In the Matter of the Arbitration Between

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

and

THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND SEABOARD COAST LINE RAILROAD COMPANY

NEW YORK DOCK - Case No.

OPINION AND AWARD

The hearing in the above matter, upon due notice was held on January 23, 1981 at the offices of the National Railway Labor Conference in Washington D.C., before Irwin M. Lieberman, serving as sole Impartial Arbitrator, by selection of the parties by Agreement dated January 8, 1980 and in accordance with the Interstate Commerce Commission Decision in Finance Docket No. 28905(sub-1)and related proceedings. The parties agreed to waive the arbitration committee referred to in Article I, Section 11 of the so-called New York Dock Protective Benefits and Conditions in favor of a single arbitrator.

The case for the two companies,hereinafter referred to jointly as the Carriers, was presented by R.I. Christian, Director of Labor Relations of the Seaboard Coast Line Railroad Company. The case for the Union was presented by William G. Mahoney, Attorney of Highsaw & Mahoney, PC. At the hearing, the parties were afforded full opportunity to offer evidence and argument. Both sides presented written submissions embodying evidence and their positions. Both parties filed post hearing briefs.

ISSUE

The dispute herein grew out of notice served by Carriers on the employees represented by the Union to coordinate certain clerical working functions of the two Carriers at Richmond, Newport News and Portsmouth, Virginia. On January 8, 1981, by Agreement, the parties stipulated that the following questionsbe submitted to the Arbitrator:

"QUESTION: What are the proper applications of Article I, Sections 5 and 9 of the New York Dock Protection Benefits and Conditions in the following specific instances?

1. Employee "A" is employed on a clerical position by SCL at Acca Yard, Richmond, Virginia, rate $75.00 per day, and acquires protection as a result of the application of New York Dock Conditions. Such employee has an option available to him of accepting a position on C&O at Richmond, Virginia, rate $75.00 per day, or exercising seniority on SCL He elects to exercise his seniority rights under the SCL working agreement to an SCL clerical position elsewhere on SCL, rate $70.00 per day. Under the application of Article I, Section 5 of the New York Dock Conditions, is the employee entitled to payment of a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position he exercises his seniority to and the average monthly compensation received by him in the position from which he was displaced, or is such employee thereafter treated as occupying the higher-rated position on C&O that he elected to decline?

2. Employee "A" is employed on a clerical position by SCL at Acca Yard, Richmond, Virginia and acquires protection under the New York Dock Conditions. Such employee has an option of accepting a position on C&O at Richmond, Virginia which does not require a change in residence, or exercising seniority to a position on SCL which does require a change in residence. Employee "A" elects to exercise seniority to a clerical position on SCL which requires a change in residence in lieu of accepting a position on C&O at Richmond, Virginia which does not require a change in residence. Is Employee "A" entitled to the protective provisions contained in Article I, Section 9 of the New York Dock Conditions.?"

BACKGROUND

On September 25, 1980 the Interstate Commerce Commission issued an order (Finance Docket No. 28905, Sub. No. 1 and related proceedings) approving the application by CSX Industries, Inc., Chessie System, Inc., and Seaboard Coast Line Industries, Inc. for the merger of both Chessie and SCLI into CSX (and the direct control by CSX of the subsidiary railroads formerly controlled by Chessie and SCLI, six controlled by Chessie and ten controlled by SCLI). The ICC decision indicated that the individual railroads would remain as separate corporate entities and continue to operate as separate cr ora entities. . In this decision the ICC imposed conditions for the protection of empl. .s

enunciated in New York Dock RY.-Control-Brooklyn Eastern District, 360, I.C.C. 60 (1979) hereinafter referred to as New York Dock Conditions.

In accordance with the ICC order and the New York Dock Conditions, Carriers served notice on the Union on November 3, 1980 of its intention to coordinate clerical work and functions at Richmond, Newport News and Portsmouth, Viriginia on or after February 2, 1981. Carriers' notice provided for the coordination of thirty-one SCL positions at Richmond with the C&O clerical forces at that point; further, the notice indicated that two clerical positions at Newport News which were performed by C&O clerical forces would be coordinated with the SCL clerical forces at Portsmouth, Virginia.

In accordance with the notices of Carrier and the requirements of the New York Dock Conditions representatives of the two Carriers and the Union met to negotiate an implementing agreement. Following a series of meetings in November, December and January of 1981, the parties reached agreement on all issues involved in the "transfer reorganization and coordination" involved except with respect to issues pertaining to the application of Article I, Sections 5 and 9 of the New York Dock Conditions relating to employees of the individual Carriers who elect to exercise their seniority on their home Carrier in lieu of accepting a position available to them on the other Carrier at the same work location. On January 8, 1981 that implementing agreement was executed by both parties. That agreement, it was understood, could not be implemented until the disputed issues submitted to this arbitration proceeding had been resolved.

Sections 5 and 9 of the New York Dock Conditions provide 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 toal 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.

(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."

"9. Moving expenses - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employement as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family and for including living expenses for himself and his family and for his own actual wage loss, not exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employement as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad with 90 days after the date on which the expenses were incurred."

Specifically, the coordinations involved in this dispute concern the abolishment of three clerical positions on SCL at Richmond, Virginia and the transfer of twenty-eight clerical positions from SCL to the C&O at the same location. Furthermore, it was agreed that three extra list positions would be established on the C&O at Richmond so that there would be a total of thirty-one positions affected in the transaction from the SCL to C&O. Furthermore, the negotiation and previous notice indicated that there would be ten C&O positions abolished at Newport News, Virginia and two clerical positions established on SCL at Portsmouth, Virginia.

The language contained in Section 6 of the implementing agreement agreed to by the parties on January 8 provides that the SCL employees at Richmond have a prior right to fill the same positions on the C&O and also an option of exercising seniority on the SCL if they chose to do so. Similarly, C&O employees had a prior right with respect to the transactions involved at Newport News and Portsmouth, Virginia to fill the positions established on the SCL at Newport News.

CONTENTIONS

A. THE UNION - SUMMARY OF POSITION

As its initial argument, the Union maintains that the two Carriers involved in this merger chose to exercise a control rather than merger route before the Interstate Commerce Commission. Since there was no merger into a single carrier by this action, the separate corporate entities are maintained, according to ICC order, which also involves maintenance of separate forces, separate collective bargaining agreements and seniority rosters for each class of employee. The Union contends that the protections imposed by the ICC do not supercede those separate agreements. The Union argues that in a control situation, which in this instance was voluntary, the two Carriers are attempting to force the employees of one of the control railroadsto leave the employment of that railroad and become the employee of the other railroad or forfeit his protection under New York Dock. In the same context, the Union argues that "the railroad" referred to in the language of New York Dock relates to only the railroad on which the affected

employee is employed. New York Dock is drafted entirely, according to the Union, in terms of the employing Carrier and not two Carriers as in the case herein. The Union contends therefore, that the New York Dock must be applied to the SCL and C&O as the separate corporate entities which they desire to remain.

The Union argues further that the working agreement and existing agreement referred to in Article I, Section 5 of the New York Dock can only have reference to the schedule agreements of the individual Carriers. The Union concludes that the entire New York Dock formula is drafted in terms of the employing Carrier and its affected employees.

The Union compares the New York Dock Conditions to its ultimate predecessor, the Washington Job Protection Agreement. The Union points to the fact that Section 7c of the Washington Agreement relates to implementing the coordination of two or more railroad facilities and specifically states that an employee in order to be eligible for a dismissal or coordination allowance be permitted to exercise "his seniority rights to another position on his home road or a position in the coordinated operation." The Union contends that the reference to coordinated operations does not appear in the New York Dock Conditions. Obviously, the ICC, according to the Union, chose not to include such language in the New York Dock Protective Benefits.

With respect to the moving allowances and related benefits, the Union argues that once the employee attempts to exercise his seniority rights and finds that the only job available to him is so far distant that he would be required to move his place of residence, he becomes entitled to such benefits under the clear language of Section 9. The Union states that an employee may be required to move his residence in order to retain employment with his home Carrier, in this instance, the SCL (Richmond).

B. THE CARRIERS- SUMMARY OF ARGUMENTS

The Carriers contends that the Union desires in the Richmond situation that an SCL oy be able to elect to go to some other point on the SCL and exercise seniority on a lower rated position. Thereafter, according to the Organization's position, the

Carriers state that the Organization contends that the employee is entitled to displacement allowance in spite of the fact that he could have gotten a position on the C&O at Richmond which would pay him as much or more than the position he elected to take at another location on the SCL. This, the Carriers contend, is patently incorrect and contrary to the New York Dock Conditions as specified in Section 5. The Carriers maintain that when an employee who may indeed elect to take a position on the SCL rather than the C&O position at Richmond elects to do so, he merely forfeits the displacement allowance if his new position compensates him less than that he would have received at Richmond for the C&O.

Carriers point out that under the first paragraph of Section 5 in the New York Dock Conditions, the term existing agreements, rules and practices relates to all agreements which include the implementing agreement executed on January 8, 1980. Therefore, the Carriers argue that the Union's position that seniority rights which are contemplated by the employee taking a position in this instance with the C&O as not being under existing agreements, is erroneous.

The Carriers maintain that if an employee elects not to take a position available to him on the other railroad at his home point he may not trigger any of the protective benefits or compensation provided for in Section 9 if he goes to another location to exercise his rights. While Carriers point out that it does not seek to force the employee to take a position that he does not desire at the same time the employee cannot expect to pass up a job of comparable compensation on the other Carrier and obtain benefits under Section 5 and 9 of the New York Dock.

With respect specifically to Section 9 of New York Dock, when an employee has a position available to him at his home point of employment and elects to exercise his seniority elsewhere, while he may do so, he is then not <u>required</u> to change his point of his employment as a result of the transaction and hence, to receive benefits under Section 9. Carriers point out that the word required is a mandatory one under Section 9 whereas

the word elect is permissive.

In essence, Carriers are arguing that when a position is available to an employee at the same location where he has worked in the past (in this instance, Richmond) his move to any other location would be a voluntary move and not a requirement. Hence, the benefits of Section 9 would not be applicable nor would the benefits of Section 5 if the position which the employee elects to fill pays less than the position he could have had at Richmond. The Carriers point out that the implementing agreement provides that rates of the positions transfered to and established on the C&O at Richmond would be increased and therefore employees electing to fill such positions would receive a higher rate of pay than they received on their SCL positions.

Carriers point out that there is no dispute with respect to the possibility that an employee who does not have prior rights to a position at his home location which carries a rate of pay equal to or exceeding the rate of his previous job, would be entitled to a displacement allowance. This circumstance would obviously be applicable at Newport News where ten C&O positions will be abolished with only two positions established on SCL at Portsmouth. If the employees involved suffer a loss of earnings in terms of positions to which they may have aspired by virtue of their seniority, they will be entitled to the displacement allowance provided for in Section 5 of New York Dock.

Carriers rely in part on two decisions involving an interpretation of Appendix C-1 involving Amtrak and certain displacement allowances which Carriers contend are comparable to New York Dock Conditions involved in this case. In particular, Carriers point to the decision involving the take over of passenger service on SCL by Amtrak in which two employees (Wheaton and Waldron) filed claims, taking the position similar to that espoused by the Union herein. Specifically, the Arbitrator in that dispute held that an employee must exercise his seniority rights to any position which equals or exceeds the employee's guaranteed rate available to him in any seniority district, whether it is

in his home district or any other (providing no change in residence was required) in order to retain his protected status. In short, the Arbitrator held that an employee could not exercise his seniority to a position with a lesser rate of pay and receive his displacement allowance when another position was available to him in another seniority district (not requiring a change of residence) which paid the same or a higher rate of pay than the job from which he had been displaced.

Carriers argue that it was well known in the ICC proceeding that the two companies would be operating under a unified management and that there would be a coordination of operations at various points between these two independent corporations. The Carriers point out that the Organization was represented in the proceeding before the ICC by a Mr. Zeh who attempted to liberalize Section 5 and 6 of the New York Dock Conditions by proposing several amendments. Specifically, Mr. Zeh, according to Carriers, proposed that an employee receive expanded protection to include being deprived of employment "with his employing railroad at the point of his residence". Under Mr. Zeh's proposal, according to Carriers, an employee could have refused a position in a coordinated operation even at a common point if the new operation was under the control of another railroad. Carriers note that the Commission rejected the proposals made by Mr. Zeh and did not modify either Section 5 or 6 of the New York Dock Conditions. Carriers conclude that the Arbitrator has no right to grant additional protection which the Union was unable to secure in its argument before the ICC.

Carriersargue that the implementing agreement is indeed "an existing agreement, rule or practice" as specified in Section 5 of the New York Dock Conditions and Section 5 and 9 of the New York Dock make it clear that an employee cannot receive displacement allowance or moving expenses unless he is placed in a worse position (as defined in Section 1(b)) or required to change his point of employment. Since neither circumstance would obtain on the face of it under the changes contemplated at Richmond, the Carriers believe that its position should be affirmed and that an employee should be required to take the highest paying job for which he stands or should be treated

as occupying that position which he elects to decline regardless of whether the position is on the C&O or SCL. Similarly the Carriers feel that the answer to question should be answered in the negative.

DISCUSSION

The crux of this dispute is the interpretation and understanding of the first and fourth paragraphs of Section 5 of the New York Dock Conditions. Those two paragraphs will be repeated herein for purposes of clarification.

> "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 differencebetween the monthly compensation received by him in the position in wnich he is retained and the average monthly compensation received by him in the position from which he was displaced. "
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> (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."

Carrying the analysis one step further, the question is raised as to whether or not the transaction contemplated in the question at issue herein comes under the term "the normal exercise of his seniority rights under existing agreements, rules and practices." In other words, the question herein may be phrased as whether or not the transaction involved herein, a coordination, which involves job abolishments, job transfers and job creations, may come under the terms of Section 5 (a) and provide an option which an employee must consider even though on a "foreign" Carrier.

Initially, it seems to the Arbitrator that a coordination must involve more than Carrier and the fact that an agreement, if only an implementing agreement, is reached

between the two Carriers and the Organization, it would be apparent that such agreement comes under the definition of existing rules and agreements (provided for in the New York Dock). In fact, if one takes the position that the arrangement provided for in Richmond did not provide an option for employees being displaced from the SCL, the Organization would have a serious problem both as a practical matter and in terms of understanding what a coordination indeed relates to. It follows, therefore, from the Arbitrator's reading of the New York Dock Conditions specified in Section 5 that the positions established at Richmond on the C&O, whether by transfer or otherwise, were indeed options based on the understanding reached on January 8 which were available to the displaced employees on the SCL.

As both parties obviously fully recognize, the paramount consideration in the implementation of employees' desires in situations such as that contemplated by the coordination herein is the exercise of seniority. Those seniority rights of the employees affected by the transaction may not be impaired in any fashion, as the Arbitrator views it, by an implementing agreement. The conditions imposed by New York Dock fully recognized by the language contained in a number of Sections including Section 5, the importance of retention of the rights guaranteed employees in their schedule agreement. Thus, an employee even though he may be accorded prior rights and an opportunity to fill the position, in this instance, at Richmond on the C&O (an SCL employee) he may not choose to do so. That employee may exercise his seniority rights to any position which those rights entitle him to upon the abolition of his job. By the same token, however, such employees may not expect to receive benefits under Sections 5 and 9 of New York Dock if they elect not to fill positions which are available to them on (in this instance the C&O) another Carrier at a point which does not require a change of residence.

AWARD

The proper application of Article I, Sections 5 and 9 of The New York Dock Protective Benefits under the specific circumstances outlined are as follows:

1. Under Section 5 if an employee chooses to exercise seniority to a lower rated position on SCL in lieu of exercising seniority to a position available on C&O which has a rate of pay which equals the employee's present position he is not entitled to payment of the monthly displacement allowance and is treated as occupying the higher rated C&O position that he elected to decline.

2. If an employee elects to exercise seniority to a clerical position on SCL which requires a change in residence in lieu of accepting a position available to him on C&O at his present work location which does not require a change in residence he is not entitled to the protective provisions contained in Article I, Section 9 of New York Dock.

I.M. Lieberman, Arbitrator

Stamford, CT
February 27, 1981