ARBITRATION COMMITTEE

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

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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 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.
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> 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.
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> 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 employe 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 Stablization 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.

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