SPECIAL BOARD OF ARBITRATION

Established Pursuant to Article 1 Section II
of the New York Dock II Conditions

CASE NO. 2
AWARD NO. 2

In the Matter of the Arbitration

- between -

Transportation-Communications International Union (BRAC)

- and -

Norfolk Southern Corporation

Hearing Held: September 29, 1988, Room 320, City Centre Building
223 East City Hall Avenue, Norfolk, Virginia

QUESTION AT ISSUE:

Organization's Question

"What is the proper method of computing test period averages for affected employees with less than one year's service?"

Carrier's Question

"What is the proper method for determining an employee's displacement and/or dismissal allowance under the New York Dock protective conditions when that employee has less than 12 month's employment?"

OPINION OF BOARD

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the application of the Norfolk Southern Corporation to obtain control of the separate railroad systems of the Norfolk and Western Railroad and the Southern Railroad for the purpose of merging and consolidating their operations (ICC Finance Docket 29430 [sub. - No. 13]). To compensate and protect employees affected by this merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 ICC 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 Carrier pursuant to the relevant enabling statute 49 USC Sec. 11343, 11347.

In the dispute herein, the Organization contests Carrier's interpretative application of Section 5 of the New York Dock Conditions, specifically as to the calculation of displacement allowances for displaced employees with less than twelve (12) months immediate service prior to the date of effective displacement. The five (5) Claimants involved herein were all employees with less than twelve (12) months of service when they were affected by a New York Dock transaction. The Organization maintained that the intent of Congress could not be implemented unless Claimants test period earnings were recomputed to provide a real monthly average compensation consonant with their abbreviated length of service. In support of its position, the Organization cited an arbitration award issued on July 10, 1971 which, in part, addressed the question of displacement allowances for affected employees with less than twelve (12) months of service immediately preceding their dates of

displacement. In that Award, the Referee, who was appointed by the National Mediation Board pursuant to the authority vested in the Board by Appendix C-1, Article 1, Section 4 issued by the United States Secretary of Labor on April 16, 1971, held in pertinent part as follows:

"In computing the average monthly allowance, the Carrier shall determine the total compensation received by the affected employee in the twelve (12) months in which he performed service immediately preceding his displacement or dismissal as a result of the discontinuance of inter city rail passenger service. In the event an affected employee's term of employment with the Carrier is less that 12 months, his average monthly allowance shall be determined by dividing his total compensation earned by the number of months that he was actually employed. If an affected employee worked 12 or more months, but performed no service at all during one or more of the immediately preceding 12 months, the parties shall utilize the earnings of the first month or months preceding the 12th month in which he performed ervice in order to be able to determine the total compensation to be divided by 12. However, if an affected employee only worked part of a month in the immediately preceding 12 months, then the compensation of that partially worked month shall be included in the total compensation of the immediately preceding 12 months."

The Referee in that case was mandated to draft an Implementing Agreement which would govern the Baltimore and Ohio Railroad Company and the United Transportation Union. (See Award issued by Referee Jacobs Seidenberg, otherwise known as the Implementing Agreement). The Organization also carefully reviewed the ICC's public policy position with respect to employee protection and Congress' intent under Section 405 of the Rail Passenger Service Act 1971.

Carrier asserted that it followed exactly the method detailed in Section 5 of the New York Dock Conditions, which requires that the total period averages be computed by dividing separately by twelve (12) the total compensation received by the displaced employees and the total time for which these employees were paid during the last twelve (12) months in which they performed service immediately

immediately preceding their displacement. It argued that the language of Section 5 is unambigiously explicit and provides no alternative formula for computing test period averages. For ready reference, Section 5 is quoted in full as follows:

"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 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."

Moreover, Carrier observed that several labor organizations known collectively as "various labor organizations" had sought modification of Section 5's computational formula when these organizations asked the ICC in Norfolk Southern Control Finance Docket No. 29430 to approve the methodology advanced herein. It noted that the ICC rejected this request and ruled instead that the New York Dock Conditions were significantly more protective of labor interests than any previously imposed set of employee protective and consistent with the statutory requirements of 49 USC 11347. It also pointed out that the Award referenced by the Organization in connection with Article 1, Section 4 of the Appendix C-1 conditions was irrelevant since it pointedly related to a dispute over the formulation of an Implementing Agreement and not to an interpretation of Section 5 of

the New York Dock Conditions. More important, it argued, the ICC rejected the computational method proposed by the concerned interested labor organizations in Norfolk Southern Control decided March 19, 1982.

In considering this case, the Board concurs with Carrier's position. Basically, what is at issue herein is the appropriate interpretation and application of Section 5 of the New York Dock Conditions. The ICC which promulgated these conditions ruled on March 19, 1982 that the Conditions satisfied the statutory requirements of 49 USC Section 11347 and also provided labor protection that significantly was more protective than any previously imposed set of conditions. It rejected the test period average modifications advanced by the petitioning labor organizations and observed in its decision that it found no unusual circumstances requiring the imposition of conditions in excess of the statutory minimum. Since the ICC as the framer of the New York Dock Conditions is better positioned to determine more objectively its original construction of Section 5 within the context of a broader historical record and since the various labor organizations' request for test period average modification clearly reflected a concern that Section 5 did not provide for a methodology that required dividing the test period earnings by the total number of months the displaced or dismissed employee performed service, the Board, of necessity must construe Section 5 in the literal sense in which it was written. To be sure, the 1971 C-1 Award fashioning an Implementing Agreement for the Baltimore and Ohio Railroad and the United Transportation Union contained an arbitral determination that is on point with the

Organization's position, but this Award did not interpret or apply Section 5 of the New York Conditions. The ICC in 1982, in effect, provided this interpretation and we must accord its decision judicial weight. Accordingly, upon the record we find that the methodology set forth in Section 5 which requires dividing by twelve (12) respectively the total compensation and the total time employees were paid during the last twelve (12) months in which they performed service immediately preceding the date of their displacement or dismissal is the correct computational method.

AWARD

1. Employee's Question at Issue

   Total compensation and total time paid as set forth in Section 5 divided by twelve (12) is the proper method of computing test period averages for affected employees with less than one year's service.

2. Carrier's Question at Issue

   The proper method for determining an employee's displacement or dismissal allowance under New York Dock protective conditions is to divide total compensation and total time paid as set forth in Section 5 by twelve (12) when said employees have less than twelve (12) months employment.

George S. Roukis, Chairman and
Neutral Member

G.C. Edwards, Carrier Member

J.C. Campbell, Employee Member

Dated: April 19, 1989