In the Matter of Arbitration

CSX Transportation, Inc.	)	
	)	New York Dock Protective
vs	)	Conditions
	)	
Sheet Metal Workers International Association	)	ICC Finance Docket 28905 (Brown)
	)	

Question

Was the Test Period Average of Huntington, West Virginia Sheet Metal Workers L. E. Brown properly arrived at by the Carrier's method of computation?

Background

The Interstate Commerce Commission (ICC) issued a decision in Finance Docket 28905 on September 25, 1980 whereby it approved control by CSX Corporation of rail carriers which were subsitiaries of the Chessie System, Inc. and of the Seaboard Coastline Industries, Inc. By so doing the ICC imposed protective conditions for employees working for these corporations as set forth in New York Dock Railway Control - Brooklyn Eastern District, 350 I.C.C. (1979). The latter are now generally known in the railroad industry as the New York Dock Conditions. After additional filings with the ICC which included the Louisville and Nashville Railroad Company (L&N) and the Seaboard Coastline Railroad Company (SCL) all of these merged and combined transportation companies assumed, in 1986, the corporate name of

CSX Transportation, Inc. (CSXT).

The South Louisville, Huntington and Corbin Coordination

In what was designated as Agreement 9-103-87 the Carrier and the Sheet Metal Workers' craft signed an implementing agreement on May 21, 1987 in accordance with New York Dock Conditions. The Agreement dealt with the Carrier's intent to close the repair facilities at the CSXT South Louisville Shop, and transfer locomotive and other heavy repair work to the C&O Hungtington Locomotive Shop in West Virginia and to the CSXT Corbin Shop in Kentucky. This Agreement clearly identified this logistical change by the Carrier as a transaction as defined by New York Dock at (1.) sqq. Attached to the implementing agreement were also a number of sidebar Letters with same date as the Agreement itself.

Claimant's Change of Status

The Claimant worked at the South Louisville Shop from January 16, 1982 until August 20, 1987 as a non-contract employee. On the latter date he voluntarily relinguished his non-contract position and exercised his seniority rights in his own Sheet Metal Worker craft. Because of his seniority in the craft the Claimant was able to bid to a position as Sheetmetal Worker at Huntington, West Virginia , effective August 24, 1987. The Claimant to this case displaced a junior, protected employee. The Claimant had

option also to exercise his choice for a separation allowance as outlined in Sidebar Letter 6 attached to the implementing agreement of May, 1987 but choose not to go this route. Thus the Claimant became one of those employees protected under under Section 5 of New York Dock at (a) which reads, in pertinent part, as follows:

.....

"...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 service 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...

...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 aforementioned monthly time paid for during the test period he shall be additionally compensated for such excess at the rate of pay of the retained position..."

.....

Claimant's Test Period Average

Under date of January 25, 1988 the Chairman and Directing General Chairman of the Organization were notified by the

Carrier's officer with information on the TPA's of various Sheet Metal Workers who had moved from the South Louisville shop to Huntington and Corbin. The Claimant to this case's name appeared under the Huntington roster list with information that his guarantee rate effective the date of transfer from South Louisville was $3,439. After the December 1, 1987 rate increase that would increase to $3,515.88. Protection under the agreement was to last until the last day of August, 1993. Of some interest, as a preliminary matter, is that the Claimant's TPA was approximately $1,000 above the some seventeen other Sheet Metal Workers listed on the same roster. Approximately a year after the December 1, 1987 rate increase Carrier's officers must have noticed and/or looked more closely at the discrepancy outlined above between the Claimant's TPA and those of his fellow Sheet Metal Workers and on December 5, 1988 the General Chairman of the craft at Hungtington was advised of a correction being made in the Claimant's TPA. This letter is of sufficient importance to be made part of the record itself in this case and it reads, in pertinent part, as follows:

> "It has been determined that Sheet Metal Worker L. E. Brown voluntarily returned to the Sheet Metal Craft from a non-contract position in Louisville, Kentucky shortly before his transfer to Hungtington, West Virginia.
>
> "Mr. Brown's test period average was incorrectly calculated to reflect his earnings in the non-contract capacity; as a result his test period average has been refigured to correctly reflect his standing in the Sheet Metal Worker Craft (the relationship through which he is entitled protection).
>
> "As payroll records do not exist for the twelve (12) month period in which Mr. Brown had earnings as a Sheet Metal Worker, it became necessary to take an average of the

of the TPA's of the Sheet Metal Workers immediately above and below him on the South Louisville Sheet Metal Roster just prior to the Louisville transition.

"These results are the corrected test period averages shown below:

Hours	Amount
173.55	$2402.713

Origin of the Grievance

The origin of the grievance centered on the change or correction which the Carrier made in computing the Claimant's TPA. Argument by the Carrier throughout the handling of this case on property has been that since the Carrier originally made an error in computing the TPA, it corrected this error by using the "standard procedure" in such cases which was to go to the average of the member of the craft both above and below the Claimant on the roster. Carrier's additional argument is that it had made no attempt to recoup the overpayments it feels it made to the Claimant, and that its method of computation is in line with arbitral precedent when similar situations occured with members of other crafts when it became necessary to compute compensation after they made a move from non-covered positions back to their crafts.

The argument used by the Claimant and his Organization throughout the handling of this case on property is that the method of calculating the Claimant's new TPA is not a fair one.

In his letter to the General Plant Manager at the Hungtington Locomotive Shops, when this issue arose, the Local Chairman of Local 462 argues, for example, that the two individuals who were chosen and averaged to arrive at the Claimant's new TPA were men who "chose not to work over-time" and that this had the effect of lowering the TPA. What would have been a more equitable approach, from the union's point of view? The Local Chairman suggests that the Carrier take the "highest guaranteed man that transferred to the Hungtington Shops from South Louisville" and use this person's TPA as norm for the Claimant's. The General Chairman of the craft in Hungtington restates this argument with the additional observation that the overtime factor should be looked at since as "a foreman, (the Claimant) could not get any overtime pay" while a non-covered employee and that he should not be compared with fellow members of the craft who "did not want to work overtime".

Absent resolution of these different views on how to calculate the Claimant's TPA, it was referred to this arbitration tribunal.

Discussion & Findings

Since the May, 1987 Implementing Agreement is between this Carrier and members of this craft noone to this case argues, as they cannot, that under New York Dock the Claimant ought to be able to use his non-covered earnings to calculate his TPA. All agree that the Carrier made a mistake when it first calculated the Claimant's TPA. Secondly, the Carrier has addressed the

issue of overpayment for the period of time after the Claimant's transfer until the "correction" was made but it has never stated, nor is that part of this case, that it will attempt to recoup these overages. In effect, the arbitrator must conclude, from study of the full record before him, that the Carrier views payment of this windfall to the Claimant as a sort of payment for its original incorrect calculation of the Claimant's TPA. The arbitrator would like to put that issue to rest so that it might not emerge in the future with this case.

The only issue before this tribunal is the correct method of calculation of the TPA of the Claimant on basis of covered earnings. Unfortunately New York Dock at Section 5(a), cited in the foregoing, does not provide a ready answer to this question. So the parties have come up with their own versions. Neither one nor the other are totally unreasonable albeit the one suggested by the Organization might permit the Claimant to dip a little more deeply into this well than might equitably be his right. It is unclear to the arbitrator, uniquely on equity grounds, why the Claimant, since he had been working as a non-covered employee, should benefit as much as the highest paid Sheet Metal Worker who transferred to Hungtington just because the latter was partial to overtime. It is unclear to the arbitrator exactly what the Claimant's views on working overtime are albeit the Organization makes it clear that he is not averse to collecting the fruits of such endeavors.

The Organization argues that the Carrier's officers just arbitrarily decided to take the average of the member of the craft above and below the Claimant on the roster and never consulted appropriate leadership of the Organization about this. The Organization also challenges the Carrier's statement that this procedure for calculating TPA's is "standard procedure". After review of the record as a whole this Board is hard pressed to come to determinations with respect to any standard procedure and it has found it to be more reasonable, in this matter before it, to search for possible solution to the issue presently before it by studying various arbitral precedent. Special Board of Adjustment 860, Award No. 1 addresses a question which is comparable to the one here at bar although it was not adjudicated under New York Dock Conditions but under a 1966 Merger Protection Agreement negotiated between Conrail and the UTU upon the merger of the former Penn Central and New York Central Railroad companies. Although many of the facts of that Award and the instant case diverge, evidently, the two cases parallel each other because in both one and the other a non-covered employee changes status to former craft and absent test period records the parties are in a dilemma on how to compute these averages. The Board in that Award No. 1 of SBA 860 finds no optimal solution to what it calls a "vexing and troublesome"case, nomenclature equally applicable to the instant one, but the Board fashions a "reasonable" solution.

In Award No. 1 of SBA 860, the Board opted for construction of a "base period earnings figure from data that should reasonably approximate the Claimant's earnings during the base period". To specifically operationalize such construct that Board found it reasonable to "use the average monthly guarantee of the two conductors immediately preceding the Claimant and the two immediately following the Claimant on the roster" in order to arrive at a mean figure. In a second case which is a New York Dock Decision dealing with the same transaction here at bar and the same Carrier, but another craft, a non-contract position was abolished and the employee exercised his seniority in the Machinist craft at South Louisville when the work was transferred to Corbin, Kentucky. Although that case differs from this one because the position held by the Claimant to this case was voluntarily vacated the resultant problem with respect to TPA earnings are substantially the same. That case also differs from this one because the Claimant argued that his test period earnings should be that of the supervisory position he held before it was abolished. In that case as in the instant one such latter position must be judged to be in error. But what is interesting about this New York Dock Decision (Seidenberg, October 3, 1990: CSXT, Inc. v IAM) is the manner in which, according to that Award, the Carrier "constructed the Machinist's rate". According to that Decision, the Carrier did the following in dealing with that employee:

> "The Carrier stated that the Claimant's protected rate would be computed on the basis as if he had been on the machinist roster at South Louisville at the time the work had been transferred to Corbin, based on the test period averages of those employees who were immediately above and immediately below him on the seniority roster, at the time of the coordination, and the average of those averages would constitute the Claimant's protected or guaranteed rate. The Carrier explained that it no longer had the record of the earnings of the Claimant when he had worked as a machinist at Louisville, and therefore it had to construct his protected rate in this manner..."

Clearly, in both of these earlier cases, as in the instant one, it is necessary to construct a rate. In both of these cases there was resort to multiples above and below the employee who was grievant in order to construct a rate "as if" the employee had been working in such a time frame so that applicable protective agreement provisions could be applied. The arbitrator here finds that to be a reasonable approach and will apply this procedure as solution to the instant claim.

Decision

The Carrier shall take the two Sheet Metal Workers above the Claimant, and the two Sheet Metal Workers below the Claimant, on the seniority roster at the South Louisville shop and shall take these two averages to compute the Claimant's TPA, with all appropriate rate increases to be factored in, after his transfer to Huntington in order to construct his appropriate current guarantee.

The Claimant's TPA guarantee shall be the average of the above and below averages as outlined above, of fellow Sheet Metal Workers. If the result of this calculation produces a TPA which is, in fact, lower than his current guarantee, he shall continue to receive his current guarantee, $2,402.713 as of the December 5, 1988 letter to the SMWIA General Chairman by the Carrier's Senior Manager-Labor Relations, with subsequent adjustments and no changes shall be made in the Claimant's compensation level. If the calculation produces a TPA higher than that calculated by the Carrier when it "corrected" the Claimant's TPA guarantee in the fall of 1988, the Claimant shall receive that (1) higher guarantee and (2) all differential pay back to the "correction" in one lump sum. Implementation of this Decision shall be within thirty (30) days of its date.

For the Arbitration Committee

Edward L. Suntrup, Neutral Member

Robert H. Melotti
Carrier Member

Richard P. Branson
Employee Member

Date: November 12, 1990

Baltimore, Maryland