the Surface Transportation Board (STB), approved a merger and consolidation of the Burlington Northern Railroad Co. (BN) and the Atchison, Topeka and Santa Fe Railway Co. (SF) on August 16, 1995 (ICC Finance Docket No. 32549). The ICC imposed the *New York Dock* labor protective conditions for affected employees. On December 19, 1995, the Burlington Northern Santa Fe Railway Company (BNSF or the Carrier) and the Transportation-Communications International Union (TCU or the Organization) reached an implementing agreement under the *New York Dock* requirements.

Subsequently, the Carrier notified the Organization on January 10, 1997, of its plans to relocate certain clerical work. The Carrier planned to move the field support work that was performed in SF Seniority District 709 in Topeka, Kansas, to a BN district in Fort Worth, Texas, 114

clerical positions were affected. At the same time, the customer service work that was being performed in Fort Worth would move to SF Seniority District 709 in Topeka. This swap was accomplished on March 22, 1997. All of the customer service positions in Topeka were rebulletined.

Meanwhile, the Carrier also notified the Organization in December 1996 and January 1997 of its plans to move most of the accounting work being done in SF Seniority District 101 in Topeka to the BN in St. Paul, Minnesota. A total of 87 clerical accounting positions in Topeka (out of 101) were abolished in February and March 1997. The affected employees were placed in other SF positions in Topeka.

Many of the employees in SF Seniority Districts 709 and 101 were displaced or dismissed as a result of the two transactions and are receiving *New York Dock* protective benefits. However, the Carrier denied benefits to 24 employees from Seniority District 709 and 2 employees from Seniority District 101. When the parties were unable to reach agreement on the eligibility of these 26 employees for *New York Dock* protective benefits, the Organization invoked arbitration under Section 11 of the *New York Dock* conditions by letter of July 10, 1998.

A hearing was held on January 28, 1999, at the offices of the National Mediation Board in Washington, DC. The parties exchanged prehearing submissions on January 14, 1999, including numerous prior arbitration awards. Both parties were afforded full opportunity to present their arguments before the three-person arbitration committee.

ORGANIZATION'S STATEMENT OF THE ISSUE

"Are T.G. Bingham, et al., displaced employees pursuant to *New York Dock*? Shall Carrier now be required to determine the claimants' test period averages as of the date they were affected by a transaction and allow their claims for *New York Dock*?"

CARRIER'S STATEMENT OF THE ISSUE

"Are claimants entitled to a "displacement allowance" under the *New York Dock* conditions, Article 1, Section 5, even though each claimant displaced to a position with the same daily rate of pay as their former position, working conditions remained unchanged, and the quantum of work in the department, as measured by actual available overtime, increased subsequent to the transaction?"

STATEMENT OF FACTS

The relevant provisions of the *New York Dock* conditions state:

1. Definitions — (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means 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 conditions.

* * * *

5. Displacement allowances — (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protection period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further that such allowance shall also be adjusted to reflect subsequent general

wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

The parties agree that the swap of field support work and customer service work in Seniority District 709 and the transfer of accounting work out of Seniority District 101 were transactions under *New York Dock*. All 26 claimants in this dispute were placed in jobs at the identical wage grades they held before the subject transactions. Prior to the transactions, the 26 claimants had worked various amounts of overtime; subsequent to the transactions, they also worked various amounts of overtime.

The Carrier states, without refutation from the Organization, that the amount of overtime actually worked in the two seniority districts increased substantially in the year after the transactions. In Seniority District 709, overtime hours increased 24.9 percent from 1996 to 1997. In Seniority District 101, overtime increased 32.8 percent from 1996 to 1997.

The 26 claimants concluded that their incomes declined in at least some of the months following the transactions. The TCU requested that the Carrier compute the test period averages (TPAs)—average monthly compensation and average monthly time paid for—for the 26 claimants. The Carrier refused to compute the TPAs, insisting that the 26 employees were not adversely affected by the transactions.

POSITIONS OF THE PARTIES

Carrier's Position

The BNSF asserts that the claimants are not displaced employees under the *New York Dock* conditions because they were not placed in a "worse position" as a result of the transactions. Although the 26 claimants were affected by transactions, they were not adversely affected, the BNSF insists. All 26 claimants were placed in jobs at the same wage grade, and with the increase in overtime in their departments, they all maintained the same or greater potential for earnings:

A reduction in earnings for a month or so cannot automatically be assumed to be the result of a transaction, especially since the quantum of work in the affected offices, as measured by available overtime hours, actually increased in each of the seniority districts after the transaction. . . . An occasional diminution in earnings in a particular month after the transaction does not make an individual a 'displaced' employee.

The Carrier continues that a comparison of the average monthly compensation during the test period:

. . . to an isolated month of compensation following the transaction is not [the] proper criterion to determine whether an employee has been placed in a worse position regarding compensation as a result of a transaction.

The Carrier says that the claimants' reduced earnings were due to factors unrelated to the transactions. It notes that if the claimants did not work as much overtime after the transactions—despite the increased availability of overtime work—it was simply because many of them had not bothered to qualify for the overtime work on other positions that was available to them. According to the BNSF, qualifying would have been a simple matter, as it was the same type of work the claimants did on their regular jobs, but involved different commodities. Prior to the transactions, the claimants had taken the initiative to qualify for overtime work on other positions, and they are obligated to do so in their post-transaction positions in order to work the same number of hours they did before the transactions.¹

The BNSF further contends that it has no obligation to compute TPAs for employees who are not adversely affected by a transaction. The BNSF claims that the

¹The Carrier also briefly notes that some employees, on occasion, have refused overtime for which they were qualified.

Organization has requested TPAs as a back door approach to demonstrate that the claimants were in a "worse position." The Carrier cites several arbitration awards that have held that the TPA is a formula intended to calculate the amount of *New York Dock* protective benefits owed, not if such benefits are due. The Organization has the burden of first proving that the claimants were adversely affected by the transactions; and, the Carrier maintains, it has failed to do so in this case.

Organization's Position

According to the TCU, the Carrier initially denied *New York Dock* benefits to the claimants based solely on the grounds that they had been assigned to positions at the same wage grade and, therefore, were not placed in a "worse position" with respect to their compensation. The Carrier is mistakenly interpreting the term "compensation" as used in Section 5(a) of the *New York Dock* conditions to mean "rate of pay." The Organization submitted numerous arbitration decisions supporting its argument that "compensation" under *New York Dock* means total earnings, including overtime, allowances, bonuses, and other elements of pay.²

Using their pay stubs for the 12 months prior to the transactions and the months following the transactions, the claimants concluded that they had suffered a loss of earnings as a result of the transactions. The loss of earnings was due to post-transaction overtime, an element of "compensation" under *New York Dock*. Once there is a transaction and employees have identified facts which they believe demonstrate an adverse effect of the transaction, the burden shifts to the employer to prove that something other than the transaction was the cause, the Organization argues.

Moreover, it is not necessary that an employee's reduction in earnings occur immediately after a transaction in order to be related to that transaction, the Organization adds.

Late in the stages of handling on the property, according to the TCU, the Carrier seized upon the issue of overtime to bolster its argument that the claimants were not in a "worse position" as a result of the transaction, but rather as a result of their failure to work overtime. If the Carrier feels that individual employees are not fulfilling their obligations to make themselves available for sufficient overtime service to satisfy their average time paid for in the test period:

then the Carrier needs to decline their monthly claims on that basis, pay the displacement allowance which the Carrier calculates to

²The Carrier also submitted numerous arbitration decisions that equate "compensation" with "rate of pay." It is apparent that arbitral authority is split on this issue.

be correct, and let the displaced employee appeal the Carrier's declination if desired.

The TCU argues:

It is not appropriate for the Carrier to paint all of the displaced employees with the same broad brush, as it has done in this dispute.

The relocation of the clerical functions involved in this case was anticipated by the Carrier in its merger application to the ICC, the TCU notes. The transfers of functions between the BN and SF seniority districts would have been prohibited by the collective bargaining agreements were it not for the ICC-approved merger, and labor protective conditions were imposed as a quid pro quo. There can be no dispute that there was a "transaction" as defined by *New York Dock*, and the employees have identified facts (reduced earnings, as determined from their pay stubs) that demonstrate that they are in a "worse position." Therefore, the Organization asserts, the Carrier is obligated to compute the TPAs for the 26 claimants.

DISCUSSION

The initial issue that must be addressed—because it is central to the other issues raised—is the interpretation of the word "compensation" as it is used in Sections 1 and 5 of the *New York Dock* conditions. Both parties have cited numerous arbitration awards on this issue, and the cited awards are contradictory. The decisions submitted by the Carrier hold that an employee moved, following a transaction, to a new position at the same rate of pay is in no worse position with regard to his compensation—essentially equating "rate of pay" or "hourly rate" with "compensation." The decisions submitted by the Organization give a more expansive definition to the term "compensation," specifically stating that it includes overtime pay.

We are inclined to adopt the more expansive definition. Clearly if the ICC had intended "hourly pay" or "rate of pay" to be the criterion for assessing an adverse impact on employees affected by a transaction, they would have used one of those phrases in drafting the *New York Dock*

conditions. By using "compensation," the ICC must have had in mind elements in addition to straight hourly wages. The word "compensation" is broad enough to include shift differentials, allowances, overtime, and other elements of pay, in addition to the contractually provided hourly rate. Exceptions to the inclusion of *all* elements of compensation are very narrow.³

It is interesting to note that the broader definition of "compensation" could conceivably mean that an employee moved to a lower-rated job with a lower hourly rate of pay following a transaction may not be entitled to protective benefits under *New York Dock*. Such an employee could receive allowances or a shift differential or sufficient overtime work to more than make up the deficit in hourly wages. Using the Carrier's definition, this employee would be in a "worse position" because his **rate of pay** would be lower. Using our definition, this employee would not be entitled to a displacement allowance.

With overtime payments included in their pre- and post-transaction "average monthly compensation," and with the evidence from their pay stubs that their earnings declined in close proximity to the transactions, the claimants have established at least a rebuttable presumption that they are displaced employees entitled to *New York Dock* protective benefits. At that point, the Carrier was obligated to compute the TPAs for compensation and hours paid, as requested by the Organization. It strikes us as common sense to apply the principle Referee Bernstein articulated years ago in Docket No. 62 under the *Washington Job Protection Agreement*: "In the normal and usual case, applying the formula of Section 6(c) [which corresponds to Section 5 of *New York Dock*] will

³Neutral John B. LaRocco (*TCU and Missouri Pacific/Union Pacific*, March 1, 1998) has indicated that one of the very narrow exceptions to compensation to be included in the TPA is extraordinary overtime worked in anticipation of an imminent transaction. He added that the Carrier would have a "heavy burden" of proving that the overtime was linked directly to a transaction and was not part of regular, recurring, or casual overtime.

show whether an employee is "in a worse position with respect to compensation." The critical language is unchanged from the *Washington Job Protection Agreement*.

The Carrier has argued that the claimants' reduction in monthly earnings is unrelated to the transaction. The BNSF says the claimants' failure to qualify for the available overtime work and alleged refusals of overtime are responsible for the earnings deficits. The Carrier places strong emphasis on the fact that the amount of overtime actually worked in the affected seniority districts increased substantially after the transaction, and the employees had ample opportunity to earn compensation equal to their TPAs.

The overtime figures cited by the Carrier (and unrefuted by the Organization) do suggest that overtime certainly did not diminish in the affected seniority districts. However, the figures alone do not show if this overtime was suitable for the 26 claimants' wage grades or if individual claimants had sufficient seniority to be awarded the overtime. As the Organization suggests, a case-by-case investigation for each claimant would be necessary to determine if they failed to meet their obligations to make themselves available for service.

Even if a closer inspection reveals that there was sufficient overtime suitable for the claimants' wage grades and seniority, there is the issue of the claimants' failure to qualify for the particular overtime work available. The BNSF points out that the claimants had, on their own initiative, qualified for overtime work on other positions prior to the transaction, and argues that they had an obligation to do so once again after the transaction. We do not agree. In the absence of the transaction, the employees would have already been qualified for enough overtime to maintain their customary earnings. It was the transaction that put them in the "worse position" of no longer being qualified for an equivalent amount of overtime.

We also reject the Carrier's argument that fluctuations in earnings are normal and, therefore, an occasional drop in earnings does not mean an employee is "displaced." We find that the *New York Dock* conditions require a monthly determination for the duration of the protective period as to whether an individual employee is in a "worse position" with respect to compensation, i.e., if his monthly earnings are less than his monthly average compensation in the test period.

Therefore, the Carrier must compute the TPAs for each claimant. This amount must include all overtime worked during the test period⁴ and during the protective period. In any month that a claimant's compensation falls below his TPA, the Carrier must pay a displacement allowance. The only exception that would allow a denial of the displacement allowance is if a claimant refuses to work overtime for which he is qualified and consequently does not work enough hours in the month to match his TPA for hours paid.

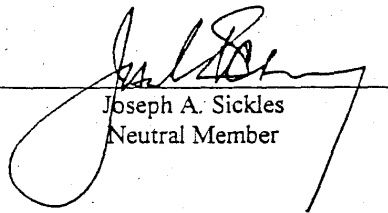
As a means to minimize the amount of protective benefits it must pay, the Carrier is entitled to require employees to qualify for the available overtime work—on the Carrier's time. In the absence of such a requirement, however, the Carrier may not shift the burden onto the claimants if they do not work their TPA hours because there is insufficient overtime for which they are already qualified.

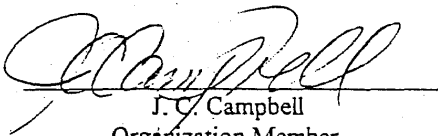
⁴The Carrier objects specifically to including the overtime earned by Claimant Usnick when he worked during his vacation period, insisting that this was an extraordinary payment. In the absence of evidence that this overtime was due directly to an imminent transaction, we find that this payment must be included in his TPA.

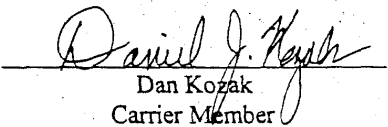
AWARD

The Carrier shall compute the TPAs for each claimant. The claimants are presumed to be displaced employees in any month in which their compensation falls below their TPA for compensation, assuming the claimants have made themselves available for service for their TPA hours. The Carrier shall pay a displacement allowance in each such month, unless the Carrier can prove that the monthly decline in earnings was due to factors other than the transaction.

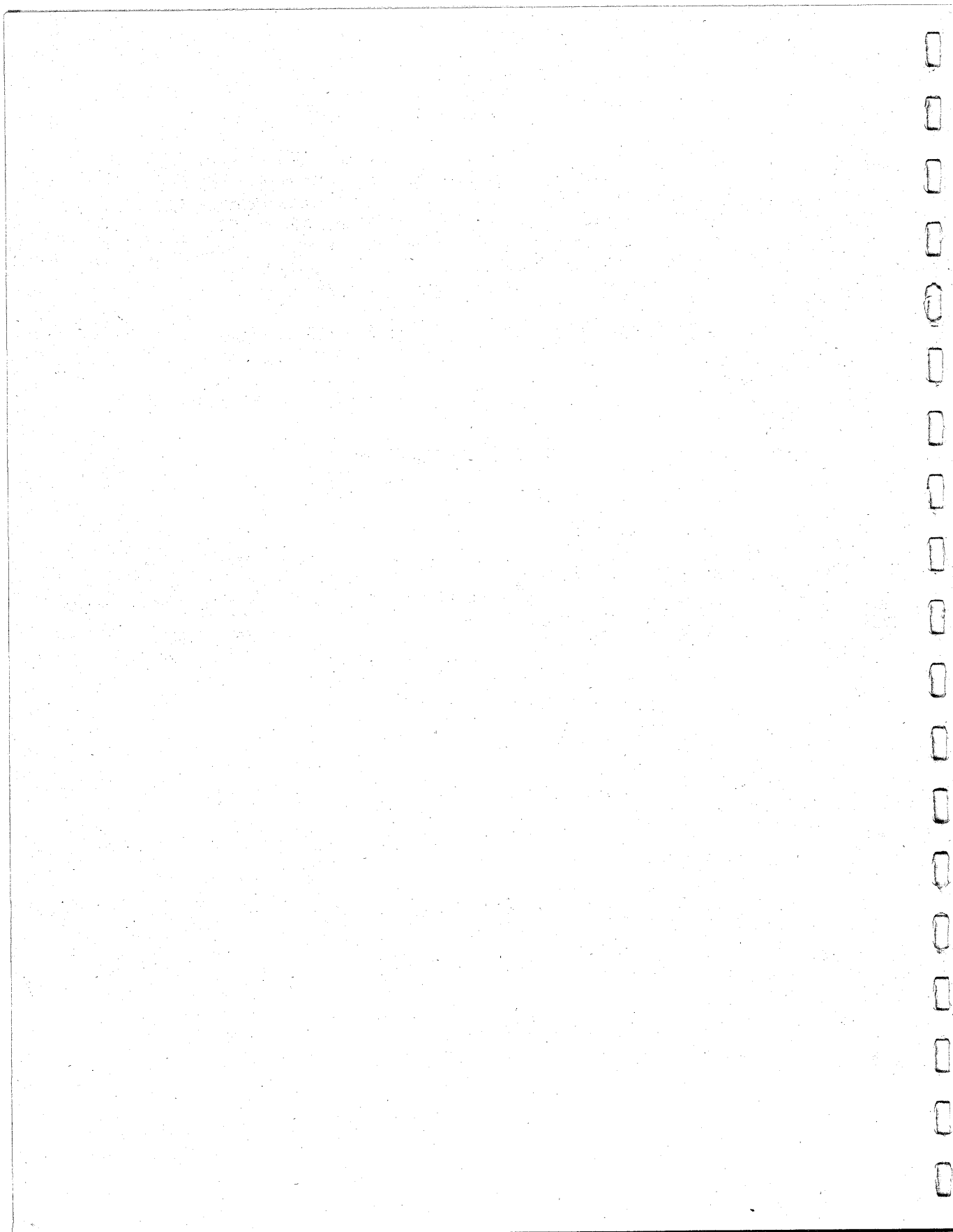
This award shall be complied with 30 days after its effective date.


Joseph A. Sickles
Neutral Member


J. C. Campbell
Organization Member


Dan Kozak
Carrier Member

Date: May 1, 1999



DECISION: The discontinuance of the position of switchtenders and the resumption of the performance of their duties by employees of Carriers using the Depot facilities was not a "coordination".

DOCKET NO. 62 -- Decision by Referee Bernstein

Brotherhood of Railway & Steamship Clerks,	)	
Freight Handlers, Express & Station Employees	)	
vs.	)	PARTIES TO DISPUTE
The Chesapeake and Ohio Railway Company	)	

QUESTION: (a) That the Carrier violated and continues to violate provisions of Agreement between The Chesapeake & Ohio Railway Company, Chesapeake District, The Chesapeake & Ohio Railway Company, Pere Marquette District (formerly The Pere Marquette Railway Company) and its Employees represented by The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees for each District signed July 22, 1954, effective August 1, 1954, and more specifically Section 27 with respect to Washington Agreement of May 21, 1936, and job stipulations of Interstate Commerce Commission Finance Docket No. 15228, when it failed to pay to Frank John Sana the difference between the monthly average of his total time paid for during period July 1, 1953 and June 30, 1954 (\$523.77/232 hours) and compensation received in his subsequently held positions (Yard Clerk A-171/Yard Clerk A-230). Claim applicable to all employees involved in the coordination and continued in service under similar conditions and without proper adjustment as required.

FINDINGS: On August 1, 1954 the parties entered into a coordination agreement involving facilities in Chicago, Illinois. This was one of a series of coordinations and agreements growing out of the 1947 merger of The Chesapeake and Ohio Railway Company and The Pere Marquette Railway Company. The parties adopted as the test period July 1953 through June 1954.

In this coordination no employee was deprived of employment. Indeed, two additional clerks were added to the force. No employee was continued in service at a rate of pay lower than that received at the time of the coordination.

However, the employee used as an example, Mr. Frank John Sana, while being paid a rate no lower than he received at the time of the coordination, received lower compensation in some months than the "average monthly compensation" of the "test period". The dispute here invokes Sections 6(a) and 6(c); for convenience the full texts follows:

"Section 6(a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise

"of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except, however, that if he fails to exercise his seniority rights to secure another 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 retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline."

* * * * *

"(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period."

In simplified form the Organization contends that whenever an employee's monthly compensation drops below the average monthly compensation of the test period, as prescribed by Section 6(c), he is entitled to a displacement allowance.

The Carrier contends that so long as an employee has a position - full time position - with a rate of pay equal to or greater than that he received at the time of the coordination, he cannot be eligible for a displacement allowance.

I believe that each position oversimplifies the actual provisions of the Agreement.

All parts of the Agreement should be read together and as harmoniously as possible. Usually all language in an Agreement serves some purpose, although this hornbook maxim is modified by the realistic proposition that some provisions of agreements are redundant. Which is the case depends upon the provisions and possibly their history; the ultimate conclusion is a matter of judgment.

In this case, the judgment is not difficult to make. Section 6(a) and Section 6(c) each serve a different function, although they are interdependent. As contended by the Carrier, Section (a) prescribes the protections to be given

employees "continued in service" and the conditions under which they will qualify for the displacement allowance whose formula is provided by Section 6(c).

That formula is to be applied to the twelve month period (the "test period") preceding the time when an employee is adversely affected by the coordination. The formula guarantees that he shall receive at least the average monthly compensation of the "test period". This is so even if after the coordination he works less than the "average monthly time paid for" during the test period. If the employee works more than the "average monthly time paid for" he is to receive the full benefit of that additional work at his then present rate in addition to the guarantee.

Clearly the function of the Section 6(c) test is to insure to the employee both the "compensation" guaranteed by Section 6(a) and whatever he earns in hours worked in excess of "average monthly time paid for". This "compensation" is the product of this rate of pay, any arbitraries and the amount of time that he worked. It is a commonplace of this industry that certain jobs normally involve overtime, e. g. for a sixth day's work when an unassigned employee is not available or for usual and recurrent, or at least frequent, overtime on given days. Such overtime at premium pay is desired and considered a prerequisite of the position. It seems quite clear that in determining whether an employee is in no "worse position with respect to compensation" after a coordination, the formula is to reflect elements of compensation in addition to the "rate of pay".

The device employed is an "average" of the "last twelve months in which (the employee) performed service" preceding the adverse effect upon him -- thereby reflecting the fluctuations in such compensation that normally occur in the course of a year, e. g. seasonal variations. Obviously, the average will serve only to approximate an equivalence in compensation "before" and "after" coordination. Generally the device is for the protection of the employee. In the normal and usual case, applying the formula of Section 6(c) will show whether an employee is "in a worse position with respect to compensation". In other words, if an employee drops below the "average compensation" (all earnings) for a period equal to or less than the "average monthly time paid for" he makes out a prima facie case that he is in a worse position than before the coordination. Because of the many variables -- new schedules, possible differences in size of work force, probable differences in volume of work, and a host of other factors -- the drop in average compensation is inferentially caused by the coordination.

The inference is rebuttable. Section 6(a) is quite explicit that the "worse(ned) position" must be "as a result of such coordination". If it can be shown that the difference in "compensation" is due to some cause unrelated to the coordination, the allowance would not be due. For this reason clearly demonstrable abnormalities in the test period which are absent after the coordination would negate the coordination as the causative factor.

From this discussion it may be seen that neither "rate of pay" nor the "test period" average earnings is dispositive. The Agreement makes "compensation" the test of "worse(ned) position" and the test period formula provides the normal and usual yardstick of compensation. But, the eligibility of an employee for an allowance depends upon whether any of the difference in compensation is a result of the coordination. Once the eligibility is shown all the difference between a month's compensation after the coordination and the "test period" average is due the employee. By adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur.

In Mr. Sana's case it is undisputed that he had abnormally high earnings in the test period due to the fact that he frequently worked more than one position.

Doubling up may be a normal incident of a position -- but the situation must be a rarity. Here it was due to the prospect of the coordination and the Carriers understandable desire not to hire new employees before the coordination. Where such a clear showing of abnormal earnings is made, the prima facie showing is overcome. There may be complicated situations in which the lower compensation is the result of both an abnormal situation before a coordination and the coordination itself. It is sufficient for Section 6(a) to show that any part of the decrease in compensation is caused by the coordination for an employee to qualify for the full difference between the test period average and actual compensation under the formula.

The tests for "worse(ned) position" are applicable only to the first adverse effect of a coordination. Once the employee is shown to be within the area of employment adversely affected by a coordination he is entitled to the benefits of the five year protective period provided by Section 6(a). This subject is more fully discussed in Docket No. 67, which is to be read in conjunction with this decision in order to ascertain the rights of employees under Section 6.

DECISION: (a) Employees may be due displacement allowances even if they are in positions carrying a rate of pay equal to or higher than that received at the time of coordination. Eligibility is established if a month's compensation (for a number of hours equal to "average time paid for") is less than that of the "average monthly compensation" for an equal number of hours and any part of the deficit is attributable to effects of the coordination.

(b) Frank John Sana is not entitled to a displacement allowance because there is no proof that his post-coordination compensation was lower than the "average monthly compensation" (for the number of hours equal to "average time paid for") as a result of the coordination.

DOCKET NO. 63 -- Decision by Referee Bernstein

Brotherhood of Railway & Steamship Clerks, Freight)	
Handlers, Express and Station Employees)	
vs.)	PARTIES TO DISPUTE
The Chesapeake and Ohio Railway Company)	

QUESTION: (a) That the Chesapeake and Ohio Railway Company violated and continues to violate applicable terms of its Agreement of April 1, 1958, with its Clerical Employees, provisions of Washington Agreement of May 21, 1936, and stipulations set forth in Interstate Commerce Commission Docket No. 15228 when beginning April 1, 1958, it refused and continues to refuse to apply to its employees the beneficial provisions of documents above referred to as a result of displacement of its employees, or where employees are deprived of employment as a result of coordination of its facilities with those of the Pere Marquette Railway Company, and

In the Matter of Arbitration, between:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
System Council No. 6

and

CSX TRANSPORTATION, INC.

Decision of Arbitration Committee
pursuant to Article I, Section 11
of the
New York Conditions (350 I.C.C. 60 (1979))
Imposed by the Interstate Commerce Commission
in
Finance Docket No. 28905 (Sub No. 1)

John C. Fletcher, Chairman & Neutral Member

C. A. Meredith, Employee Member
IBEW, System Council No. 6

R. D. Hiel, Carrier Member
CSX Transportation, Inc.

October 3, 1990

INTRODUCTION:

On January 26, 1987, Carrier served notice on the Organization, pursuant to the provisions of the September 25, 1964, National Agreement of its intent to transfer certain mechanical work from its Louisville, Kentucky shops to Corbin, Kentucky. Five months later, to the day, an Implementing Agreement was reached, which provided that New York Dock Conditions, (New York Dock Railway Control - Brooklyn Eastern

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District Terminal, 360 I.C.C. 60 (1979)), would be applicable to the transaction.

Mr. C. T. McKeehan, the herein Claimant, retained seniority in the Electrician's Craft at Louisville, Kentucky. However, at the time of the transaction he was working as a non-agreement Supervisor at Carrier's Evansville, Indiana Locomotive Shop. In late 1987, Carrier downsized its non-agreement Supervisory work force. McKeehan, because of his relatively low ranking in this group, was released from his Supervisory position. On November 12, 1987, he exercised his Electrician's Craft seniority.

McKeehan was allowed to place himself at Corbin. He was advised that his Test Period Average, for protective pay purposes, would be computed in the following manner:

In order to compute what your protected rate would have been if you had been an electrician at South Louisville at the time of the transfer of work to Corbin, we have requested the Test Period Averages computed at the time of the coordination for the contract employees immediately above and below you on the seniority roster. As soon as that information is available, we will take an average of those two Test Period Averages and that amount will be used as your guarantee rate. This will not be equivalent to your supervisory rate of pay.

The Organization filed a protest to this method of computation of McKeehan's Test Period. It asked that his Test Period be determined as provided in the second paragraph of Section 5(a) of the Conditions.

It is the parties disagreement on the method of establishing Mr. McKeehan's Test Period Average which is the dispute before this Arbitration.

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QUESTION AT ISSUE:

The Organization fashions the Question at Issue in this matter to be:

(1) Is Electrician C. T. McKeehan entitled to a Test Period Average under New York Dock derived from his earnings received in the twelve (12) months in which he performed services immediately preceding the date of his displacement?

(2) As an employee protected under New York Dock, what is the amount of the Test Period Average for Electrician C. T. McKeehan?

While Carrier fashions it slightly different:

Was the Test Period Average of Corbin, Kentucky, Electrician C. T. McKeehan properly arrived at by the Carrier's method of computation?

There are no procedural or jurisdictional impediments to an award on these questions.

THE POSITION OF THE PARTIES:

The Position of the Organization:

The Organization contends that the only proper method of computing Mr. McKeehan's Test Period Average is to literally follow the method set forth in Section 5 (a) of the Conditions. In doing so, it argues, Carrier must consider Claimant's earnings received in the twelve months in which he performed Carrier service immediately preceding the Date of his displacement, which must include his earnings as a non-agreement supervisor.

The Organization argues that Carrier's suggested method of establishing Claimant's Test Period Average, averaging the earnings of the individuals above and below McKeehan and averaging these results to determine his TPA is arbitrary and without basis under the Implementing Agreement or the Conditions.

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In support of its position the Organization relies on a number of Awards of various tribunals, but mainly it bottoms its case on New York Dock Arbitration, TCIU v. UP, Stallworth, Arbitrator, (February 28, 1989), which concluded that:

The proper method for computing test period averages is to include both agreement and non-agreement compensation earned during the test period.

The Organization asks that this Arbitration establish Claimant's TPA at \$3,475.00 per month, (his average monthly compensation as a supervisor), plus increases.

The Position of the Carrier:

Carrier contends that Claimant, (as a promoted employee returning to the Craft subsequent to the Coordination), derive entitlement to protective benefits from language within the Implementing Agreement which only conveys:

... whatever rights (he) may have had if (he) had been present at the time of the coordination.

The contemplates treating McKeehan as an Electrician and not as non-agreement Supervisor when developing his TPA.

It argues that the way it developed McKeehan's TPA was consistent with prior arbitration Awards on the subject. Carrier cites a number of decisions on the subject, with particular emphasis on Award 433, SBA 605, Eischen, Referee, (May 21, 1984) stating:

It is unreasonable to the point of absurdity to conclude that the official position worked, irrespective of compensation, should establish the protected rate which is the quid pro quo for continued (resumed) employability under the BRAC Agreement.

Carrier disputes that the award of Arbitrator Stallworth, relied on by IBEW, is appropriate because if it is followed non-agreement Supervisory employees returning to their

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Craft would receive more than:

... whatever rights they may have had if they had been present at the time of the coordination.

It contends that the averaging method used in determining Claimant's TPA was equitable and proper in the circumstances present in this case.

DISCUSSION:

This case involves the correct method to be used in establishing Test Period Averages of an Electrician who performed no service within his Craft in the twelve month period immediately preceding his return to his Craft and subsequent inclusion within coverage of New York Dock protection. The issue is whether his TPA should be based on compensation earned in a non-agreement Supervisory position or if it should be based on an average derived from the earnings of the two individuals immediately above and below him on the seniority roster. (Carrier indicates that it has been unable to develop any earning data on McKeehan as an Electrician because of the length of time he has been away from Craft and the unavailability of payroll records back that far.)

It is our opinion that Mr. McKeehan's TPA must be developed in the manner prescribed in Section 5 (a) of the Conditions. Support for any other method of development, no matter how equitable it may appear to some, simply cannot be found in the language of the Implementing Agreement or in the provisions of the Conditions. Moreover, as will be discussed in more detail below, prior arbitration authority supports the contentions of the Organization on this point and not those advanced by Carrier.

The language contained in Section 5(a) has been in place since 1979. And even before that similar, if not identical, language appeared in Section 6 of the May 1936, Washington Job Protection Agreement, which, by all accounts, was the precedent establishing forerunner for the I. C. C.'s earlier, Oklahoma, New Orleans and Southern-Central of Georgia, Employee

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Protective Conditions, required to be imposed in abandonment and merger transactions by Section 5 (2) (f) of the Interstate Commerce Act. From time to time negotiators in drafting employee protective and implementing agreements have altered the formula established by WJPA Section 5 and/or sections of I.C.C. employee protective conditions, to suit their situations, but this was not done in the transaction under review here.

The fact that the parties to the Implementing Agreement did not, intentionally or unintentionally, see fit to alter, what others have termed "the straightforward language of Section 5(a)", as it concerns the establishment of Test Period Averages must be given great weight and precludes subsequent alteration, on our part thru the Arbitration process, on the basis that one party now considers that a literal application of a TPA under the formula provided would be lacking in equity.

This Carrier and this Organization spent five months, from the date notice was given to the date the Implementing Agreement was signed, with the Louisville - Corbin transaction an active negotiating status. While it is understood that in that period full time negotiations did not occur, it is clear that considerable thought, nevertheless, went into the process drafting a suitable Implementing Agreement. The resulting product of these efforts is thoroughly detailed and contains no less than 23 side letters covering almost every imaginable subject and/or contingency. It is notable that while the negotiators saw fit to modify some provisions of New York Dock, the TPA development formula provided in Section 5 (a) was left unchanged.

IBEW Letter No. 13 to the Implementing Agreement clearly provides that non-agreement Supervisors who lose their jobs involuntarily may exercise seniority rights back into their Craft and be entitled to whatever rights they would have enjoyed if they had been present at the time the coordination occurred. When this provision was included within the Agreement it should have been apparent to all involved in the negotiations that such employees were receiving rates of pay greater than employees working exclusively within the Craft. The parties were, we are certain, also aware of the language of Section 5 (a) of NYD Conditions on development of TPA's.

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However, they did not see fit to provide new and different language altering the TPA development formula in such circumstances. It would be an affront to the Arbitration process to do so for them now. Especially since we are not being asked to interpret intent of the parties or obviously ambiguous language, but, instead, are being asked to sidestep "straight forward language" because it is perceived as lacking equity.

Carrier contends that its development of McKeehan's TP, is consistent with prior arbitration Awards on the subject. It stress adherence to the result of SBA 605, Award No. 433. We do not find Award No. 433 faulty or inappropriate in the circumstances present there. However, we have difficulty in accepting it as precedent in our case because of two critical factors.

First it should be observed that compensation guarantees in the February 7, 1965, Agreement are bifurcated. Regularly assigned employees are protected with regard to their normal rate of compensation as it existed on October 1, 1964, (plus increases). Other than regularly assigned employees are protected with a monthly displacement allowance, developed somewhat similarly to those under Section 5 (a) of NYD. However, the parties to the February 7, 1965, Agreement, the controlling instrument involved in Award No. 433, adopted several interpretative Questions and Answers which clearly expressed their intention to exclude certain non-Craft employment which may have occurred earlier. One question, for example was:

Question No. 9: Can employment in more than one craft be counted in determining protected status?

Answer to Question No. 9: Ordinarily not; however, in cases such as promotion of a telegrapher to train dispatcher, promotion of a clerk to yardmaster, etc., where the seniority in the craft from which promoted is retained, employment in the higher classification will be counted.

If service in another craft would not ordinarily be credited under the February 7, 1965, Agreement, it would also seem that the earnings received in that craft would not be used

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in development of TPA's. But in those instances where such other craft service was to be counted, the parties to the February 7, 1965, Agreement developed a computation procedure which met this contingency. Their solution is found in the Answer to Question No. 1, reading in part:

To the extent that an employee whose guarantee is governed by Section 2 of Article IV has compensated service in such other craft, such service will also be included in determining the base period average earnings and hours paid for. However, his base period average monthly earnings shall be computed by taking his average hourly earnings in the base period in the craft in which he is protected (adjusted to include subsequent general wage increases), multiplying by the total number of hours paid for in the base period in both crafts and dividing by 12.

It is not our purpose here to interpret the February 7, 1965 Agreement, but, it seems that the Answer to Question No. 1 established a formula where the hours worked in the other Craft are added to the hours worked in the protected employees Craft and both are used with the average hourly earnings from the Craft in which protected to develop a TPA. No such similar agreed to interpretation exists with respect to Section 5 (a) of New York Dock or the June 26, 1967, Implementing Agreement, perhaps because the Conditions and the Implementing Agreement do not specifically exclude Carrier earnings from sources outside an employees Craft, which appears to be the case, for the most part, under the February 7, 1965 Agreement.

Each of the other awards from SBA 605, submitted by Carrier as support for its contentions, have been carefully reviewed. They are determined not to be controlling because of the special interpretations placed on the February 7, 1965, Agreement, and there are no similar understandings in place for NYD and the Implementing Agreement, with regard to Section 5 (a), which we are aware of.

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Carrier also has supplied Award 1, SBA 860, Seidenberg Referee, (November 20, 1976), dealing with a dispute over base period compensation and time paid for under the 1966 Penn-Central Merger Protective Agreement. It is from the novel remedy generated in this Award that Carrier developed its peer averaging concept which it seeks to apply to McKeahan's situation. Award 1, SBA 860 cannot stand as precedent here because language of the UTU Merger Protective Agreement, under review there, detailed which service would count and provided special considerations on periods while absent on leave for union business as well as time working as an official, supervisory or in a fully excepted position.

For example the UTU Penn-Central Merger Agreement developed train service employees test periods from:

... the individual's average monthly compensation for the last twelve months in which he performed service in train service, ...

A similar provision is not present in the language of the Conditions being reviewed here.

Carrier has stressed that by using language reading:

"... shall be entitled to whatever rights they may have had if they had been present at the time of the coordination."

In the Agreement and Side Letter 13, it is manifest that it was the parties' intention to treat returning non-agreement Supervisors as if they had worked in the Craft in the 12 months preceding the coordination that they would only be protected at the level of compensation they would have received if they had worked in the Craft during that time.

Even if this argument were accepted in total as presented, which it is not, TPA's would still have to be developed in accordance with the procedures provided in the Conditions, which the parties did not modify. This procedure requires examination of the earnings and hours in the preceding 12 months and taking the "total compensation" received and divid

this number by the "total time paid for." This formula does not provide an exclusion of earnings received in higher rated service and it does not provide for an exclusion of earnings received in lower classes of service. The formula is arbitrary - providing for no exceptions of any type, and while some may argue that it is not equitable to protect a demoted Supervisor at his higher rate others may argue that a recently promoted Journeyman Mechanic is not treated equitably when lower rated helper or apprentice service would be counted. But, regardless of which perspective of equity and fairness is considered, the formula is there, and that is what must be followed, unless the parties see fit to alter its language. A situation not present here.

However, if a general statement indicating that returning Supervisors are to be entitled to whatever rights they may have had if they had been present at the time of the transaction, was intended to provide a different formula for developing TPA's it would have been quite simple to include this formula within the text of the Agreement. This of course was not done. This omission forces a conclusion that returning Supervisors are entitled to have their TPA's computed as provided by the language of Section 5(a) as if they had been present at the time of the coordination. This computation includes "compensation earned" in the preceding 12 months.

Many of Carrier's arguments here are similar to those considered and rejected in New York Dock Arbitration TCIU v. UP Stallworth, Arbitrator, (February 28, 1989). In that case the contentions of the parties were stated to be:

The Carrier contends that for purposes of calculating a Claimant's test period earnings, the Claimants may not include compensation earned in non-agreement positions. The Organization argues, however, that the New Dock Conditions require the benefits to be based upon the total compensation during the preceding year including non-agreement earnings.

The decision of the Arbitrator held:

The Committee concludes that the literal language of these sections (Article 1, Sections 5(a) & 6(a)) should be applied, and that all of Claimant's

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earnings with the Carrier during the prior year, whether from agreement or non-agreement positions, are to be included in the test period earnings.

As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon "total compensation" in the service of the Carrier "during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction." The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the Carrier for the year prior to the transaction.

It is our view that this is a correct interpretation of the New York Dock Conditions. As such it will be applied to the matter under review here.

One additional point. TCIU v. UP, (supra), also stated that:

The Committee is bound to apply the literal language of the New York Conditions, unless the Carrier can show a compelling reason why this straightforward interpretation does not reflect the actual intent of the Parties.

Carrier argues that in our case a "compelling reason" to use a different method of computing Claimant's TPA is that by protecting his non-contract rate of pay he would be receiving far more than whatever rights he may have had if he had been present at the time of the coordination.

This contention is found to be unpersuasive because, among other things, it operates from an assumption that it is "rate of pay" which is the factor being protected. "Rate of Pay" is not the element of protection; "compensation" is the term that is used and that is the element on which protection must be based.

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Additionally, notwithstanding Carrier's contentions when this matter was being reviewed on the property and notwithstanding its arguments before this Arbitration, we have no persuasive showing that at the time the Implementing Agreement was under consideration and in negotiations the parties ever intended that Section 5 (a) ever be applied other than literally as written. Accordingly, Carrier has not shown a compelling reason why the straightforward language of Section 5(a) should not be applied to the development of McKeehan's TPA.

Finally, it should be observed that Carrier insists that the Award in TCIU v. UP is in error. However, it does not cite a single other authority in which unaltered NYD Conditions are scrutinized and a different result is reached. As discussed above, each authority submitted by Carrier involved language which could fairly be interpreted to support the conclusion reached. These decisions, though, cannot be viewed as controlling in this matter because of the existence of significant language differences between the Agreements studied in those case and the Conditions under review here.

On the totality of the entire record we are compelled to make an Award in favor of the Organization.

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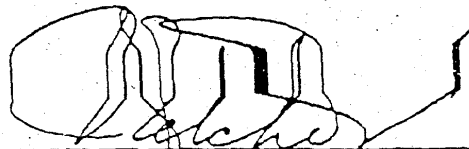
The Question at Issue posed by Carrier is answered, No.

Question 1, posed by the Organization is answered:

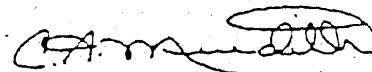
Electrician C. T. McKeehan is entitled to have his Test Period Average under New York Dock Conditions include all earnings received in the twelve month period in which he performed service immediately preceding the date of his displacement, including earnings he received while working as a non-agreement Supervisor.

Question 2, posed by the Organization is answered:

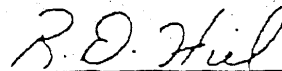
Electrician C. T. McKeehan shall have his Test Period Average determined by dividing separately by 12 the total compensation received and the total time for which he was paid during the last 12 months in which he performed service immediately preceding the date of his displacement.



John C. FLETCHER, Arbitrator
Chairman and Neutral Member



C. A. Meredith, General Chairman
Employee Member



R. D. Hiel, Manager Labor Relations
Carrier Member



Dated at Mt. Prospect, IL., this 3rd Day of October, 1990.

CONRAIL-IAM&AW
NY DOCK (MGA)
(Custer, et al)

ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 11
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31875

In the Matter of an Arbitration between
CONSOLIDATED RAIL CORPORATION
and
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS

FINDINGS & AWARD

QUESTIONS AT ISSUE:

1. With respect to each Claimant, namely, J. Custer, R. Slunski, R. Endsley, S. Thorpe, D. Evanoski and T. Yuratovich, which, if any, meet the definition of a "displaced employee" under the New York Dock conditions?

2. With respect to each, if any, Claimant where the answer to Question No. 1 is affirmative:

a) What is the date of the beginning of the employee's protective period?

b) What is the correct calculation of the average monthly compensation (TPA) for use in determining displacement allowances?

BACKGROUND:

This arbitration arises pursuant to Section 11 of the New York Dock employee protective conditions, as imposed by the Interstate Commerce Commission (the ICC) when it approved the merger of the Monongahela Railway Company (the MGA) into the Consolidated Rail Corporation (Conrail or the Carrier), and follows an Award and Arbitrated Implementing Agreement that issued under date of June 21, 1993 in implementation of the ICC authorized transaction.

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The Claimants are employees of the former MGA who are represented by the International Association of Machinists and Aerospace Workers (the Employees or Organization). Three of the Claimants had worked in the Locomotive Shop of the MGA as Maintenance of Equipment (ME) machinists, and three had worked in the Maintenance of Way and Signal Department of the MGA as Maintenance of Way (MW) machinists, together with one other employee (Kautzman), who was likewise represented by the Organization. All of these former MGA employees became employees of Conrail upon the consummation of the ICC-authorized merger.

On June 25, 1993, the Carrier addressed the following letter to the Organization:

"You are hereby notified that the MGA New York Dock Arbitrated Implementing Agreement dated June 21, 1993 between the International Association of Machinists and Aerospace Workers, and Consolidated Rail Corporation and Monongahela Railway Company will become effective July 2, 1993.

On July 2, 1993, the employees of the former Monongahela Railway Company will be covered by the applicable Collective Bargaining Agreement between your Organization and Conrail. On that date and thereafter the coordination of work will take place in accordance with the above-cited arbitrated implementing agreement and the conditions imposed by the Interstate Commerce Commission in I.C.C. Finance Docket 31875."

On the date that the aforementioned Implementing Agreement was made fully effective (July 2, 1993) requests were submitted to the Carrier for each of the Claimants to be recognized and certified as a "displaced employee" as that term is defined in the NY Dock Conditions. The basis of the claims and the reason for the denial of the claims will hereinafter be summarized in the position of each of the parties.

A "displaced employee" is defined in Section 1 of the NY Dock Conditions to mean "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 conditions."

A displaced employee, pursuant to the NY Dock Conditions, is entitled to a "protective period," or period of time (six years) during which that employee is to be provided certain protective benefits, including a "monthly displacement allowance" equal to the difference between the monthly compensation received by the displaced employee in the position in which such employee is retained and the average monthly compensation received by the displaced employee in the position from which such employee was displaced. The monthly displacement allowance is determined by

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dividing separately by 12 the total compensation received by the employee and the total time for which that employee was paid during the 12 months in which the employee performed compensated service immediately preceding the date of that employee's displacement as a result of the transaction, and is commonly referred to as the "test period average."

The Awarded Implementing Agreement did not mandate, as requested by the Organization, that each employee who was in active service on the MGA on the date the merger transaction was implemented be certified as a protected employee or that they be given a test period average. However, the Carrier did subsequently agree, at the request of the Organization, to provide test period average earnings for the employees represented by the Organization who held positions on the former MGA for the 12-month period from July 1992 through June 1993, namely, the six Claimants in this dispute. It was stipulated in the letter of agreement, however, "that providing this test period average earnings data does not, in and of itself, establish that the employee has been adversely affected or is entitled to a displacement, dismissal or separation allowance."

As indicated above prior to the merger, there were three ME machinists positions on the former MGA. These positions were at South Brownsville, PA, and all three positions worked the first trick, Monday through Friday, with rest days of Saturday and Sunday.

Effective the close of business on September 28, 1993, the Carrier abolished all three of the aforementioned positions at South Brownsville, PA that were being held by Claimants Custer, Slunski and Endsley. At the same time, the Carrier advertised three ME positions at Brownsville, PA, one on the first trick, and two on the second trick. The three named Claimant each bid for and were awarded the positions at Brownsville, PA, which is located about two miles distant from South Brownsville, PA.

Thereafter, on December 22, 1993, the Carrier abolished the three ME machinists positions at Brownsville, PA that were being held by the three above mentioned Claimants and readvertised the three positions to reflect a change of headquarters to Waynesburg, PA, a location about 26 miles from South Brownsville, PA. The three ME machinists positions and Claimants Custer, Slunski and Endsley have remained at this location since that time.

The foregoing notwithstanding that effective August 24, 1994 the three positions were abolished and readvertised with one first trick position (Claimant Endsley) and one second trick position (Claimant Custer), and a third trick position being vacant account Claimant Slunski, at that time, and for some months later, being off work as disabled/sick as a result of an injury.

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Insofar as concerns Claimants Thorpe, Evanoski and Yuratovich, who were working as MW machinists, together with non-claimant MW Machinist Kautzman, there was no change in their positions until November of 1993. At that time (November of 1993), a reduction was made in the MW machinist force. As a result of job abolishments, Claimant Evanoski and non-claimant Kautzman were essentially forced to other positions available to them in an exercise of their dove-tailed seniority on the Conrail Seniority District No. 12A Roster at the Conway locomotive facility. The positions for the two remaining Claimants (Thorpe and Yuratovich) did not change and they have remained headquartered at South Brownsville, PA.

Machinists Kautzman claimed certification as an adversely affected employee for NY Dock benefits effective November 15, 1993, and his claim was subsequently granted by the Carrier. At the time the Carrier agreed to honor Machinist Kautzman's claim (March 22, 1994), the Carrier offered to treat Claimant Evanoski in the same manner as Machinist Kautzman. The Carrier offer was rejected, and the claim for Claimant Evanoski continued to be pursued, it being alleged, in principal, that he was entitled to certification and the payment of a displacement allowance as a displaced employee from the earlier claim date of July of 1993 as opposed to the above mentioned date of November of 1993.

In this latter regard, the Board would note that although the Carrier does not dispute the fact that Claimant Evanoski was adversely affected by the transaction, and that it had made an offer to treat Claimant Evanoski in the same manner as MW Machinist Kautzman, the Carrier says that it later withdrew the offer in a finding that no claim had been specifically filed for November of 1993. The Organization disputes the contention that no claim was filed for November of 1993.

In any event, the Organization continued to pursue the contention that the six Claimants be certified or recognized as displaced employees effective July of 1993, and when conferences on the property failed to resolve the dispute(s) here at issue, the parties determined that they would place such matter to this arbitration board in the form of the Questions at Issue as set forth above.

POSITION OF THE EMPLOYEES:

It is the position of the Organization that the Claimants are entitled to the employee protective benefits prescribed by the NY Dock Conditions because each of them was placed in a worse position with respect to compensation and/or rules governing working conditions as result of the transaction or merger. Moreover, it argues that what is done in placing one employee in an adverse situation places all in an adverse situation.

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The Organization maintains that because of what it calls, "the complexity of the different transactions/coordinations of the consolidation" that the Claimants should be certified as "displaced employees" as of July 2, 1993, the date that the Carrier implemented the Arbitrated Implementing Agreement.

Among other things, the Organization contends that the Claimants were placed in a worse position because the Carrier changed their conditions of employment and did not make available to them the same amount of hours of service and rates of pay which they previously worked prior to the transaction.

The Organization says that each of the Claimants has made a prima facie case that they each have been placed in a worse position with respect to compensation when earnings dropped below the test period average following the transaction to less than the "average monthly time paid for," or they were placed in a worse position in respect to rules governing their working conditions. The Organization thus says the burden shifted to the Carrier to prove otherwise, and that, in this regard, the Carrier has failed to do so.

The Organization also says that because of the many variables (new schedule rules, differences in size of the work force, differences in volume of work and, what it calls, "a host of other factors") the drop in average compensation and being placed in worse position is inferentially caused by the transaction.

The Organization says that while it recognizes that in order to be a "displaced employee" that an individual must establish that they have been placed in a "worse position" as a result of a transaction, that the whole of the consolidation of the MGA and Conrail was a "transaction," but that is not to say, the Organization asserts, that no action taken pursuant to the ICC authorization, such as job abolishments or the combination of seniority rosters is not also to be considered as a transaction. The Organization thus says it is the Carrier's merger related transactions/coordinations disturbed the work place tranquility, and that absent these transactions/coordinations there would have been no change in working conditions.

In this same connection, the Organization says that operational changes, the transfer of equipment, and the restructuring of work not only adversely affected the Claimants, but likewise had an adverse impact on all machinists on the Conrail seniority roster into which the Claimants had their seniority dove-tailed, i.e., the Conrail Seniority District No. 12A Roster.

The Organization thus asks that all six Claimants be held to be displaced employees under the NY Dock Conditions.

POSITION OF THE CARRIER:

It is the position of the Carrier that the Claimants do not meet the definition of a displaced employee as that term is defined by the NY Dock Conditions and has been recognized in awards of past boards of arbitration.

The Carrier says that the Claimants have suffered no diminution of their compensation and that their work rules and work opportunities have, if anything, improved as a result of the transaction or merger.

Further, the Carrier submits the under the scheme of NY Dock arbitration, employees have the initial burden of showing that they have been adversely affected by a transaction and that it is only then that the Carrier has the burden of showing that any adverse affect was due to a cause other than a transaction. In this respect, the Carrier asserts that there has been no showing of record that the Claimants in the dispute at issue have been placed in a worse position.

Rather than having been adversely affected, the Carrier submits that no positions were abolished at the time of the transaction (July 2, 1993) and that all the Claimants received an increase in their daily rate of pay. Moreover, the Carrier submits that the earnings of all the Claimants but Claimant Evanowski have increased since the transaction. In this latter regard, the Carrier offers statistical data showing that the Claimants (except Claimant Evanowski) experienced improved earnings for the 12 months after the date of the claimed adverse affect (July of 1993) that range from 7% to 30% over the 12 months which had preceded the transaction. Thus, the Carrier offers that the Claimants, except for Claimant Evanowski, essentially stayed on the same or like jobs, they were paid at least the same, if not a higher rate of pay, and their overall earnings were more after the transaction was implemented.

The Carrier also urges that the Organization is essentially seeking to reargue the case which led to the Arbitrated Implementing Agreement, and more especially, blanket certification for all employees as a result of the transaction. In this respect, the Carrier argues that it is not that the transaction took place, and had some affect on an employee, but whether an employee was placed in a worse position with respect to their compensation and rules governing their working conditions that defines an employee as a displaced employee under the NY Dock Conditions. In the instant case, the Carrier maintains that the record shows that the Claimants (except as concerns Claimant Evanowski) were not in fact adversely affected as a result of the transaction. It therefore asks that the Questions at Issue be answered in the negative.

FINDINGS AND OPINION OF THE BOARD:

Clearly, the NY Dock Conditions prescribe, and it has long been recognized in awards of arbitration boards in the disposition of employee protective disputes, that an employee is not adversely affected by a transaction if that employee is enabled to obtain a position where compensation is equal to or greater than compensation prior to the transaction and that employee has not been placed in a worse position with respect to rules governing their working conditions.

That a position occupied by an employee at the time of the transaction is abolished does not, in and of itself, establish that such an employee is thereby entitled to be recognized as a displaced or adversely affected employee. It is only after an employee affected by a transaction exercises seniority as a result of the abolishment of a position that it may be determined if that employee has in fact been placed in a worse position, or, principally, a position unlike that which the employee would have stood for absent the transaction.

The NY Dock Conditions prescribe that a displacement allowance shall be paid "so long after a displaced employee's displacement as he is unable, in the normal exercise of seniority rights under existing agreements, rules and practices, to obtain a position, which does not require a change in his place of residence, producing compensation equal to or exceeding the compensation he received in the position from which he was displaced..." Here, except as concerns Claimant Evanoski, there is no probative showing that the Claimants, in the normal exercise of their seniority rights under the existing agreements, rules and practices, were not able to obtain positions producing compensation equal to or exceeding the compensation they had received as former MGA employees without a change in their place of residence.

The Board would also note that it finds it difficult to comprehend how it may be properly argued on the one hand that the Claimants lost work opportunities and, on the other hand, claim that these same individuals worked too much.

Even if was to be found, arguendo, that the earnings of certain of the Claimants fluctuated over several months following the transaction, this fact alone does not establish that such a happenstance was directly attributable to the transaction. In this respect, the Board would note, and adopt as here applicable, the findings of Arbitrator Herbert L. Marx, Jr. as set forth in an arbitration between Conrail and the BME, wherein it was stated in part as follows:

"It may be argued that New York Dock benefits are applicable in any month where compensation does not reach

the test period average, and so comparisons of annual earnings are not relevant. The Arbitration Committee understands and accepts this, insofar as it is applicable to employees who have been clearly determined to be 'displaced employees' in a 'worse position.' But this monthly test does not apply in considering whether employees are determined to be in a 'worse position' so as to qualify them for New York Dock in the first place."

In regard to the question of whether the Claimants were placed in a worse position with respect to the rules governing their working conditions. As stated in the Findings of the Arbitrated Implementing Agreement, the parties were found to have been in basic agreement that the then current Conrail-IAM&AW Schedule of Rules Agreement be the surviving agreement when the MGA was merged into Conrail. The Board in that dispute stated in its Findings that "both parties have wisely chosen to be in general agreement that the Conrail-IAM&AW Schedule of Rules Agreement be applicable when the former MGA employees are merged into Conrail, albeit, as indicated above, the IAM&AW would like to amend that Agreement to preserve certain MGA rules."

In the circumstances, this Board finds no basis for the Organization to have heard to say that the Claimants had been placed in a worse position because of a change in rules governing working conditions. This, notwithstanding that, except for repeated argument about those same former rules of the MGA which were found not proper to be carried over, the Organization has not identified any rule or working condition that would support the contention that the Claimants have in fact been placed in a worse position.

It being evident in study of the record that the Claimants, except for Claimant Evanoski, have failed to establish a valid basis to be recognized as entitled to the protective benefit status prescribed by the NY Dock Conditions for a displaced employee, this Board has no alternative but to deny each of their individual claims. Accordingly, insofar as concerns Claimants Custer, Blunski, Endsley, Thorpe and Yuratovich, Question at Issue No. 1 is answered in the negative.

In regard to Claimant Evanoski, the Board finds that he was in fact adversely affected and meets the definition of a displaced employee under the NY Dock Conditions. And, as concerns the question of whether a claim had been specifically filed for the month of November of 1993, we find the record sufficient to support the conclusion that even assuming, arguendo, a claim had not been filed for November of 1993 that the record in this case, as demonstrated by the Carrier's past willingness to treat Claimant Evanoski in the same manner as MW Machinist Kautzman, supports a finding that if a claim for November had not in fact been filed,

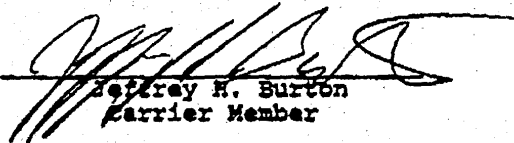
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the Carrier was on notice from the prior filing of claims commencing with the month of July 1993 and the handling of the claim, that the claim was of a continuing nature. The beginning of the protective period for Claimant Evanoski shall be the date that he was displaced following the abolishment of his position in November of 1993. The calculation of Claimant Evanoski's test period earnings for use in determining any displacement allowance to which he may be entitled is to be the 12-month period which preceded the date he was displaced in November of 1993.

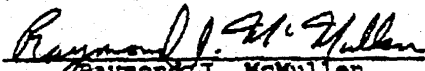
AWARD:

The Questions at Issue are answered as set forth in the above Findings. That is, in the negative insofar as concerns Claimants Custer, Slunski, Endsley, Thorpe and Yuratovich; and, in the positive for Claimant Evanoski.


Robert E. Peterson, Chairman
and Neutral Member


Jeffrey H. Burton
Carrier Member

Philadelphia, PA
April 17, 1995


Raymond J. McMullen
Employee Member

*Employee's Dispute
attached Hereto*

Dissent of the Employee Member to the
Findings and Award Rendered by Chairman and
Neutral Member R. E. Peterson of the

ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31875

In the Matter of an Arbitration between

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

and

CONSOLIDATED RAIL CORPORATION

Re: New York Dock Disputes
Merger MGA - Conrail
Claims of Custer, et. al.
Date of Findings & Award - April 8, 1995

The Employee Member of this Board, based on the record, most vigorously dissents to the Award rendered by the Arbitrator in the instant dispute. This dissent is due to the failure of the Arbitrator to properly interpret the provisions of New York Dock as intended by the Interstate Commerce Commission (ICC) in behalf of employees adversely affected by an ICC approved transaction.

In essence, this Board either did not understand the facts of the dispute that led to its award or it chose to ignore the record of the dispute which clearly reflects that the Claimants were adversely affected as a direct result of the transaction/coordination. Subsequent to the effective date of the coordination, four of the Claimants' respective earnings consistently dropped below their test period averages, yet this Board has failed to acknowledge that adverse effect and afford each of them the New York Dock "displacement" benefits to which entitled.

The New York Dock clearly was intended to protect an employee involved in a transaction from being "placed in a worse position with respect to his compensation" than the employee earned during his 12 month test period average.

The Marx Award this Board has relied on as the basis of its decision is clearly not on point in the instant case. The Marx Award clearly established that a fluctuation in an employee's earnings not associated with a transaction does not entitle one to a displacement allowance. However, in the instant case, the record clearly reflects that four of the Claimants suffered a real loss of earnings as a direct result of the coordination, thus being adversely affected, they were entitled to an appropriate displacement allowance for any period in which their earnings were less than their test period average.

Furthermore, in obvious disregard for the facts of the record of this case, the Arbitrator in the instant dispute stated in his Findings and Opinion that "... the Organization has not identified any rule or working condition that would support the contention that the Claimants have in fact been placed in a worse position." (I bid, p. 8) The Arbitrator's conclusion is without merit. The Employees' submission, clearly established that each Claimant was adversely affected as a result of the transaction/coordination. The Organization, in its Submission, referred this Board to no less than 15 awards supporting the Employees' claim.

In conclusion, the provisions of New York Dock and the award rendered in the instant case are in direct conflict one with the other as there can be no doubt that the Carrier's merger related transactions/coordinations definitely caused each of the Claimants to be adversely affected as such adverse effects are defined in New York Dock. It is quite obvious that in this particular case, the record has been ignored with the subsequent result that adversely affected employees have been deprived of their New York Dock entitlements.

Consequently, this award is palpably erroneous, has no probative value and should be recognized as such.

Raymond J. McMullen

Raymond J. McMullen
General Chairman, IAMAW District 19

In the Matter of Arbitration
Under New York Dock Conditions, Section 11
Pursuant to ICC Finance Docket No. 31432

Between:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And:

CONSOLIDATED RAIL CORPORATION

Arbitration Committee

Herbert L. Marx, Jr., Chairman and Neutral Member
Kenneth R. Mason, Employee Member
J. H. Burton, Carrier Member

October 9, 1992

Hearing held at Philadelphia, PA, August 27, 1992

EMPLOYEES' QUESTION AT ISSUE:

Were Claimants (D. R. Jones, W. J. Smith, Jr., R. Weahry, J. B. Santangelo, D. J. Flower, M. D. Lane, D. W. Mason, D. M. Petrella, and G. Gonzalez) placed in a worse position in respect to compensation and/or rules governing working conditions, or deprived of employment, as a result of the transaction described in ICC Finance Docket No. 31432 and thereby entitled to the labor protective provisions of New York Work Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)?

CARRIER'S QUESTION AT ISSUE:

Were the Claimants (D. R. Jones, W. J. Smith, Jr., R. Weahry, J. B. Santangelo, D. J. Flower, M. D. Lane, D. W. Mason, D. M. Petrella, and G. Gonzalez) adversely affected by the transaction described in ICC Finance Docket No. 31432, and are they entitled to the labor protective provisions under New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C. C. 60 (1979)?

BACKGROUND FACTS

The Carrier and CSX Transportation jointly owned 16 miles of trackage on the Akron Branch in Ohio. While the trackage was predominately utilized by CSXT, the Carrier was responsible for dispatching trains and maintaining the track. On January 31, 1989 a letter of understanding was reached between the two Carriers, providing for CSXT to purchase the Carrier's interest in the Akron Branch and to assume responsibility for maintaining the trackage and dispatching trains over the territory.

The Interstate Commerce Commission approved this undertaking in Finance Docket No. 31432, imposing New York Dock labor protection for employees.

Pursuant to Section 4 of New York Dock, an Implementing Agreement was reached on January 30, 1990 between the Carrier and the Organization. On February 6, 1990, CSXT assumed responsibility for the Akron Branch. Under Section 5 (and in one instance, Section 6) of the Implementing Agreement, the Claimants were furnished with test period earnings statements. The Claimants continued to have Akron as their headquarters until September 10, 1990, when their headquarters were transferred to Ravenna. No changes were made in the Claimants' titles or base rate of pay.

FINDINGS

There is no question that a transaction, as defined under New York Dock, occurred in that control of the Akron Branch was ceded by the Carrier to CSXT. The result was that work on the Akron Branch was no longer available to Carrier's Maintenance of Way employees. The Organization argues that the earnings of the Claimants were, at times, diminished not as to base rate but as to total compensation as compared to the Claimants' test period earnings. Based on this, the Organization contends that the Claimants met the qualifying requirements of Section 1 (b) of New York Dock, which reads as follows:

"Displaced employee" means 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 conditions.

The protection due the Claimants, according to the Organization, is provided in Section 5 (a) of New York Dock, which reads as follows:

So long after a displaced employee's displacement as he is unable, in the normal exercise of seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Thus, the Union contends that the transaction led to placing the Claimants in a "worse position" owing to loss of overtime work on the Akron Branch and that they are entitled to benefits in any month when their compensation is less than that of their test period compensation.

The Carrier contends that no "displacement" occurred in that the Claimants continued in their pre-transaction assignments. Earnings records show no overall diminution after the transaction, although this may vary depending on changes in earning levels depending on the general availability of work. According to the Carrier, the loss of the Akron Branch represented 20 per cent of available work time, with the remaining 80 per cent unchanged. Earnings may well vary depending not on the loss of the Akron Branch but on changes in the overtime required in the remaining portion of the Claimants' assignments.

In the Arbitration Committee's view, questions as to the meaning of "position" in Section 1 (b) were properly resolved in Transportation-Communications International Union and Norfolk Southern Corporation (Neutral George S. Roukis, April 19, 1989), which stated:

. . . 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. The pervasive arbitral authority cited by the Organization supports our determination.

However, where there is no actual removal or transfer from a "a specific job assignment", as here, the Organization bears a considerable burden to show that the Claimants' "status, situation or posture" was "worse" after the transaction. The Organization provided data to show that in the first one or two months following the transaction, monthly earnings for most of the Claimants were less than the test period average, and in two instances this was the case for five months and nine months, respectively.

The Carrier, however, supplies data which tells a different story. In a study of the annual earnings of eight of the nine Claimants (one Claimant having work only portions of the years in question), earnings in 1991 were higher than 1990 (pre-transaction) for five of the Claimants and lower for three of the Claimants. In a five-year study of the Claimants' earnings (1987-1991) variations in earnings were common. For example, in 1988 earnings for all Claimants were lower than 1987, despite the absence of any applicable transaction.

It may be argued that New York Dock benefits are applicable in any month where compensation does not reach the test period average, and so comparisons of annual earnings or not relevant. The Arbitration Committee understands and accepts this, insofar as it is applicable to employees who have been clearly determined to

be "displaced employees" in a "worse position". But this monthly test does not apply in considering whether employees are determined to be in a "worse position" so as to qualify them for New York Dock in the first place.

It is clear that the Claimants have had a portion of their work territory reduced as a result of the transaction. They did not, however, suffer displacement from their assignments nor reduction in their work week or base pay rate. The only change which can be put forth is an allegation as to overtime opportunity lost as a result of sale of the Akron Branch. But the overall earnings records, before and after the transaction, fail to prove that the Claimants were placed in a "worse" position. Put another way, the Organization offers no convincing proof that overall earnings were affected by loss of the Akron Branch.

As stated in an Award concerning sale of trackage (Brotherhood of Maintenance of Way Employees and CSX Transportation, Inc., Neutral Nicholas H. Zumas, March 26, 1990):

The BMWWE has not sustained its burden of proof in this matter. Fluctuation of levels of compensation and movement of territory are normal characteristics of maintenance of way employment. The fact that some Claimants had their work levels altered or their headquarters points moved does not prove adverse effect nor does it show the causal nexus between the transaction and the adverse effect that is required before imposing NYD protection benefits.

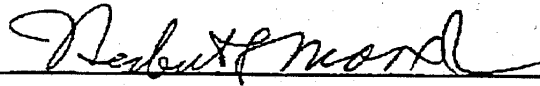
In sum, the Arbitration Committee here must rule on the eligibility for New York Dock benefits for employees not required to terminate their current work assignments as the result of a transaction. While it is within reasonable possibility that such

employees are found to be in a "worse position", there is no convincing showing here of a consistent and clearly measurable diminution of compensation owing solely to the transaction.

A W A R D

The Question at Issue posed by the Carrier is answered in the negative.

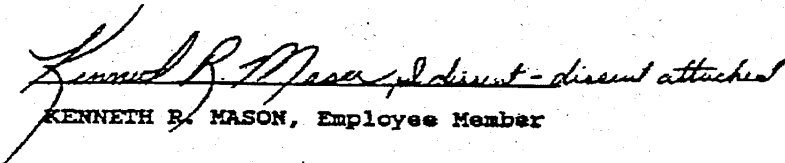
The Question at Issue posed by the Organization is answered in the negative.



HERBERT L. MARX, Jr., Chairman and Neutral Member



J. H. BURTON, Carrier Member


pl dissent - dissent attached

KENNETH R. MASON, Employee Member

NEW YORK, NY

DATED: DEC 01 1992

DISSENT OF LABOR'S MEMBER

In the Award, the Committee acknowledged a transaction, as defined under New York Dock ["NYD"], did take place in the selling of the Akron Branch by Conrail to CSX Transportation. However, the majority held that Claimants loss in compensation was not solely attributed to the transaction.

In rendering its decision the majority of the Committee, held in part:

"However, where there is no actual removal or transfer from a "a specific job assignment", as here, the Organization bears a considerable burden to show that the Claimants' "status, situation or posture" was "worse" after the transaction. The Organization provided data to show that in the first one or two months following the transaction, monthly earnings for most of the Claimants were less than the test period average, and in two instances this was the case for five months and nine months, respectively."

and later:

"It is clear that the Claimants have had a portion of their work territory reduced as a result of the transaction. They did not, however, suffer displacement from their assignments nor reduction in their work week or base pay rate. The only change which can be put forth is an allegation as to overtime opportunity lost as a result of the sale of the Akron Branch. But the overall earnings records, before and after the transaction, fail to prove that the Claimants were in a "worse" position. Put another way, the Organization offers no convincing proof that overall earnings were affected by the loss of the Akron Branch."

In the above quotes, this member finds the majority incorrectly placed the burden of proof on the Organization. Section 11(e) of NYD, clearly places the burden on the Carrier to show that something other than the transaction affected the employees. Section 11(e) reads:

Section 11(e)

"(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee."

Thus, this member finds the Organization identified the transaction, and the pertinent facts relied upon. The Organization offered pay records of the Claimants following the transaction. These records showed earnings following the transaction were below Claimants Average Monthly Compensation ["AMC"].

The Carrier presented to the Committee, the wage records of the Claimants covering a five year period (1987-1991). In rendering the decision the majority based its findings, in part, on the variations in earnings over that period. In doing so, this member finds the majority looked outside of the NYD provisions. NYD only provides for a review of earnings and hours worked during the previous twelve months, in which the Claimant had earnings.

Under the second paragraph of Section(5) of NYD, the AMC is determined by adding together compensation earned by the employee in the previous twelve (12) months in which the employee received compensation. This amount is then divided by twelve (12). The second paragraph in Section (5) reads:

"Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases."

In this member's opinion, NYD only provides for the comparison of earnings with that of the employee over the previous twelve (12) months in which the employee had earnings. Hence for this Committee to review anything outside the previous twelve (12) months, in which the Claimant had earnings, was done outside the

provisions of NYD. Accordingly, this member must reject any findings based on a five (5) year review of wages, while taking the position the Carrier failed to meet its' "burden of proof".

In the Carrier's presentation before the Committee, the Carrier acknowledged that approximately twenty percent (20%), (Organization contended it was a far greater percentage) of the time worked by the Akron Track Gang, was spent on the territory covered by the transaction. Further, the Committee acknowledged the work opportunity for Conrail employees, on the territory covered by the transaction, would no longer be available to Claimants.

However, the majority held Claimants were not displaced from their assignments, and with their work week and base pay rate unchanged, combined with other factors that may affect earnings, Claimants were not placed in to a "worse position", in regards to either work rules or compensation, as a result of the transaction. Thus, Claimants are not entitled to the protection provided under NYD. According to the majority, Claimants loss in compensation was the result of other factors.

This Member disagrees. Instead I find that Claimants were "...placed in a worse position with respect to his compensation and rules governing working conditions". The Committee correctly found, following the transaction Claimants lost the ability to work on a section of track that previous to the transaction and according to the Carrier, required a minimum of twenty percent (20%) of their time worked. In doing so, according to this member, the Committee found the Claimants were directly affected by the transaction. However the majority found otherwise.

This twenty percent (20%) loss of work opportunity, included both straight time hours, as well as overtime hours. Hence, a loss in compensation. As a result of this transaction, and no longer being afforded the opportunity for overtime on the Akron Branch, Claimants compensation will most assuredly be reduced.

Section 1(d) of NYD never uses the term "base pay rate". NYD only speaks of compensation. Section 1(b) of the NYD reads:

"(b) "Displaced employee" means 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 conditions."

This Member finds the term "compensation", as used in the above section, is a combination of earnings made in both straight time and overtime hours. This contention is supported by the language of Section 5 of NYD, as defined above.

This computation of compensation includes straight time earnings, combined with overtime earnings. It does not address, or take into consideration the basic pay rate.

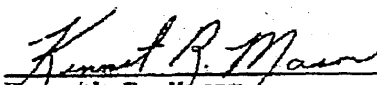
The majority found the Claimants were not required to terminate their current assignments as a result of the transaction. Yet, on September 10, 1990, Claimants' headquarters was moved to another location. A move, this member finds, the Carrier would not have made had it not been for the transaction. Thus, this member finds the headquarters of the Akron Track Gang was relocated as a result of the transaction.

NYD recognizes that certain changes maybe made by a Carrier in anticipation of a transaction, to avoid the certification of employees as NYD protected. In such situations, the Carrier is still held accountable to the employees.

In the present case, this member finds the Carrier's sole motivation in having Claimants report at the former headquarters for approximately eight (8) months following the transaction, before transferring them to a new headquarters, was to avoid NYD. The Carrier has offered no other explanation.

Therefore, this member must reject the majority's decision to incorrectly place the burden of proof on the Organization. This member finds that the Claimants loss in compensation was solely the result of the transaction. In this member's opinion, the Carrier failed to show otherwise.

This member finds further, the loss in compensation and the moving of the headquarters, even though eight (8) months later, can only be linked to the transaction. Accordingly, this member must dissent from the findings of the majority.


Kenneth R. Mason
Employee's Member
Brotherhood of Maintenance of
Way Employees

ARBITRATION BOARD
NEW YORK DOCK II LABOR PROTECTIVE CONDITIONS
(IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31922)

In the matter of an arbitration between
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
SOO LINE RAILROAD COMPANY

FINDINGS & AWARD

QUESTION AT ISSUE:

Is the Carrier required under the provisions of the New York Dock Conditions to furnish employees affected by a line sale their test period averages to the employee or his representative upon request for such test period averages?

BACKGROUND:

The Interstate Commerce Commission (the "ICC" or "Commission") in approval of the purchase of a line of track by Wisconsin Central, Ltd. (the "WCL") from the Soo Line Railroad Company (the "Soo Line" or "Carrier") in Finance Docket No. 31922, service date of November 5, 1991, imposed the labor protective conditions in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. (1979) as clarified in Wilmington Term. RR. Inc. - Pur. & Lease - CSX Transp., Inc., 6 I.C.C. 2d 799 (1990) and 7 I.C.C. 2d 60 (1990), aff'd sub nom. Railway Executives Ass'n v. ICC, 930 F. 2d 511 (6th Cir. 1991) (the "NY Dock Conditions"). The line of track which the WCL purchased from the Soo Line is commonly known as "The Ladysmith Line," situated between Ladysmith, Wisconsin and Superior, Wisconsin, a distance of 102 miles.

Pursuant to Article I, Section 4, of the NY Dock Conditions, the Soo Line served notice on November 11, 1991 upon its employees represented by, among others, the Brotherhood of Maintenance of

Way Employes (the "BMWE" or "Organization") of its intention to effect the above described transaction in accordance with the ICC decision. In part here pertinent, this Carrier notice, served as Division Manager Notice No. 59, reads:

"RE: LADYSMITH LINE SALE

"Pursuant to the employee protective conditions provided in New York Dock . . . as imposed by the ICC in Finance Docket No. 31922, the Soo Line Railroad Company hereby serves notice of its intention to sell the Ladysmith to Superior Line, MP 355.487 north of Ladysmith, Wisconsin to the point of intersection with the south right-of-way line of Stinson Avenue at Superior, Wisconsin to the Wisconsin Central, Ltd. on November 25, 1991 or as soon thereafter as practicable.

We anticipate the changes to be affected will result in the abolishment of Section 157 South Superior and Section 155 Stone Lake; the Roadmaster Position at Superior and the Signal Maintainer Position at Superior.

Because Soo Line has no train operation on this line no adverse impact is anticipated on train and engine employees.

Estimate of number of employee affected:

Class of Employes	Number Affected
Section Foremen	2
Section Laborers	2
Roadmasters	1
Signal Maintainers	1"

On or about November 15, 1991 the Organization requested that there be a meeting for the purpose of reaching an implementing agreement in application of the terms and considerations for the protection of the employees it represents who would be affected by the sale of the line of track or the ICC approved transaction.

The Carrier responded to the Organization by letter dated November 19, 1991. It confirmed that a draft agreement had been faxed to the BMWE on November 15, 1991. This letter further stated:

"Inasmuch as the I.C.C. has imposed New York Dock protective conditions as clarified by Wilmington Terminal, the level of protection has been set. There is no rearrangement of force as a result of this transaction and the employes whose positions have been identified to be abolished as a result, have system seniority on the entire former Soo Line property. As I have indicated in the past in similar situations, for

these reasons, I do not agree that an implementing agreement is necessary as the necessary conditions have been provided for.

However, as has been done in previous situations, without prejudice to the Carrier's position, I did agree to provide a proposed agreement as you requested. We have had some discussion regarding separation allowances and I have indicated that separation allowances are provided under the terms of New York Dock conditions. I am aware that New York Dock protective conditions require a ninety (90) day written notice containing a full and adequate statement of the proposed changes to be affected by the intended transaction and that the I.C.C. acknowledged the Soo Line has no operation on this line and therefore, waived the normal time period for completing the transaction. I also understand that New York Dock protective conditions provide a dispute resolution mechanism.

My staff will be available to meet with you at 9:00 a.m., November 22, 1991 to make a good faith effort to reach an agreement in this regard, without prejudice to my previously stated position."

The Organization responded to the Carrier letter on November 21, 1991. It took exception to certain of the Carrier statements and asserted that sale of the line of track could not be consummated or positions abolished until such time as the parties negotiated an implementing agreement or any dispute in connection therewith had been resolved in arbitration.

The Carrier responded to the Organization's contentions, and in addition to refuting certain positions espoused by the Organization, offered the following as directly pertains to the dispute here at issue:

"During this discussion, your desire to enhance protective conditions contained within the terms of New York Dock became very clear. You supported your demand for 'test period averages' before determining whether an individual meets the definition of a 'displaced' or 'dismissed' employee with the contention that that is the only way an individual knows if he has been placed in a 'worse' position. My staff pointed out that it is not the purpose of the 'average monthly compensation' or 'displacement allowance' to determine if an individual has been placed in a worse position as a result of the transaction. Certainly, an individual who has been placed in a 'worse' position as a result of the transaction has the ability to support his claim with facts and once that has been accomplished, his 'average monthly compensation' will be calculated. Your insistence that

employees be provided such information prior to determining if they meet the definition of a 'displaced' or 'dismissed' employee is an obvious effort to gain 'pre-certification' for all employees involved, regardless of any 'adverse' impact as a result of the transaction.

* * * * *

[C]learly, there are no changes in working conditions involved and this is a force reduction which will occur under the existing collective bargaining agreement. Your position as outlined is without support of the ICC and/or board award. Inasmuch as you were so insistent that we provide employees whose positions will be abolished as a result of this transaction with 'test period averages' prior to determining if they had been placed in a worse position or met the definition of a 'displaced' or 'dismissed' employee, R. L. Mullaney indicated that arbitration would be necessary and made that request.

Further, in a discussion with R. L. Mullaney of my staff on December 2, 1991, you were reminded that employees are, in fact, provided a statement of gross earnings, to date, with each paycheck. If it is truly your desire to see that employees are provided salary information necessary to understand obligations and benefits to which they are entitled under New York Dock and not to seek 'certification' of benefits for anyone in the 'transaction', this statement should suffice."

The Organization, by letter dated December 5, 1991, responded to the Carrier in part here pertinent as follows:

"[I] have considered your most recent offer of an implementing agreement and I must inform you that I find it unacceptable. As you are aware, the issues of both the calculation and the content of Test Period Averages for those employees affected by this transaction must be resolved in the implementing arrangements which we are attempting to negotiate. So far these negotiations have been fruitless, but since the 30 days allotted for negotiations under Article I, Section 4 have not expired, I would suggest that we meet again on December 19, 1991, in order to make another attempt to reach a negotiated solution before restoring to arbitration of this dispute. Attached hereto is our revised proposal for such agreement. Please note that Section 5 of our previous proposal, presented to your staff on November 22, 1991, was not intended to enhance the imposed conditions. We had inserted the moving allowance option based on the Carrier's proposal sent to this office by fax on November 18, 1991."

The parties thereafter came to mutual agreement on the terms of an Implementing Agreement, except as concerns the matter that is the subject of the above Question at Issue. In this connection the Carrier says that it is not obligated to have the Implementing Agreement contain a provision that requires it provide test period averages to employees assigned to the line of track and employees affected by the exercise of displacement rights prior to determining whether they have been placed in a worse position or meet the definition of a "displaced" or "dismissed" employee.

On the other hand, the Organization maintains that the Carrier is obliged to be in agreement to provide information related to TPAs to affected employees and says that the Implementing Agreement should contain a provision that reads as follows:

"Each employee assigned to the line as described in Section 1 above and employees affected by the exercise of displacement rights by such employee will, upon request, be provided with a computation of test period earnings and hours as described in Article I, Section 5."

A "displaced" and "dismissed" employee is defined in Article I, Section 1(b) and 1(c) of the NY Dock Conditions as follows:

"(b) 'Displaced employee' means 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 conditions.

(c) 'Dismissed employee' means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction."

A "displacement allowance" is defined in Article I, Section 5, of the NY Dock Conditions as follows:

"5. Displacement allowances. - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would be entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of 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 retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause."

Provision for the negotiation and arbitration of an Implementing Agreement is set forth in Article I, Section 4, of the NY Dock Conditions, and reads in part here pertinent as follows:

"4. Notice and agreement or decision. -- (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such

notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner:

Within five (5) days from the date of receipt of notice at the request of either [party] . . . hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix . . . Each transaction which may result in a 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. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree . . .

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered."

The parties selected the undersigned arbitrator to be the chairman and neutral member of the arbitration board.

POSITION OF THE ORGANIZATION:

Basically, it is the contention of the Organization that the NY Dock Conditions require that the Carrier provide a test period average (TPA), as described in Article I, Section 5(a), supra, to each "affected" employee. The Organization therefore submits that the Implementing Agreement here in question should properly contain a provision that reads as follows:

"Each employee assigned to the line as described in Section 1 above and employees affected by the exercise of displacement rights by such employee will, upon request, be provided with a computation of test period earnings and hours as described in Article I, Section 5 [of the NY Dock Conditions]."

The Organization says that a provision such as that quoted above

is to be properly a part of the Implementing Agreement because the Carrier is obliged to provide employees with their TPA once they have been affected so as to permit those employees, in turn, to determine if they have been placed in a worse position as a result of a transaction and thereby entitled to benefit of a displacement allowance.

It asserts that affected employees need to be aware of their TPA since it is only with the benefit of such information that an affected employee can comply with the provisions of Section 5 of Article I of the NY Dock Conditions, supra, in regard to the exercise of seniority to a position producing compensation equal to or exceeding the compensation received in the position from which the employee is displaced.

In this particular case the Organization submits that there are four employees represented by the Organization who will be initially affected by the transaction, i.e., two Section Foremen and two Section Laborers, or, namely, the positions identified by the Carrier in its November 11, 1991 notice, supra, and that others will no doubt be affected by a chain of displacements.

Accordingly, the Organization requests that the Question at Issue be answered in the affirmative and that the Board direct that the Implementing Agreement include the aforementioned clause related to the Carrier being required to provide affected employees, upon request, with their TPA.

POSITION OF THE CARRIER:

The Carrier maintains that it is not the purpose of a TPA to determine if an individual employee will be placed in a worse position as a result of a transaction. It says the purpose of an Article I, Section 5(a), "Displacement Allowance," is to provide an equitable method for determining compensation to be allowed a "displaced employee" who has in fact been placed in a worse position with respect to their compensation and rules governing working conditions as a result of a transaction.

It says that there is nothing contained within the definition of a "displaced employee" in the NY Dock Conditions which supports an employee's entitlement to their TPA prior to the time that they are placed in a worse position as a result of a transaction. The Carrier therefore takes the position that it is obliged to provide a TPA only to a "displaced" employee who is entitled to a "displacement allowance."

In the case at hand, the Carrier offers, it remains to be determined who in fact, if anyone, will be a "displaced employee" and thereby entitled to a "displacement allowance."

Moreover, the Carrier says that if a dispute arises concerning the definition of a "displaced" employee or whether an individual is entitled to a "displacement allowance" that such dispute must be resolved under the terms of Article I, Section 11, of the NY Dock Conditions.

The Carrier says that in seeking to have the disputed provision included in the Implementing Agreement that the Organization is attempting to enhance protective conditions contained within the NY Dock Conditions. It says that the Organization is in reality seeking to gain a right of "pre-certification" for all employees involved, regardless of any "adverse" impact as a result of the transaction and to relieve the employee of the obligation to establish the causal nexus between the transaction and any adverse affect. Such a happenstance, the Carrier argues, would permit the Organization to shift to the Carrier the burden of proving any lesser earnings received by an employee was the result of something other than the transaction.

While the Carrier does not dispute the fact that four positions represented by the Organization will be abolished with the sale of the rail line, it says that no rearrangement of force will occur under the terms of the collective bargaining agreement and that no selection of forces is therefore necessary. Thus, the Carrier says there will be no change in working conditions and the employees affected by the transaction will only be subject to what it says would be a normal force reduction and an exercise of system seniority rights. In this regard, the Carrier says that it is difficult to predict the overall impact on any employee in the exercise of such system seniority.

The Carrier says that the Organization would like the Board to believe that anyone affected or displaced in conjunction with this force reduction is entitled to a "displacement allowance" as provided in Article I, Section 5(a), in any month in which their earnings may be less than their "average monthly compensation" prior to being displaced, regardless of the reason for such a difference or without establishing the necessary causal nexus between the transaction and the adverse affect.

For the above reasons the Carrier says that the Implementing Agreement which does not contain the language in dispute should be adopted as sufficiently meeting the requirements of Article I, Section 4, of the NY Dock Conditions.

FINDINGS AND OPINION OF THE BOARD:

The Board has given studied consideration to the various arguments of record, the pertinent provisions of the NY Dock Conditions; and, in particular, the awards cited by the parties in support of their respective positions.

There is no question that the Bernstein Awards referenced by the Organization cast light upon certain artful language contained in the Washington Job Protection Agreement of 1936 (WJPA). However, as the Carrier points up, there are a number of significant differences between the purposes for which the WJPA was entered into by the various carriers and the unions as compared with the NY Dock Conditions. As Referee Murray M. Rohman said in an award which issued on August 6, 1974 (PC v. IBEW & RED) as concerns the differences between the WJPA and Amtrak Appendix C-1 Provisions, or protective provisions patterned somewhat after the NY Dock Conditions: "[The] philosophy and economic conditions prevalent in the '30's were different than those prevailing in the '70's when Appendix C-1 was promulgated."

Moreover, the Bernstein Awards which are cited involve determinations that are, for the most part, bottomed on interpretation of agreements which had been entered into by the parties in the particular dispute. Thus, the awards lend themselves to a rather limited interpretation of even the WJPA.

In Case No. 138, for instance, Referee Bernstein makes extensive reference to an Implementing Agreement. It is this Agreement, not the WJPA, which is quoted as prescribing that a TPA be furnished upon the written request of an employee. The Agreement states:

"If as a result of the merger an employee is displaced or deprived of employment, upon written request of the employee or his representative to the Superintendent, the carrier shall promptly furnish to such employee, with copy to his General Chairman, a statement showing total compensation received by such employee and his total time paid for during the last twelve months in which he performed service immediately preceding the date on which he is displaced or deprived of employment."

It is also significant that notwithstanding the foregoing terms of Agreement, a separate Letter of Agreement essentially states that the carrier is to provide a TPA to involved employees when "it becomes known what employees are affected" and, further, that when an employee is "adversely affected" and claims compensation loss that the employee will file a claim with the carrier.

In the circumstances, that Referee Bernstein concluded that the carrier had "improperly neglected" to provide a TPA upon request must be viewed in the context of the Implementing Agreement, and not the WJPA, having required such information be given upon the request of the employee or the union.

That a "position" occupied by an employee is abolished at the time of a transaction, as in the case here at issue, does not mean that that particular employee has been adversely affected

and thereby entitled to a displacement allowance. The test is what happens to the employee in the exercise of seniority and displacement rights after the abolishment of the position. And, even in this regard it must be considered that the Carrier has no control over the voluntary exercise of seniority.

Employees may place themselves into situations which, on the surface, suggest they are in a worse position as a result of a transaction. However, it may be that such circumstance is the result of, for example, a desire on the part of the affected employee to work at a given location, on a certain shift, or be off from work on particular rest days. This, as opposed to the employee having exercised seniority and working on another position which would equal or better the compensation and working conditions of a former position which was abolished or subject to displacement.

In this same respect, it is noteworthy that Referee Bernstein offered that it was not abolishment of a regular position that establishes entitlement to a displacement allowance. He said, in Case No. 138, that to be "adversely affected" would seem to require some actual detriment, and that "protection" does not come into play until compensation is worsened, requiring a comparison of compensation before and after the employee is "first adversely affected."

Therefore, that an employee may be forced to exercise seniority as the result of the abolishment of a position on the line of rail that is abandoned must be viewed in the light of whether, after having done so, the employee is placed in a worse position, or, principally, a position unlike that which the employee would have stood for absent the transaction. It must be recognized, as held in numerous past awards, that a remote or tangential effect of a transaction does not qualify an employee for a displacement allowance.

As stated by Referee Nicholas H. Zumas in a dispute between the CSX and the BMWE involving the NY Dock Conditions (Award dated March 26, 1990):

"It is well settled that the burden of proof in cases seeking NYD protection benefits rests with the Organization to show that Claimants were adversely affected by the transaction. The Organization must prove that actual harm was suffered by Claimants as a result of the I.C.C. approved transaction.

[F]luctuation of levels of compensation and movement of territory are normal characteristics of maintenance of way employment. The fact that some Claimants had their work levels altered or their headquarters points moved does not prove adverse effect nor does it show the causal nexus between the transaction and the adverse ef-

fact that is required before imposing NYD protection benefits."

Further, as stated by Referee Marty E. Zusman in an award which issued under date of December 7, 1990 in a dispute involving the BRS and CSX and application of the Oregon Short Line Conditions, or protective provisions not unlike those found in the NY Dock Conditions:

"Finding no evidence of language or practice requiring Carrier to calculate a TPA where no evidence exists that the employee has suffered a loss and is within the meaning of the Oregon Short Line Protective Provisions as a 'displaced employee,' we must answer the question [that the Carrier be required to provide a TPA for each of the named claimants] in the negative."

This Board likewise fails to find by language or practice that the NY Dock Conditions require a carrier to provide a TPA to an employee merely because he would be affected by a job abolishment or sustain a loss of compensation. In our view, the NY Dock Conditions clearly intend that employees not be given a TPA or be certified as entitled to the protective benefits of the NY Dock Conditions until they have been adversely affected as a result of the transaction as concerns their compensation and rules governing their working conditions.

In this latter regard, the Board finds it significant that Section 5, Displacement Allowances, of the NY Dock Conditions, *supra*, prescribes that an employee is entitled to a displacement allowance so long "after" the employee's displacement as that employee is unable, in the normal exercise of seniority rights to obtain a position producing compensation equal to or exceeding the compensation in the position from which the employee was displaced. No mention is made in this or any other section of the NY Dock Conditions of an employee being entitled to a displacement allowance following the date an employee is affected by a job abolishment. Further, this same section of the NY Dock Conditions states that a TPA is to be calculated on the basis of the last 12 months in which the employee performed services "immediately preceding the date of his displacement as a result of the transaction." Again, there is no mention of the date that the employee is initially affected by a job abolishment.

Certainly, to give employees a TPA simply on the basis of the position they occupied being abolished, much less because they were in the employ of the Carrier at the time of a transaction, would be tantamount to placing the burden of proof upon the Carrier to show that there was no causal nexus between any loss of future compensation and the transaction, instead of, as the NY Dock Conditions contemplate, the employees being required to show the manner in which they had been adversely affected in the first instance so as to be entitled to a protective allowance.

The Board also believes that consideration must be given to the fact that there is a significant difference as to the manner in which a protective period is described in the WJPA as opposed to the NY Dock Conditions. In the WJPA a protective period is said to be "a period not exceeding five years following the effective date of the coordination." The protective period in the NY Dock Conditions is said to mean that period of time that "extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom."

In other words, the WJPA gave reason for an employee to be immediately placed under a protective umbrella since the protective clock commenced running at the time of the coordination. This is not a circumstance of concern with respect to application of the NY Dock Conditions. The window of protection for an employee under the NY Dock Conditions does not commence on the date of a transaction, but rather runs from the date on which an individual employee is first adversely affected. Thus it would seem to the Board that a purposeful change was made in the adoption of the NY Dock Conditions language so as to preclude a premature determination of affect that might well cause employees to be subjected to a less meaningful period of protection than would obtain if the protective period was not to commence until the employees had in fact been adversely affected.

There is no question that the absence of a proper knowledge of a TPA places a difficult burden upon an employee to know where to exercise seniority in carrying out the mandate that an employee exercise seniority to the same or a higher rate of pay so as to be entitled to the protective coverage of the NY Dock Conditions. However, this concern may not be viewed as requiring that the TPA be computed before there is sufficient reason to recognize that employee as having been adversely affected in the first instance as a result of a transaction.

Moreover, even as concerns levels of compensation and the rate of pay of various positions, it is evident that paycheck stubs provided to employees twice monthly contain a statement of "year to date" earnings and rates of pay are indicated on bulletins for positions. Thus, it would appear that such information is readily available to employees to track any concern that they may have as to their individual situations and a determination as to whether a sufficient basis exists to show that the consequence of a change in their level of compensation is in fact due to some cause related to the transaction, or, here, the track line sale.

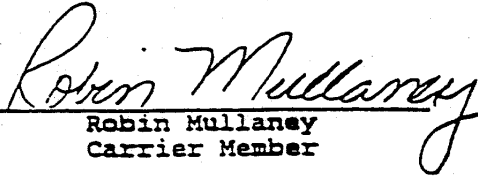
Since the Board finds the contractual provisions which the Organization seeks to be made a part of the Implementing Agreement go beyond the scope of the NY Dock Conditions, it must be concluded that this Arbitration Board does not have the authority to impose such a condition as a part of an arbitrated Implementing Agreement.

AWARD:

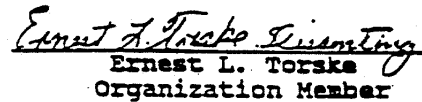
The Question at Issue is answered in the negative. The Carrier is not required under the NY Dock Conditions to furnish employees "affected" by a line sale with a test period average upon request for such data. Accordingly, the Implementing Agreement which has been identified above as not having included language to such an effect will be the final agreement between the parties.



Robert E. Peterson, Chairman
and Neutral Member



Robin Mullaney
Carrier Member



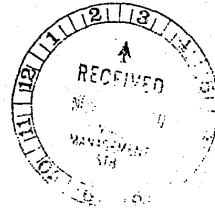
Ernest L. Torske
Organization Member

Minneapolis, MN
April 28, 1992

Disput to follow

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE No. 582 (Sub. No. 1)



MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE RAIL LABOR DIVISION
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Pursuant to the Board's decision served on October 3, 2000, the Rail Labor Division of the Transportation Trades Department, AFL-CIO ("RLD") and its affiliated organizations¹ submit these comments in response to the Board's Notice of Proposed Rulemaking ("NPR") and request for comments regarding its proposed modifications to its regulations governing major rail consolidations.

The RLD appreciates the fact that the Board's proposals have recognized that there are serious problems with the current major consolidation regulations which clearly favor consolidation applicants and effectively devalue the concerns and interests of rail workers, communities and shippers. The RLD also acknowledges that the Board identified the ways in which the current rules have harmed Rail Labor and others, and that the Board apparently intended the new proposals to address those concerns. However, the RLD submits that if the Board intends to fix the problems, it must speak more specifically, more clearly and more directly in a number of areas. Because the ICC and STB have often given conflicting signals on

¹ American Train Dispatchers Department; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; Service Employees International Union; Sheet Metal Workers International Association; Transportation • Communications International Union; Transport Workers Union of America

order to retain their jobs." The Board then urged the major railroads and their unions to negotiate broad based agreements about such issues and report back to the Board.

While RLD appreciates that the Board has now recognized that mandatory transfers of employees pose serious concerns warranting the Board's attention, we suggest that the Board should have addressed those concerns in the current rule.

In its opening comments, the RLD detailed, with specific examples, the hardship placed on employees being required to relocate long distances as the result of a major rail transaction. The RLD pointed out that, as rail mergers covered increasingly broad geographic areas, the distances employees were being required to relocate has dramatically increased. The current *New York Dock* conditions are simply inadequate to address this problem, and the RLD respectfully submits that the Board should do so, at this time, by adopting the rules proposed by RLD. (See RLD Comments pp. 23-24).

VI. TEST PERIOD AVERAGES

The RLD notes that the Board did not address the RLD's request that the regulations at Section 1180.1(e) provide for modification of the Board's employee protective conditions to expressly state that employees should be furnished with Test Period Average ("TPA") data upon their request.

Neither the calculation of the TPA, nor the furnishing of a TPA to an employee, constitutes a determination that a transaction-related adverse effect has occurred, and is not "pre-certification" of an adverse effect. The TPA merely provides the means for the employee to help determine whether there has been an adverse effect and to quantify the severity of the adverse

effect for a given month. The TPA also enables the employee to fulfill the obligation to work the highest-rated position available to the employee in the normal exercise of his/her seniority.

Nonetheless, carriers have resisted performance of this relatively simple administrative function in the hope of frustrating employees in their efforts to obtain benefits to which they are entitled. They have argued that they are not required to furnish a TPA until such time as an arbitrator has found that an employee has been adversely affected. In essence, the carriers say that employees can not obtain benefits without showing adverse effect as a result of the transaction by loss of earnings, but they will not provide the employees with readily available data necessary to show loss of earnings until they are found to be adversely affected as a result of the transaction. This means that an employee must attempt to show loss of earnings based on pay stubs for the preceding twelve months. And it must be remembered that the loss of earnings is for the test period "time paid-for", so the employee must calculate his/her average hours worked for the preceding twelve months in addition to his/her average earnings.

Thus, there are substantial equitable reasons why the Board should require carriers to provide TPAs. Additionally, as the RLD demonstrated in its Comments on the ANPR, there is statutory and practice precedent for the provision of TPAs, and there is no good reason for the carriers to refuse to provide them. Accordingly, to insure that employees who have been adversely affected by a consolidation receive the benefits to which they are entitled, the Board should state that it will require that railroads provide each employee with his/her TPA, upon the employee's request.

CONCLUSION

For all of the reasons stated herein, the RLD urges the Board to adopt the changes in its major consolidations regulations, with the clarifications, modifications and additions that are described herein.

Respectfully submitted,

Rail Labor Division
Transportation Trades Department, AFL-CIO

Edward Dubroski

Edward Dubroski
Chair, Rail Labor Division, TTD

Of Counsel:

Richard S. Edelman
Donald F. Griffin
Mitchell M. Kraus
Harold A. Ross
Michael S. Wolly

Dated: November 17, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE No. 582 (Sub. No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE RAIL LABOR DIVISION
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

Pursuant to the Board's decision served on March 31, 2000, the Rail Labor Division of the Transportation Trades Department AFL-CIO ("RLD") and its affiliated organizations¹ submit these comments in response to the Board's Advance Notice of Proposed Rulemaking ("ANPR" or "Notice of Proposed Rulemaking") regarding modifications of its regulations governing major rail consolidations. RLD agrees that the Board should reconsider and revise its regulations on major rail consolidations. It has been clear for some time that the current regulations favor applicant carriers and their parent corporations and undervalue the concerns of other parties such as rail employees, communities and shippers; in particular, Transactions effected under the current regulations have been devastating to railroad workers. It has also been clear in the last few years that recent consolidations which have been so damaging to railroad workers, have failed to produce the promised benefits; indeed the recent consolidations have worsened rather than enhanced rail transportation. Accordingly, RLD submits that the Board should revise its regulations concerning major rail consolidations. In these comments, RLD will address the

¹ American Train Dispatchers Department; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; Service Employees International Union; Sheet Metal Workers International Association; Transportation • Communications International Union; Transport Workers Union of America



B. Test Period Averages

The RLD submits that the Board should clarify that employees should be furnished with Test Period Average Data upon their request. Protection for employees adversely affected by rail mergers typically is based on the conditions imposed in *New York Dock*. Article I, Section 1(b) of *New York Dock* defines a "displaced employee" 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 conditions."

A displaced employee, upon demonstrating that he/she has been placed in a worse position as the result of a transaction, is entitled to "a monthly displacement allowance ["MDA"] equal to the difference between the monthly compensation received by him[/her] in the position in which he[/she] is retained and the average monthly compensation received by him[/her] in the position from which he[/she] was displaced." *New York Dock*, Art. I, §5(a). Moreover,

"[e]ach displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he[/she] was paid during the last 12 months in which he[/she] performed services immediately preceding the date of his[/her] displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases."

Id.

The baseline from which actual earnings are deducted in calculating the MDA is referred to as the "test period average" ("TPA"). Neither the calculation of the TPA, nor the furnishing of a TPA to an employee, constitutes a determination that a transaction-related adverse effect has occurred, and is not "pre-certification" of an adverse effect. Rather, furnishing the TPA provides the means for the employee to quantify the severity of the adverse effect for a given month. The

TPA also enables the employee to fulfill the following obligation to work the highest-rated position available to the employee in the normal exercise of his/her seniority:

"If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline."

New York Dock, Art. I, §5(b).

A requirement that railroads involved in mergers automatically provide their employees with TPA data is not without historical foundation. When Congress enacted the Regional Rail Reorganization Act of 1973, the employee protection provisions included precisely such a requirement:

"An employee and his representative shall be furnished with a protected employee's average monthly compensation and average monthly time paid for, computed in accordance with the terms of this subsection, together with the data upon which such computations are based, within 30 days after the protected employee notified the Corporation in writing that he has been deprived of employment or adversely affected with respect to his compensation."

P.L. 93-236, Title V, §505(b)(5), Jan. 2, 1974, 87 Stat. 986.

Further, all of the "Big 5" Class I railroads⁷ voluntarily agreed to automatically furnish employees with TPAs in the most recent round of industry mergers. As just one example, the Brotherhood of Locomotive Engineers (BLE) entered into commitment letters to provide all engineers with TPAs as a condition precedent for BLE support of the following mergers: Burlington Northern with Santa Fe; UP with Southern Pacific, a copy of which was entered into

⁷Burlington Northern Santa Fe (BNSF), Consolidated Rail Corporation (Conrail), CSX Transportation (CSX), Norfolk Southern (NS), and Union Pacific (UP).

the ICC's record as part of BLE's submission concerning the UP/SP merger proposal; the division of Conrail between CSX and NS; and the proposed merger of BNSF with Canadian National. In those cases, certain groups of employees were deemed to be adversely affected as a result of pending transactions arising during the implementation of the merger. Thus, the major railroads' actions acknowledge that there is at least an implicit duty to provide TPA data. Significantly, these agreements show that the level of computer technology utilized by the carriers' payroll departments means that it cannot be argued that a requirement to furnish TPA data is burdensome.

A requirement for railroads to automatically provide employees with their TPA data also would provide for greater efficiency and economy, because it would reduce or eliminate a number of disputes arising from the application of *New York Dock*. These disputes generally fall into three categories.

The first category — establishing a causal connection between a merger-related transaction and the adverse effect — would not be disturbed by such a requirement. The other two types of disputes concern whether the carrier's TPA data is correct, and whether the displaced employee is occupying the highest-rated position that the normal exercise of his/her seniority allows. It is in this area where a requirement to furnish TPA data would produce a benefit for carrier and employee alike.

In the absence of a pre-certification agreement, such as the BLE agreements cited above, a railroad employee faces a daunting challenge in proving that he/she has met the *New York Dock* criteria for being awarded a MDA. Despite the mandate of the conditions that the burden of proof be on the carrier, under recent decisions, the employee must establish a nexus between a

merger-related transaction and the adverse impact. The employee may also be required to demonstrate that he/she is working the highest-rated position allowed by the normal exercise of his/her seniority, or risk having his/her TPA offset by that position. And this all must be accomplished in a setting where the carrier — and not the employee — is in possession of the critical data. The ability of an employee to simply put forward a claim for employee protections would be enhanced by requiring carriers to provide TPAs.

At present, many railroads maintain the position that they are not required to furnish a TPA until such time as an arbitrator has found that an employee has suffered an adverse effect as the result of a merger-related transaction. The absence of a requirement to automatically furnish TPA data serves as an inducement for the railroad to evade its obligation to provide protection, and the potential for costly arbitrations has a chilling effect on the employees in their pursuit of their legal rights. The railroads place the employees in a "Catch-22" situation--they can not obtain benefits without showing adverse effect as a result of the transaction by loss of earnings, but they can not obtain the data necessary to show loss of earnings until they are found to be adversely affected as a result of the transaction. This means that an employee must attempt to show loss of earnings based on pay stubs for the preceding twelve months. And it must be remembered that the loss of earnings is for the test period "time paid-for", so the employee must calculate his/her average hours worked for the preceding twelve months in addition to his/her average earnings. This is unnecessarily complicated and burdensome, when the employee's earnings and hours worked are objective facts readily available to the carrier.

The underlying principle of *New York Dock* is quite simple — displaced employees who have been adversely affected by merger-related transactions are entitled to a MDA to compensate

them for said adverse effect. This principle is betrayed when a railroad can rely upon its data monopoly to deny an otherwise qualifying employee the full measure of his/her MDA.

One's ability to meet the criteria for eligibility for the MDA necessarily depends upon possessing the relevant TPA data. An accurate TPA is indispensable if the employee is to reasonably determine whether there is a bona fide adverse effect, regardless of causation. Furthermore, the employee is relieved of the burden of wearing an informational blindfold while in pursuit of the highest-rated position in attempting to protect his/her MDA.

It makes no economic sense for these issues to be discovered and adjudicated in the context of an arbitral process, when the uncomplicated step of automatic furnishing of TPA data can serve the same end. Accordingly, we urge the Board — in promulgating new regulations governing proposals for major rail consolidations — to adopt a requirement that railroads provide each employee with his/her TPA, upon the employee's request.

Proposed Changes to The *New York Dock* Conditions:

Article I, Section 1(c) of the *New York Dock* Conditions should be amended to read as follows:

(1)(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position, the transfer of said position to a location greater than thirty (30) miles from that position's previous location, or the loss of said position [thereof] as the result of the exercise of seniority rights by an employee whose position, as a result of the transaction, is either (1) abolished or transferred to a location greater than thirty (30) miles from that position's previous location. ~~[as a result of the transaction.]~~

Article I, Section 1(d) of the *New York Dock* Conditions should be amended to read as follows:

(1)(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed until the earlier of (1) such time as said employee is eligible to receive an unreduced Railroad Retirement Annuity or (2) the expiration of period equal to the employee's length of service. ~~{to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or dismissal.}~~ For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of Section 7(b) of the Washington Job Protection Agreement of May 1936.

The *New York Dock* conditions be clarified to provide at Sections 5 (a) and 6(a) that test period average monthly earnings and time paid for shall be provided to an employee by the carrier upon the request of the employee.

VI. SHORTLINE AND REGIONAL RAILROADS

After years of singing the praises of the market-place, complaining about restrictions imposed by government regulation: and advocating the supposed benefits of shortline and regional railroading, the shortlines, regionals and some of their customers have recently advocated government subsidies, and new legislation and regulation to protect the shortlines and regionals; they will presumably press their agenda for new government involvement in their comments in response to the Board's notice of proposed rulemaking. RLD strongly opposes any governmental assistance for the regional and shortline railroads.

A prime example of the hypocrisy of the shortlines and regionals is the request for relief from contracts that they entered with the Class I railroads when they purchased branch lines from the Class I's. At the time when those transactions were in vogue, Rail Labor argued that they often were not genuine transactions, that the lines sold were not really going to be independent of

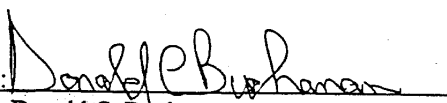
Board certainly has the authority to condition a foreign *rail* carrier's ability to acquire a domestic carrier and operate in this country on compliance with applicable U.S. regulations as well. The foreign carrier, after all, has voluntarily decided to engage in U.S. rail operations by virtue of submitting the merger to the Board for approval. The revision we propose will confirm that consideration will be given to imposing reasonable requirements such as compliance with U.S. laws and regulations for all carrier operations that directly affect domestic rail safety, regardless of where those operations are located, as part of the Board's overall investigation into the effects of foreign carrier activity in this country as part of the merger approval process.

CONCLUSION

For all of the reasons stated herein, the RLD urges the Board to adopt the changes the RLD has proposed with regard to the Board's procedures for major rail consolidations.

Respectfully submitted,

Rail Labor Division
Transportation Trades Department, AFL-CIO

By: 
Donald C. Buchanan
Chair, Rail Labor Division, TTD

Richard S. Edelman
Donald F. Griffin
Mitchell M. Kraus
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Michael S. Wolly

Dated: May 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Review Of An Arbitration Award has been served by overnight delivery on Mitchell M. Kraus, General Counsel, Transportation Communications International Union, 3 Research Place, Rockville, Maryland 20850, this 9th day of April, 2002.

Kurt L. Edwards