ARBITRATION BOARD
(ARBITRATION PURSUANT TO SECTION 11
OF THE NEW YORK DOCK CONDITIONS)

BROTHERHOOD OF RAILROAD SIGNALMEN)
)
vs.) FINDINGS AND AWARD
)
BALTIMORE AND OHIO RAILROAD COMPANY)

QUESTION AT ISSUE:

BY THE BROTHERHOOD OF RAILROAD SIGNALMEN (the "Organization"):

"1. Whether the terms and conditions of the New York Dock formula, upon the application of which the CSX control of these formerly competing railroads [Baltimore & Ohio Railroad (B&O), Chesapeake & Ohio Railway (C&O), Seaboard System Railroad (SBD) and Louisville & Nashville Railroad (L&N)] was conditioned, should be applied as provided in Article I, Section 5 [of the New York Dock Conditions] to an individual railroad signalman of B&O as an employee affected by transactions undertaken pursuant to that control authority.

2. Whether the claim of Michael P. Ryan was improperly denied by the B&O."

BY THE BALTIMORE AND OHIO RAILROAD (the "Carrier):

"Did the Carrier comply with Section 5(a) of the New York Dock conditions in calculating the test period average hours and compensation of M. P. Ryan?"

BACKGROUND:

On September 25. 1980 the Interstate Commerce Commission (ICC or Commission) in Finance Docket No. 28905 (Sub. No. 1) and related proceedings approved the application of the CSX Corporation to control the railroad subsidiaries of the Chessie System, Inc. and Seaboard Coast Line Industries, Inc., through merger of the two carriers into CSX.

In granting such authority, the ICC imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979), commonly known as the New York Dock conditions.

On November 9, 1983, pursuant to Article I, Section 4, of the New York Dock conditions, the Carrier served notice to the Organization of its intent to coordinate the job functions of signalmen employed on the SBD, or more specifically the former L&N, with the job functions of signalmen on the B&O and C&O in the Greater Cincinnati, Ohio, terminal area.

An Implementing Agreement covering the above coordination was entered into between the Carrier and the Organization on March 24, 1984.

The Carrier had meantime abolished, on October 28, 1983, the position of Assistant Signal Maintainer at St. Bernard, Ohio, a position which had been listed to be abolished on the notice which the Carrier had provided the Organization under date of November 9, 1983. Claimant Ryan was the incumbent of the position at the time it was abolished.

Although Claimant Ryan was not immediately recognized by the Carrier to be a "displaced employee" as contemplated in Section 1(b) of Article I of the New York Dock conditions, there is no dispute that the Carrier did in fact subsequently agree to Claimant Ryan having attained such status as the result of the aforementioned abolishment, and thereby entitled to a monthly "displacement allowance." In this regard, the Carrier had addressed the following letter to the Organization under date of June 15, 1984:

> "This is in further reference to your letter of February 28, 1984 and our reply of April 30, 1984, concerning Carriers' notice of November 9, 1983 of intent to coordinate work performed by Signal employees for B&O and C&O in the greater Cincinnati, Ohio terminal area and by Signal employees for SBD in the greater Cincinnati, Ohio terminal area.
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> As you know, the coordination will become effective 12:01 a.m., June 18, 1984.
>
> We indicated in our letter of April 30, 1984 that we were investigating the claim of Michael P. Ryan, I.D. 1519467 for protection. This is to now advise that we have determined without prejudice to such position as we might take with respect to any other claim for protection filed as a result of this transaction that Mr. Ryan is entitled to have test period averages of hours and compensation developed as a result of the abolishment of his assistant signal maintainer position the close of business October 28, 1983.
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> As provided for in the New York Dock Conditions, test period averages will be determined for the period October 29, 1982 through October 28, 1983 for Mr. Ryan. A retroactive adjustment will be made for protection, if any is due, for the period subsequent to October 28, 1983. In view of the fact that Mr. Ryan had five years, two months and twenty eight days of service prior to being cut off, his protective period will be of equal length.
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> Please contact me if you have any further questions on this matter."

The Carrier and the Organization were not able to subsequently agree upon the use of certain months in computing Claimant Ryan's

test period compensation. Thus, the dispute here at issue concerns application of Section 5(a) of the New York Dock conditions.

In part here pertinent, Section 5(a) of the New York Dock conditions reads as follows:

> "Each displaced employee's displacement allowance shall shall be determined by dividing 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 o 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."

POSITION OF THE ORGANIZATION:

Essentially, it is the Organization's position that the extent of the test period utilized by the Carrier for computation of test period averages for Claimant Ryan had wrongfully included three months in which Claimant was on furlough and had performed no compensated service, i.e., January, June and August 1983.

The Organization maintains that merely because Claimant was entitled to and paid holiday pay for January 1, 1983 on the basis of work performed prior to being furloughed, or had been allowed previously earned two-day vacation allowances while on furlough during the months of June and August 1983, that the Carrier may not properly construe such payments to represent months in which Claimant had performed service during the 12-month test period prescribed by Section 5(a) of the New York Dock conditions.

Contrary to the Carrier computation of test period averages, the Organization says that the test period should be based upon services performed by Claimant during the ten months of March 1982 through December 1982 and the months of September and October 1983. It submits these months to be the last 12 months in which Claimant performed services immediately preceding the date of his displacement.

POSITION OF THE CARRIER:

The Carrier says that it has fully complied with Section 5(a) of the New York Dock conditions in calculating Claimant's test period. It maintains that since Claimant had in fact been granted compensation during the months of January, June and August 1983 that such months were properly included in determining Claimant's test period in pursuance of Section 5(a) of the New York Dock conditions.

In support of its position, the Carrier cites the decision of an arbitration board in a dispute between the Denver & Rio Grande Western Railroad and the Railway Labor Executives' Association, issued under date of November 12, 1981, with Peter Henle assisting as arbitrator. It also cites a decision in the matter of ar-

bitration between an individual employee (E. G. Hamblin) and the Illinois Central Gulf Railroad, issued under date of October 28, 1977, with Nicholas H. Zumas assisting as arbitrator.

The Carrier also contends that it agreed to protect Claimant Ryan on what it states was a "without prejudice" basis. In this regard, it makes reference to a letter which it had forwarded to the Organization under date of June 15, 1984, supra. Here, the Carrier directs particular attention to its letter having stated that the test period would run from October 29, 1982 through October 28, 1983, the Carrier then saying to this Board: "The Organization's acceptance of this test period, as indicated in the fact that no claim was filed for seven months after Carrier stated the terms under which the claimant would be protected, precludes subsequent challenges such as that in the instant dispute."

FINDINGS AND OPINION OF THE BOARD:

Although the two arbitral decisions cited by the Carrier in support of its position, supra, do in fact touch upon the calculation of test period averages, this Board believes that careful study of the findings of those two boards reveal the decisions of both boards to have been related to specific and limited circumstances of record.

In the DRG&W case, it appears the rationale expressed as support for calculating base compensation by utilizing 12 months immediately prior to the transaction, with at least one such month having involved compensated service, was determined proper by that board so as to preclude what it believed would otherwise have constituted preferred treatment to seasonal employees as compared to year-round or full-time employees. The nature of the circumstances which had led that board to its decision were described by that arbitration board to be as follows:

> "[T]here seem to be few, if any, instances in which these [Oregon Short Line III] protective conditions have been applied to a set of circumstances similar to those in this case. The more unique features of this transaction are the following:
>
> (1) The object of the sale, the 45-mile narrow gauge line, although in earlier years an integral part of the DRGW system, at the time of sale had no connecting link with any other section of that system. In fact, the shortest distance between the narrow gauge railroad and the main body of the railroad was roughly 150 miles (Durango to Alamosa).
>
> (2) Because the narrow gauge line has been operated almost exclusively as a seasonal tourist attraction (May to September), most of its employees were local residents who, although they maintained a year-round employment status with the DRGW, were actually working for the railroad three to six months of the year and on furlough status the remainder of the year. A relatively small workforce, largely maintenance employees did work year-

round.

(3) The sale was consummated prior to any implementing agreement between the DRGW and its employees regarding the application of any protective provisions to those employees affected by the sale. As a result, when the DRGW took certain personnel actions at the time of sale or shortly thereafter (notifying employees with seniority only at Durango that no work was available for them and offering other employees with wider seniority jobs at other locations), the individuals involved were forced to respond without knowing whether or when any employment protective provisions would apply to their individual situations.

The presence of these unusual circumstances complicated the task the parties faced in attempting to reach a voluntary implementing agreement. It similarly complicates the task of a neutral referee setting out to define such an implementing agreement. It is not enough simply to refer to the language of the Oregon Short Line III conditions since this language does not by itself solve some of the issues now confronting the parties. Rather additional language must be included to resolve the special issues inherent in this transaction; ..."

Thereafter, in discussing the major issues in dispute between the parties in the DRG&W case, and what that arbitration board found to be appropriate language to be incorporated into an implementing agreement, the board in that case stated, among other things, the following:

"Degree of Protection for Seasonal Employees

In this case, seasonally employed workers comprise a majority of the employees whose employment was related to the Durango-Silverton line. To what degree, if any, should they receive the protections of OregonShort Line III conditions? It seems clear from a reading of the 1979 ICC decision that these conditions were written as applying essentially to year-round permanent employees. This also seems to be true of the various predecessor provisions, including the Washington Job Protection Agreement. No reference is made to seasonal, part-time, or part-year employees. In fact, there seem to be few, if any, instances in which courts, administrative bodies, or arbitrators have ruled on this question.

The RLEA argues that these employees are entitled to the same protections as year-round employees, except that these protections would not apply to months in which they were traditionally not employed. The carrier contends that the status of furloughed employees (most seasonal employees were on furlough at the time of the sale) has not been affected by the transaction; these employees were on furlough before the sale and they continue to be on furlough after the sale. 'At that point they are neither dismissed or displaced until such time

as there might be need for their services.' (Transcript I, p. 114-115).

It is clear, however, that had the sale not occurred, the carrier would have recalled all or practically all of these furloughed employees to work during the 1981 operating season . . . . The sale of the line obviously did have an adverse affect on the employment opportunities of these employees, not merely for the summer of 1981, but probably for future summers as well.

* * * * * * *

[S]ome further consideration appears necessary to apply Oregon Short Line III conditions to seasonal (furloughed) employees. In a number of cases these individuals have been working for the carrier for many years. In any year they may be employed for as long as six months and this work may constitute the individual's main source of income. In other cases particularly the younger people, work with the DRGW has been concentrated in the traditional summer vacation months of June -- August and provides earnings for further education or other activities. The second group obviously has a more casual relationship to their work and to the DRGW.

There is some doubt whether the Oregon Short Line III conditions are meant to apply to seasonal workers with only a casual and temporary job attachment. As previously indicated, there appears to be no precedent in earlier rulings on this question, but a related document, the C-2 Appendix to the National Railroad Passenger Corporation Agreement between the Corporation (Amtrak) and the various railroad unions, does include a provision on this issue. It excludes from the protective provisions of the agreement discontinuance of seasonal service in operation 120 days or less. Although the language applies to service in terms of operations rather than service in terms of employment, it is nonetheless an indication that at least in this instance both railroad management and unions have recognized that employees involved in short-term operations can be excluded from basic employee protection.

In the attached implementing agreement, language is included entitling furloughed employees to protection, but only for employees who worked for the DRGW 120 days or more during 1980.

* * * * * * *

"Calculation of Base Compensation

Both parties agree that the language in Oregon Short Line III conditions regarding the method of calculating base compensation (in order to measure possible displacement or dismissal allowances) is ambiguous. It reads as follows:

'Displacement Allowance: (Section 5a)

"Each displaced employee's 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 service immediately preceding the date of his displacement as a result of the transaction.

Dismissal Allowance: *******."'

The ambiguity concerns the specific 12 months to be utilized in this calculation. The 12 months can be the actual 12 calendar months prior to the transaction providing the individual received compensation in at least one of them. Alternatively, the 12 months can be the 12 months prior to the transaction in each of which the employee received some compensation. The former is the carrier's view, the latter the RLEA's.

While this issue has little effect on allowance calculations for the regular, year-round employees, it does have greater applicability to the determination of allowances for the seasonal employees. Generally, the monthly allowance amount under the RLEA proposal would be higher than the carrier proposal, but the total under the two systems would be roughly the same on an annual basis since the RLEA would provide allowances only for those months in which the employee received compensation in 1980. However, the net amount to the individual is likely to be higher under the RLEA proposal since a higher base would be established against which to record such offsets as unemployment benefits and outside earnings.

This is a difficult question to resolve. The language in Oregon Short Line III conditions is ambiguous. It was extensively discussed at the hearing. (Tr. I, 98 - 112, II, 148 - 152, 161 - 166) It seems logical to relate protection for seasonal employees to their normal period of employment. While the proposed RLEA language appears reasonable, a number of troubling issues would remain. Two of them are the following:

(1) Application of the proposal to employees with fewer than 12 months of compensated service. What about the employee who had worked only one or two seasons prior to the transaction? The RLEA proposed language appears to include only months of compensated service.

(2) Length of protective period. The proposed language does not clarify the application of Section 1(d) of Oregon Short Line III conditions, defining 'protective period.' A casual reading of the RLEA proposal leaves the impression that a dismissed or displaced employee

working, for example, for six months in each of three years, might be entitled to receive his allowance for 36 months (six months in each of six years) since he was 'in the employ of the railroad' for three calendar years prior to the transaction. This would constitute preferred treatment compared to year-round employees.

On balance, it seems best in this implementation agreement to measure the 12 months consecutively dating back from the date the employee is first deprived of employment as a result of the transaction. (With this conclusion it is unnecessary to consider the RLEA proposal to include in the calculation of base compensation only months in which the employee worked at least half the working days.)"

This Board has quoted quite extensively from the findings in the DRG&W case because: 1) The Board believes the record should reflect the extent of unusual or unprecedented circumstances which gave the arbitration board in the DRG&W case reason to conclude there was need to break new ground in arriving at its determinations relative to imposition of an implementing agreement; and, 2) The Board believes it appropriate to clearly show why it does not find the award in the DRG&W case as dispositive of the issue here in dispute.

Moreover, notwithstanding Carrier's citation of the above award, and its argument that "the test period averages should properly be calculated on the basis of the most recent period of twelve consecutive months in which the employee performed service during one of the months in question," the record as developed on the property in the case before us reveals that the Carrier had apparently not found sufficient reason to follow the dictates of the DRG&W award. In this connection, it is significant to note that in response to an undated inquiry from Claimant Ryan about his protective allowance, the Carrier's Manager Personnel and Labor Relations had written Claimant Ryan under date of July 31, 1984, stating in part the following as concerns application of the New York Dock conditions:

"As provided for in the New York Dock Conditions, your test period average would be determined for the period October 29, 1982, through October 28, 1983. Should there be any months during the test period when your received no compensation, then the next earliest month in which compensation was received would be used. For example, if you had no compensation in July 1983, the test period would run back to September 29, 1982, and so forth.

Our Payroll Accounting Department has all the necessary data to compile your test period averages and they will provide this information to Mr. Cashwell's Office who will then prepare the necessary forms for any protection you may be due subsequent to October 28, 1983." (Underscoring by the Board)

In studying the decision of the arbitration board involving the ICG case, this Board does not find, as the Carrier urges, that

the ICG board award has direct application to the dispute at issue before this Board.

The issue before the ICG arbitration board involved a question as to whether a grievant had been properly compensated under the Amtrak (Appendix C-1) employee protective conditions when the Carrier in that dispute applied the average monthly time factor in making an adjustment to a protective allowance as the result of a general wage increase. In the instant dispute, we are concerned with a question as to whether a month in which an employee had not actually worked, but in which the employee had received a contractual payment, may be utilized in computing test period averages.

Now, as concerns this Board's opinion about the composition of Section 5(a) of the New York Dock conditions, supra. We think it significant that authors of the protective provisions elected to state that test period averages be based upon "the last 12 months in which [the employee] performed services immediately preceding the date of his displacement as a result of the transaction." No mention is made of the test period being based on the past calendar year or past 12 consecutive months. Section 5(a) rather clearly calls for such calculation to be based on the last 12 months in which the protected employee had "performed services."

The Carrier's payment of holiday pay for January 1, 1983 was the consequence of Claimant having qualified for such payment by reason of having worked the requisite number of days in December 1982 before he was furloughed at the end of his tour of duty on December 31, 1982. The payment of two days vacation in June and and again in August 1983 were due Claimant for work actually performed during the calendar year 1982, and reportedly had been granted Claimant at the times in question in an effort to help him meet financial burdens he had been experiencing while on furlough. In other words, it does not appear these particular payments were attributable to service performed during each of the three months in question.

In the light of all the above, we believe that for this Board to hold the protective period to be other than the last 12 months in which Claimant actually performed compensated service, would be contrary to the provisions of the applicable New York Dock conditions. Thus, this Board does not find that the Carrier may properly utilize the months of January, June and August 1983 as months of compensated service in computing the Claimant's test period averages.

Turning to the Carrier's argument that its letter of June 15, 1984, supra, constituted a "without prejudice" disposition of all matters related to computation of Claimant's test period averages.

In the opinion of the Board, absent affixed signatures from the Claimant and/or representatives of the Organization attesting to the letter being an agreed upon understanding, the letter may not be looked upon as having been dispositive of the dispute here at issue. Therefore, we do not find that Claimant's right to have asserted a claim once it was established there was reason to

believe that the Carrier was incorrectly calculating Claimant's test period averages had been waived by such letter.

Turning next to what appears from the record as presented to be an ancillary dispute with respect to the length of Claimant Ryan's protective period.

Although some past decisions of boards of arbitration have been to the effect that the protective period was not limited to the length of time an employee had been in service prior to an ICC order or a transaction, such findings appear to have been restricted to those instances whereby it was determined that the protective conditions or the implementing agreements were silent with respect to such issue. That is not the situation in the instant dispute. Here, the New York Dock conditions, in Section 1(d), specifically provide that the protective period is for a maximum of six years, conditioned on the stipulation, 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."

Accordingly, Claimant Ryan is entitled to a protective period equal to his service in the employ of the Carrier, not to exceed six years. Thus, if the record shows, as Carrier states, that prior to his displacement the Claimant had only 5 years, 2 months and 28 days of service in its employ, that is the proper length of his protective period as prescribed by the New York Dock conditions.

Finally, as concerns the Carrier protest and suggestion the claim be barred on the basis of a time limit violation.

The New York Dock conditions do not include any reference to time limits with respect to the filing of a claim, and several past boards of arbitration have held that the normal time limit on claims rules of the working schedule agreements do not apply to claims for protective benefits. Therefore, to sustain the Carrier in this regard would be contrary to the provisions of the New York Dock conditions.This is not to say, that an undue delay in filing a claim may not, under certain circumstances, justify recognition of the doctrine of laches. However, we do not find from our study of the handling of this dispute that such was the case with respect to Claimant Ryan filing his claim. In this connection, the record shows that the claim was brought to the Carrier's attention during what is described in the record as the initial conference dealing with the Notice of November 30, 1983 for coordination of the signal work and employees in the Greater Cincinnati, Ohio terminal area, and that the Carrier had advised the Organization that it would investigate the claim.

Furthermore, the record shows that Claimant Ryan had written an undated letter to the Carrier after being told he would be entitled to a displacement allowance. This letter was received in the Carrier offices on June 27, 1984, and it challenged certain of the Carrier's calculations as set out in its letter of June 15, 1984 to the Organization. This Carrier letter, incidentally,

appears to have been Carrier's first response to the Organization on the subject following its announced intent to investigate the claim. Moreover, nowhere in the Carrier letter or its subsequent reply to Claimant Ryan under date of July 31, 1984 was mention made of any purported time limit violation. Nor do we find that the Carrier had attempted to invoke such a defense in any subsequent correspondence up to and including the date the claim was finally denied on appeal on the property by Carrier letter dated January 4, 1985. The Carrier time limit argument is therefore found to be without merit.

In the circumstances of record, the Board will hold that the claim of Michael P. Ryan was improperly denied by the Carrier in that the Carrier had not fully complied with Section 5(a) of the New York Dock conditions in calculating the test period average hours and compensation of Claimant Ryan.

AWARD:

The Question at Issue is disposed of as set forth in the above Findings and Opinion of the Board. The claim of Michael P. Ryan was improperly denied by the Carrier in that it did not comply with Section 5(a) of the New York Dock conditions in calculating the test period average hours and compensation of Claimant Ryan.

Robert E. Peterson, Chairman
and Neutral Member

W. C. Comiskey
Carrier Member

V. M. Speakman
Organization Member

Baltimore, MD
February 27, 1987