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In the Matter of Arbitration Between:)
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Transportation-Communications)
International Union -- BRAC)
)
and)
)
Union Pacific Railroad Company.)
)
Pursuant to Article I, Section 11)
of the New York Dock Conditions)
Imposed by the Interstate Commerce)
Commission in Finance Docket No.)
30,000)

Case No. 2

Before Arbitration Committee
Members:

Richard D. Meredith

Carrier Member

William R. Miller

Employee Organization
Member

Lamont E. Stallworth
Labor Arbitrator

Neutral Member

Hearings Held

Chicago, Illinois
August 18, 1988
December 19, 1988

ISSUE IN DISPUTE:

The Parties have submitted the following issue to the Committee:

1. What is the proper method for computing test period averages when the test period includes both agreement and nonagreement earnings?

BACKGROUND:

This case involves the level of benefits to be paid to certain Claimants under the New York Dock Conditions. In

September, 1982 the Interstate Commerce Commission (I.C.C.) approved the merger and consolidation of the Missouri Pacific Railroad Company (MP), the Western Pacific Railroad Company (WP) and the Union Pacific Railroad Company (UP). As a condition of that merger the I.C.C. imposed a set of labor protective conditions upon the railroads involved to afford some protection to the employees affected by the merger. Known as the New York Dock Conditions, this Agreement offers certain benefits and guarantees to employees who are affected by merger-related transactions.

On May 1, 1986, the Carrier announced a company-wide force reduction. (Employees' Exhibit B, pp. 1-2). On this date the Carrier offered non-agreement employees certain benefits under a voluntary force reduction program. (Employees' Exhibit B, pp. 3-12). In the same announcement, the Carrier also described the terms of an involuntary force reduction program, which it said it would put into effect if it did not obtain enough volunteers for the voluntary program. (Employees' Exhibit B, pp. 13-19).

The Carrier contended that the force reduction was not merger-related. However, in June, 1987, in another case before an Arbitration Committee between the same Parties, the Committee decided that the force reduction was related to the merger, at least as it affected the claimant, P. J. Kelley, who worked in the Accounting Department. Therefore, the Committee determined that the claimant was eligible for benefits under the New York Dock Conditions, which are more generous than the benefits and

protection offered by the Carrier in its two force reduction programs.

Each of the five Claimants in the instant dispute occupied non-agreement positions at the time the Carrier announced its force reduction program. Four of the Claimants received lump sum payments under the Force Reduction Program; all five exercised their seniority and moved to positions under the collective bargaining agreement. (Employees' Submission, p. 5). A few months after moving to these agreement positions each of the Claimants was affected by a merger-related transaction. Subsequently, each of them filed claims for New York Dock benefits.

Initially, the Carrier denied the claims on several grounds, e.g. that the Claimants were not affected by merger-related transactions. However, for purposes of resolving the instant case the Parties are addressing only the issue of the proper method of computing the test period earnings. 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 Organiztion argues, however, that the New York Dock Conditions require the benefits to be based upon total compensation during the preceding year, including non-agreement earnings. The Parties were unable to resolve this dispute and have submitted it to the Committee for resolution.

After the initial hearing, the Neutral Member of the

Committee sought additional information from the Parties in the form of the following questions:

1. Is the only transaction at issue here one which involved a displacement or dismissal from an agreement, rather than a non-agreement position?

2. If so, how is this case related to and affected by the P.J. Kelley grievance?

3. If more than one transaction is involved, how should the Committee apply the principle that an employee should be in the same position economically after a transaction as before the transaction?

4. If only one transaction is involved, how should the Committee reconcile the principle that an employee should be in the same position economically after a transaction with the language of the Agreement which states that benefits should be calculated on a 12-month basis?

The Parties responded to these questions with written submissions and oral argument held on December 19, 1988. The Parties concurred at that only one New York Dock transaction is at issue in this case, i.e. the latter displacements which occurred after the Claimants had exercised their seniority and assumed agreement positions. The issue of whether non-agreement earnings may be included as a basis for calculating the test period earnings remains.

THE ORGANIZATION'S POSITION

The Organization contends that the Committee can resolve this dispute by simply applying the formula for test period earnings that is contained in Article I, Section 5 of the New York Dock Conditions. That formula bases the allowance on the

total compensation received by an employee during the last twelve months prior to the transaction.

According to the Organization, the Carrier's position in this case contradicts the straightforward language of the Agreement and therefore should be rejected. The Organization also argues that the Carrier's position leads to absurd results for some employees (presumably because the short time they occupied their agreement positions before the transaction occurred resulted in a very low monthly allowance).

The Organization also argues that the weakness of the Carrier's position is made clear by the fact that the Carrier made another proposal, which the Organization apparently rejected, offering another formula which produced higher test period earnings. This formula would have included one month of the employee's non-agreement earnings as part of the test period.

In addition, the Organization contends that the weakness of the Carrier's position is evident through evidence that the Carrier wants to base the monthly allowance only on the (agreement) positions held by the Claimants at the time of the transaction. Under this method the Carrier would exclude earnings even from agreement positions in which the Claimants had worked in the previous year.

The Organization asserts that this is not the intent of the New York Dock Conditions. According to the Organization, Article I, Section 5 provides the correct formula for determining test period earnings, and the Carrier cannot be permitted to make

substitute calculations. Therefore the Organization urges that the Committee answer the question in issue by holding that all compensation, earned in both agreement and non-agreement positions during the year prior to the transaction, be included in figuring test period earnings.

THE CARRIER'S POSITION

The Carrier contends that the test period earnings should not include any compensation earned in a non-agreement position. In support of its position the Carrier argues that:

1. The term "total compensation" as used in the New York Dock Conditions does not include all compensation, but only that compensation which may reasonably be included;
2. It is not reasonable to include non-agreement earnings because to do so would constitute a windfall for the Claimants.

The Carrier acknowledges that a literal reading of the language of the New York Dock Conditions appears to support the Organization's position. The Carrier cites the language of the Agreement which states that the monthly displacement allowance is based upon an employee's "total compensation" for the Carrier within the twelve months preceding the transaction.

Nevertheless, the Carrier urges that other tribunals have upheld exclusions of certain income from the concept of "total compensation" in the New York Dock Conditions. In particular, the Carrier relies upon an opinion in which a referee excluded the earnings of employees performing a one-time task paying overtime wages.

The Carrier contends that the Committee should adopt the principle that an employee awarded a monthly displacement allowance should be no better or worse off than if he continued to work in his job. Since the jobs which the Claimants held at the time of the transaction were agreement jobs, the Carrier contends, awarding them a displacement allowance based in part on their higher non-agreement wages would put them in a better position than if they had continued to work.

On rehearing the Carrier also suggested that to base the monthly allowance on non-agreement earnings could also create a hardship for employees who earned less as non-agreement employees than as agreement employees. In conclusion, the Carrier argues that in order to prevent either a windfall or a hardship for these employees, the monthly allowance should be based only upon the earnings of the position from which the employee was dismissed or displaced.

THE OPINION

This case involves the proper method of calculating test period earnings in order to determine the monthly allowances of employees affected by a New York Dock transaction. The issue is whether the allowances should be based upon compensation earned in both non-agreement and agreement positions.

The Claimants in this case all held non-agreement positions during the year prior to the transaction giving rise to this dispute. Sometime during that year each Claimant moved to an agreement position. These initial moves are not the New York Dock

transaction(s) at issue here. Rather, once the Claimants entered their agreement positions, they were subsequently displaced or dismissed by a merger-related transaction that the Parties agree entitled them to New York Dock benefits. The question then is whether the Claimants' monthly allowances authorized because of this transaction should be based in part on compensation earned in their agreement positions.

The applicable language of the New York Dock Conditions 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), and providing further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

(Article I, Section 5(a), emphasis added).

The Carrier also points to the language determining a dismissed employee's allowance as relevant,

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. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(Article I, Section 6(a)).

The Committee concludes that the literal language of these sections should be applied, and that all of a Claimant's 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.

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

Much of the Carrier's argument concerns whether non-agreement earnings should be credited towards the calculation of the monthly allowance. However, the Committee concludes that the Carrier's full position is that the monthly allowance should be based only upon the earnings of the position held by an employee at the time of the transaction. The Committee makes this determination from the Carrier's letter quoted at p. 10 of the Employees' Submission, and from the last paragraph of the

Carrier's second written submission in this case, submitted on December 19, 1988.

This evidence suggests that the Carrier is seeking to deny credit for any compensation, even that earned in agreement positions, if a Claimant held more than one job in the applicable year. This interpretation directly contradicts the New York Dock language at issue here, which does not refer to the last job held by a Claimant prior to the transaction. In contrast, it refers to the "total compensation" earned by an affected employee in the prior year, in the service of the Carrier. This expansive language suggests that the drafters of the document contemplated that an employee might hold more than one position in the course of that year.

Furthermore, if the Parties had intended the result sought by the Carrier, there would have been no need to calculate an average compensation for the entire prior year. The Parties simply could have taken the wages of an employee at the time of his transaction, or gone back a month or two to even out any irregularities caused by calculations made on only one or two weeks' pay.

The Committee concludes therefore that nothing in the language of the New York Dock Conditions suggests that the Parties intended to exclude wages earned from a job other than the job held at the time of the transaction. Furthermore, nothing suggests that there was an intent to differentiate

between compensation earned in agreement as opposed to non-agreement jobs.

The Carrier argues, however, that to permit calculations based upon an employee's non-agreement income would provide a "windfall" to the Claimants. As the Carrier also acknowledges, however, the unusual employee who was earning more as an agreement employee than in his former non-agreement job would suffer a hardship under the Organization's formula for calculating allowances.

The assumption behind the Carrier's position is that the New York Dock agreement demands that an employee should be in the same position -- no better and no worse -- after a transaction than if he had continued to work in his job. Allied Services Division/Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees vs. Western Railroad Association, (Dennis, Ref). Although there is some logic to this argument, in fact the New York Dock Conditions state only that an employee should not be placed in a worse position as a result of a transaction.

Furthermore, even if the Carrier's interpretation were correct, the issue here may be cast as "what is a [better or worse] position?" The Carrier urges that the Committee compare a Claimant's position on the day before the transaction with the day after. The Organization measures the Claimant's position on the basis of the year before the transaction date. The language of the Agreement supports the latter position.

In addition, the arbitration case relied upon by the Carrier contains facts which are distinguishable from those at issue here. There Referee Dennis excluded overtime earnings due as a result of a one-time job moving office furniture, files etc. to a new office. The decision was based on the view that it was unreasonable to include "casual or unassigned overtime as well as most other forms of compensation received by employees not directly related to their basic jobs." (Decision, p. 8, Carrier Exhibit A). However, the compensation at issue here was not casual or overtime earnings. Instead, it was directly related to the Claimants' basic jobs during the test period. Therefore, the rationale of that decision does not apply.

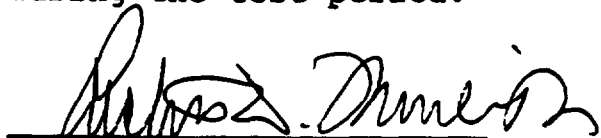
As a closing matter, the Committee has not based this decision on the Organization's position that the Carrier's own compromise position, which would have taken into account some of a Claimant's non-agreement earnings, demonstrates the Carrier's lack of confidence in the position it has brought before this Committee. The Committee views the Carrier's compromise offer as a settlement proposal offered in an attempt to resolve this dispute. To base this opinion on that offer would discourage both Parties from making similar offers to settle such disputes. Therefore as a matter of principle the Committee has not considered the offer as an indication of the strength of the Carrier's position.

In conclusion, the Committee determines that the literal language of the New York Dock Conditions applies, and the monthly

allowances must be based upon all compensation received by the Claimants for service to the Carrier in the applicable year.

AWARD

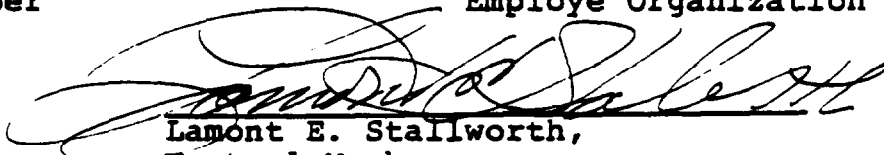
The proper method for computing test period averages is to include both agreement and non-agreement compensation earned during the test period.



Richard D. Meredith
Carrier Member



William R. Miller
Employee Organization Member



Lamont E. Stallworth,
Neutral Member

Dated this 20th day of February, 1989.

City of Chicago.
County of Cook.
State of Illinois.