SPECIAL BOARD OF ARBITRATION

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

CASE NO. 3
AWARD NO. 3

In the Matter of the Arbitration

- between -

Transportation-Communications International Union (BRAC)

- and -

Norfolk Southern Corporation

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

QUESTIONS AT ISSUE:

1. Is the position of Yard Brakeman "comparable employment" under Section 6 of the New York Dock Conditions for Clerks A.D. Livengood, D.L. Lucado, J.C. Porterfield and J.H. Quesenberry?

2. Is the position of Machinist "comparable employment" under Section 6 of the New York Dock Conditions for Clerk R.E. Bill?

3. Is the position of Road Brakeman "comparable employment" under Section 6 of the New York Dock Conditions for Clerks G.E. Smith and R.G. Forrester?

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OPINION OF BOARD

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the application of the Norfolk Southern Corporation (NS) to obtain control of the separate railroad systems of the Norfolk and Western Railroad (N&W) and the Southern Railroad (SOU) for the purpose of merging and consolidating their operations. (ICC Finance Docket 29430 (Sub - No. 1)). 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 Carrier pursuant to the relevant enabling statutes, 49 U.S.C. Sec. 11343, 11347.

All of the Claimants involved in this dispute were affected by New York Dock transactions. They became dismissed employees pursuant to Article I, Section 1(c) of the Conditions. Each claimed, and received dismissal allowance in accordance with Article I, Section 6. Subsequently, by letters sent on various dates in Mid-1987, each was offered a position of employment with Carrier. Claimants Livengood, Lucado, Porterfield, and Quesenberry were offered the position of Yard Brakeman at Roanoke Terminal; Claimant Bill was offered the position of Machinist at Shaffers Crossing, Roanoke; Claimants Smith and Forrester were offered the position of Road Brakeman on the Roanoke District, Shenandoh Division. None of the positions required a change in residence. In pertinent part, the letters all stated:

"Please be advised that you have ten (10) days from the date of this letter to either:

1. accept the offer; or

2. have your protection under the New York Dock Conditions terminated.

In the event you fail to make an election as set forth above, you shall be considered as having exercised option (2) above . . .

In order to simplify your handling of these options, you are provided below two spaces with which you may signify your election. If you sign the option in the first space, you will be exercising Option 1, which is your acceptance of the position offered herein and a commitment that you will report for duty in that capacity. If you choose to accept the offer, you will be required initially to receive training on the position until you become qualified to perform its duties. Your signature in the second space would indicate your election of the alternative, which will result in termination of your protection under the New York Dock Conditions."

Under protest, however, each Claimant selected Option 1 rather than suffer termination of their New York Dock benefits. Claimants D.L. Lucado and J.D. Porterfield were later disqualified from the offered positions due to physical unsuitability and the Organization concurrently apprised Carrier that the offers of "comparable employment" were not in accordance with the requirements of New York Dock. Article I, Section 6(d) which is directly applicable to this dispute is referenced as follows:

"(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement."

In support of its position, the Organization argued that Article I, Section 6(d) implicitly requires a studied evaluation of an employee's ability for comparable employment. In other words, it asserted that what might be comparable for one employee might not be comparable for another employee. It charged that Carrier cavalierly presupposed that the only restrictions upon its (Carrier's) prerogatives under Section 6(d) was a brief 10 days notification to a protected employee to "take it or leave it". In essence, it maintained that the offer of comparable employment presented such a critical choice to an employee, that failure to accept a position even on reasonable defensible grounds would inevitably lead to a cessation of entitlements under New York Dock. Specifically, the Organization contended that the paucity of information provided the Claimants with respect to the jobs' task particulars rendered it difficult for the employees to make a reasonable choice. It observed that unlike the traditional standard of minimum experience and training necessary to enable an employee to assume a position and become qualified within a set period of time, Section 6(d) establishes a standard requiring immediate qualifications for the offered comparable position. Consequently, it argued that Carrier made offers to employees who were not only unqualified but said employees did not possess the minimum fitness and abilities for the positions. It pointed out that Article II, Section 9 of the Master Implementing Agreement provided the interpretative framework for recalling dismissed employees, emphasizing in particular, that the parties purposely provided a process and methodology whereby recalled

employees would be accorded training as an essential precondition of establishing qualifications. It noted that the history of labor protective benefits under New York Dock was traced to the provisions of Appendix C-1 which were devised and certified by the United States Secretary of Labor. More to the point, it reproduced an answer by the Secretary of Labor (1971) to a question dealing with comparable employment.

"Section 6(d) requires a dismissed employee to accept only a comparable position for which he is qualified. The use of the words "comparable" and "qualified" clearly prohibit a railroad from arbitrarily denying protection to a dismissed employee who refused a job which is not comparable and for which he is not qualified. Hence no employee would be required to accept a demeaning job."[1]

Moreover, it further argued that by comparing the normative employment conditions and clerical backgrounds of the employees herein with the tasks, skills, employment conditions and job attributes of Yard and Road Brakeman and Machinist, it was readily apparent there was no comparability between Claimants' prior clerical positions and the offers of employment by Carrier. It referenced Award No. 18 of Special Board of Adjustment No. 948 involving The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Vs. New Jersey Transit Rail Operations, July 8, 1986 as controlling authority on the employment characteristics constituting comparable employment i.e.,

1. Collective bargaining rights in respect to such matters as hours of work and pay for overtime and holidays;

2. Rights respecting grievances and discipline;

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[1]This answer was provided in the affidavit of James D. Hodgson, April 27, 1971. See Organization Exhibit E for details.

3. Benefits such as vacation, holiday and sick pay;

4. Wage rates and seniority.

Furthermore, it noted that the Amtrak arbitral awards Carrier referenced involved interpretations of Article III of Appendix C-1, which specifically required employees of Terminal Companies to apply for employment with each owning and using Carrier. By contrast, it observed that Article III does not require that the comparable employment must be that for which the employee is qualified. Accordingly, upon the facts herein, the Organization maintained that since none of the Claimants were qualified for the positions offered and since Carrier failed to comply with the explicit requirements of Section 6(d), Carrier unmistakably violated Article I, Section 6(d) of the New York Dock Conditions.[2]

In rebuttal, Carrier argued that Section 6(d) does not require that the offer of comparable employment be in the clerical craft or class from which furloughed. It pointed out that it merely provides for the offer of a comparable position. It asserted that the positions of Yard Brakeman, Road Brakeman, and Machinists were indeed comparable as contemplated by Section 6(d), since there were a wide range of positions falling within the clerical craft that were typically akin to the operating crafts. In fact, some of the duties of these clerical positions entailed climbing the sides of rail cars to make inspections and do yard checks, manually throwing track levers, placing rear end markers on trains without

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[2]The Organization acknowledged that Claimant R.E. Bill was qualified as a Machinist, however, it observed that it was unknown whether he was qualified at the time the position was offered.

cabooses, supplying cabooses, operating cranes and motorized vehicles and tying down TOFC equipment. Moreover, clerical positions require day and night assignments, including Saturdays, Sundays and holidays with various assigned hours. It also observed that the report, entitled, "Railroad Industry Job Analysis" for the clerical positions of Transportation Clerk and Warehouseman/Material Handler unequivocally shows that clerical assignments encompass a broad range of duties and responsibilities and job characteristics which are shared by a number of positions in other crafts and classes.[3] It noted that in Issue No. 9 of Amtrak Appendix C-1 award involving the Cincinnati Union Terminal Company and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, 1973, the Arbitration Committee held in pertinent part, "that comparable employment does not require the proferred position be confined to the same craft or class." This involved a comparison of a Mail & Baggage Handlers position with a Fireman's position. It also noted that in Amtrak No. 12 between the Chicago Union Station Company and the same Organization, the Board defined what was considered comparable employment.

"Neither Article I, Section 4 nor Article III of Appendix C-1 requires each owning and using Carrier and the National Railroad Passenger Corporation to offer comparable employment in the clerical craft or class. Article III requires them to offer only "comparable employment", irrespective of craft or class."

As a further demonstration of this interpretative perspective it cited the arbitral holding in the 1981 case involving Rufus Byrant

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[3]See Carrier's Exhibit I for the 1981 report prepared by the Railroad Personnel Association.

and Southern Railway Corporation. The Arbitration Committee in this dispute held in pertinent part,

"The intent of Article I, Item 6(d) of Appendix C-1 is to permit affected employees the chance to work rather than to sit home idle and draw benefits as well as to permit mitigation of protective payments otherwise due a protected employee without a job. As pointed out by Referee Bernstein in Docket No. 66 before the Disputes Committee established by Section 13 of May 1936 Washington Job Protection Agreement: reasonable doubts are to be resolved in favor of employment and maximizing of losses to both employees and Carriers."

Finally, it observed that the interpretation provided by Reconvened Arbitration Board No. 12 vis a vis the question of comparable employment established meaningful applicatory guidelines.

"A job which entails more than the performance of unskilled or semiskilled manual labor under direct or immediate supervision should be considered a comparable job within the meaning of Section II, Part C-6, of the Award. In applying this principle it is suggested as a guideline that any job which entails at least one of the following, or similar, characteristics would qualify as a comparable job.

1. The use of machines or specialized tools.

2. Working with or assisting skilled mechanics.

3. Performance of clerical work, including such items as receiving, delivering, checking, weighing, listing, routing or sorting of freight, baggage, mail or express

4. The exercise of individual responsibility when working outside the immediate area of supervision; or

5. Trainee or apprentice job leading to promotion."

As to the individual Claimants herein, Carrier noted that Clerks D.L. Lucado and J.C. Porterfield lacked the physical ability to perform the duties of Yard Brakeman and reverted to their status as furloughed employees. Clerk J.H. Quesenberry was recalled to service as a Clerk prior to reporting to work as a Yard Brakeman, thus nullifying the proferred position. Clerk A.D. Livengood met the

physical requirements and marked up for work as a Yard Brakeman on July 20, 1987 and has performed service in that capacity since that time. Clerk R.E. Bill accepted the Machinist's position at Shaffers Crossing, Roanoke, Virginia and is presently working in that craft. Furthermore, Clerk Bill had previously worked as a Machinist for some ten (10) years and was clearly qualified for the Machinist's position. Similarly, Clerks G.E. Smith and R.G. Forrester were hired as Road Brakeman on May 28, 1976 and May 12, 1978 respectively and worked in road service until March, 1985 when they were hired as Clerks at Roanoke, Virginia. It was Carrier's position that the work in question was comparable employment as that term is understood and accordingly, Article I, Section 6(d) of the New York Dock Conditions was not violated.

In considering this case, the Board notes the lack of any legislative history, so to speak, regarding the precise application of Article I, Section 6(d). This is so with respect to the definition of comparable employment. To be sure, the language of this provision clearly sets forth the conditions and requirements governing the offering or acceptance of comparable employment, but there is a notable absence of any definitional exigesis with respect to the words "qualified" and "comparable employment". Thus, interpretation hinges upon past arbitral awards adjudicated under different forums, circumstances and agreements.

In the case herein, the parties have not submitted arbitral decisions under New York Dock specifically dealing with similar fact specifics or interpretative documentation, singularly addressing the definitional aspects of Section 6(d); instead they have

submitted several arbitral decisions on the same relative issue, though arbitrated under other protective arrangements. However, these cases dealt with the fundamental issue of comparable employment.

In the cases cited, there is a consistent unanimity among the Arbitration Boards and Committees, that it was the skills, not the functions that primarily determined comparable employment. Crossing-crafts or classes was not prohibited. Employees in the non-operating crafts or classes, for example, clerical employees, could perform train service and, in effect, cross crafts under similar protective circumstances. The words, "comparable employment" were construed to be a term of art and consequently subject to flexible application. On the other hand, an employee could refuse a job which was not comparable and for which he was not qualified. By extension, he would not be required to accept a demeaning position. There was no record history, however, where this was done on the property, with the concurrence of the parties or arbitral sanction.

In focusing, on the criteria identified by other arbitral bodies as rendering jobs or positions comparable, that is, similarity of rights, benefits, employment conditions, and compensation under collective bargaining agreements or working in a job that required the use of machines or specialized tools or working with or assisting skilled mechanics or performing clerical duties or possessing skills needed to function in another craft, it is plainly obvious that the term "comparable employment" is not just restricted to the affected employees' craft or class. As noted before it has cross craft application. Since there were no specific indications

as to what does not constitute comparable employment, and since the authorities cited, particularly the Interpretation of Reconvened Arbitration Board No. 282 and the detailed analysis of the term "reasonably comparable employment" in the Special Board of Adjustment case involving the same Organization herein and the Burlington Northern Railroad, emphasize skills equivalence, not functional tasks as paramount considerations, the Board must accord this distinction appropriate judicial weight.

In fact, Claimants R.E. Bill, G.E. Smith and R.G. Forrester had previously worked in similar positions to the ones at issue herein. In a generic sense, many of the skills needed for effective performance in the clerical craft are applicable to positions in other crafts or classes, and as such, the rationale for crossing crafts is understandable. In the absence of a showing that the comparable positions offered to Claimants were demeaning or a correlative showing that Claimants clearly lacked the skills equivalence to perform the jobs proferred, the Board must find that the positions contested herein were comparable within the meaning of Article I, Section 6(d) of the New York Dock Conditions. The term "comparable employment" extends beyond craft boundaries with distinctions centering on comparative skills. Had the Organization conducted a detailed comparative analysis of the skills needed to perform the Claimants' clerical job and the skills needed to perform the jobs proferred and demonstrated that Claimants lacked the skills needed to perform the non-clerical jobs, the Organization's position would have had compelling merit. This type of showing would have

given an employee a more defensible position to reject a job offer. Accordingly, and upon the record, the Board must find for Carrier on the three questions at issue.

In the future and within the defining parameters of this Award, the Board advises the parties to conduct this type of skills equivalence analysis when comparable positions are proferred. It provides a more accurate measure of qualifications, when crossing crafts or classes is at issue, and provides an employee with qualitatively stronger justification to refuse a job offer.

AWARD

1. The answer to the first question at issue is yes.
2. The answer to the second question at issue is yes.
3. The answer to the third question at issue is yes.

George S. Roukis, Chairman
and Neutral Member

G.C. Edwards, Carrier Member

J.C. Campbell, Employee Member

Dated: August 19, 1989