ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	
TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, (BRAC) Organization,	OPINION AND AWARD Pursuant to Article I, Section 11 of the New York Dock Conditions
and	
MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY, Carriers.	Case No. 1 Award No. 2

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

QUESTIONS AT ISSUE

1. Is an absence from work due to illness a voluntary absence under Section 5, Paragraph 3 of the New York Dock Conditions?

2. If the answer in Item 2 supra is in the negative shall the Carrier be required to compensate Clerk J. E. Anderson in the amount of $43.80 which represents sick pay deducted from his pay for sick days of February 4 and 5, 1985?

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.

At the Neutral Member's request, the parties waived the Section 11(c) time limit for issuing this decision.[1]

II. BACKGROUND AND SUMMARY OF THE FACTS

As the result of a UP/MP Accounting Department coordination governed by Implementing Agreement No. 20, the UP abolished Claimant's Senior Rate and Division Clerk position at Omaha, Nebraska. Pursuant to Article III, Section 2 of Implementing Agreement No. 20, Claimant applied for and was awarded a new MP Accounts Specialist position paying $107.51 a day at St. Louis,

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

Missouri. Claimant elected protection under the New York Dock Conditions and the parties concur that Claimant became a displaced employee in late 1984 or early 1985.

Claimant's test period average monthly earnings amounted to $2,588.11 based on test period average hours of 182.9 per month. The Carriers represented to this Committee that Claimant's test period average earnings included any paid sick leave he received during the twelve month test period but the record does not reflect if, in fact, the Carrier paid Claimant any sick leave compensation during the test period.

Claimant's protected rate for February, 1985 was $129.41 a day which was $21.90 more than the daily rate of his St. Louis position. Claimant was absent from work due to illness on February 4 and 5, 1985. The MP paid Claimant his full daily protected rate of $129.41 for both days Claimant was off sick. In June, 1985, the Carrier recovered $43.80 from Claimant's paycheck representing its alleged erroneous overpayment of $21.90 a day for February 4 and 5, 1985.

The issue in this case is whether Claimant was entitled to his full guarantee for the two days he was away from work due to sickness in February, 1985. The portion of the New York Dock Conditions most pertinent to this issue is the third paragraph of Section 5(a) which provides:

> "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 added.]

III. POSITIONS OF THE PARTIES:

A. The Organization's Position

The Organization argues that since sick pay is included within Claimant's test period average earnings, the Carrier effectively reduced his New York Dock benefits by $21.90 per day. From the Organization's viewpoint, Section 5(a) precludes the Carrier from arbitrarily reducing Claimant's guarantee merely because he was ill.

An absence due to illness is hardly a voluntary absence. The Carrier implicitly acknowledged that Claimant was involuntarily away from work and thus, entitled to his guarantee since it originally compensated him for $129.41 for both February 4 and February 5, 1985.

B. The Carrier's Position

The Carriers contend that the New York Dock Conditions were not intended to confer benefits on employees who earned less than their test period average earnings due to reasons other than a transaction. Section 5(a), Paragraph 3 of the New York Dock Conditions provides for deductions from displacement allowances when the displaced employee is voluntarily absent. Even though

nobody volunteers to be ill, Claimant's absences cannot be attributed to the Carriers or their transaction.

Alternatively, the Carrier argues that Claimant's displacement allowance, for February 4 and 5, 1985, though initially miscalculated, was computed consistent with a past practice developed subsequent to the 1982 merger. Since the merger, the parties have negotiated more than thirty implementing agreements. The Carrier has paid benefits to hundreds of clerical employees but none have legitimately received dismissal or displacement allowances on days they were absent due to illness. The past practice is entrenched. Moreover, the Organization has never objected to this established method of computing displacement allowances.

IV. DISCUSSION

The third paragraph of Section 5(a) of the New York Dock Conditions unequivocally provides that the Carriers may offset from displacement allowances those days that employees are voluntarily absent. While it is true that employees do not intentionally contract a disease, arbitration decisions under both the New York Dock Conditions and the Appendix C-1 Conditions have decided that an absence from work due to illness suspends the guarantee for the period of the absence. IBT v. CR NYD § 11 Arb. (Blackwell; 8/9/84); UTU v. ICG Appendix C-1 Arb. (Rohman); 5/8/80). See also Special Board of Adjustment No. 605, Award No. 379 (Friedman). Put simply, even though the employee does not

want to be absent, his unavailability cannot be attributed to the Carriers.

Within the confines of the scant record before us, this Committee is unable to correlate the amount of sick leave pay Claimant received during his test period with any complementary benefit he might receive during each year of his protective period. Furthermore, it is infeasible to match sick leave pay included in the test period average with a displacement allowance. In summary, if Claimant received any sick leave pay during his test period, he reaps the benefit of the compensation, albeit a small fraction thereof, on each day he actually works.

The Carrier properly deducted $43.80 from Claimant's displacement allowance for February 4 and 5, 1985.

AWARD AND ORDER

The Answer to the First Question at Issue is Yes.

The Second Question at Issue is moot.

Dated: March 1, 1988

F. T. Lynch
Employees' Member

L. A. Lambert
Carriers' Member

John B. LaRocco
Neutral Member