

In the Matter of Arbitration  
Under New York Dock Conditions, Section 11  
Pursuant to ICC Finance Docket No. 32432

Between:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And:

CONSOLIDATED RAIL CORPORATION

Arbitration Committee

Herbert L. Marx, Jr., Chairman and Neutral Member  
Kenneth R. Mason, Employee Member  
J. H. Burton, Carrier Member

October 9, 1992

Hearing held at Philadelphia, PA, August 27, 1992

EMPLOYEES' QUESTION AT ISSUE:

Were Claimants (D. R. Jones, W. J. Smith, Jr., R. Weahry, J. B. Santangelo, D. J. Flower, M. D. Lane, D. W. Mason, D. M. Petrella, and G. Gonzalez) placed in a worse position in respect to compensation and/or rules governing working conditions, or deprived of employment, as a result of the transaction described in ICC Finance Docket No. 31432 and thereby entitled to the labor protective provisions of New York Work Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)?

CARRIER'S QUESTION AT ISSUE:

Were the Claimants ( D. R. Jones, W. J. Smith, J. R. Weahry, J. B. Santangelo, D. J. Flower, M. D. Lane, D. W. Mason, D. M. Petrella, and G. Gonzalez) adversely affected by the transaction described in ICC Finance Docket No. 31432, and are they entitled to the labor protective provisions under New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C. C. 60 (1979)?

BACKGROUND FACTS

The Carrier and CSX Transportation jointly owned 16 miles of trackage on the Akron Branch in Ohio. While the trackage was predominately utilized by CSXT, the Carrier was responsible for dispatching trains and maintaining the track. On January 31, 1989 a letter of understanding was reached between the two Carriers, providing for CSXT to purchase the Carrier's interest in the Akron Branch and to assume responsibility for maintaining the trackage and dispatching trains over the territory.

The Interstate Commerce Commission approved this undertaking in Finance Docket No. 31432, imposing New York Dock labor protection for employees.

Pursuant to Section 4 of New York Dock, an Implementing Agreement was reached on January 30, 1990 between the Carrier and the Organization. On February 6, 1990, CSXT assumed responsibility for the Akron Branch. Under Section 5 (and in one instance, Section 6) of the Implementing Agreement, the Claimants were furnished with test period earnings statements. The Claimants continued to have Akron as their headquarters until September 10, 1990, when their headquarters were transferred to Ravenna. No changes were made in the Claimants' titles or base rate of pay.

### F I N D I N G S

There is no question that a transaction, as defined under New York Dock, occurred in that control of the Akron Branch was ceded by the Carrier to CSXT. The result was that work on the Akron Branch was no longer available to Carrier's Maintenance of Way employees. The Organization argues that the earnings of the Claimants were, at times, diminished not as to base rate but as to total compensation as compared to the Claimants' test period earnings. Based on this, the Organization contends that the Claimants met the qualifying requirements of Section 1 (b) of New York Dock, which reads as follows:

"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 protection due the Claimants, according to the Organization, is provided in Section 5 (a) of New York Dock, which reads as follows:

So long after a displaced employee's displacement as he is unable, in the normal exercise of 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.

Thus, the Union contends that the transaction led to placing the Claimants in a "worse position" owing to loss of overtime work on the Akron Branch and that they are entitled to benefits in any month when their compensation is less than that of their test period compensation.

The Carrier contends that no "displacement" occurred in that the Claimants continued in their pre-transaction assignments. Earnings records show no overall diminution after the transaction, although this may vary depending on changes in earning levels depending on the general availability of work. According to the Carrier, the loss of the Akron Branch represented 20 per cent of available work time, with the remaining 80 per cent unchanged. Earnings may well vary depending not on the loss of the Akron Branch but on changes in the overtime required in the remaining portion of the Claimants' assignments.

In the Arbitration Committee's view, questions as to the meaning of "position" in Section 1 (b) were properly resolved in Transportation-Communications International Union and Norfolk Southern Corporation (Neutral George S. Roukis, April 19, 1989), which stated:

. . . the Board concurs with the Organization's interpretation that the word "position" as contained in Section 1 (b) of the New York Dock Conditions connotes status, situation or posture rather than a specific job or assignment. The pervasive arbitral authority cited by the Organization supports our determination.

However, where there is no actual removal or transfer from a "a specific job assignment", as here, the Organization bears a considerable burden to show that the Claimants' "status, situation or posture" was "worse" after the transaction. The Organization provided data to show that in the first one or two months following the transaction, monthly earnings for most of the Claimants were less than the test period average, and in two instances this was the case for five months and nine months, respectively.

The Carrier, however, supplies data which tells a different story. In a study of the annual earnings of eight of the nine Claimants (one Claimant having work only portions of the years in question), earnings in 1991 were higher than 1990 (pre-transaction) for five of the Claimants and lower for three of the Claimants. In a five-year study of the Claimants' earnings (1987-1991) variations in earnings were common. For example, in 1988 earnings for all Claimants were lower than 1987, despite the absence of any applicable transaction.

It may be argued that New York Dock benefits are applicable in any month where compensation does not reach the test period average, and so comparisons of annual earnings or not relevant. The Arbitration Committee understands and accepts this, insofar as it is applicable to employees who have been clearly determined to

be "displaced employees" in a "worse position". But this monthly test does not apply in considering whether employees are determined to be in a "worse position" so as to qualify them for New York Dock in the first place.

It is clear that the Claimants have had a portion of their work territory reduced as a result of the transaction. They did not, however, suffer displacement from their assignments nor reduction in their work week or base pay rate. The only change which can be put forth is an allegation as to overtime opportunity lost as a result of sale of the Akron Branch. But the overall earnings records, before and after the transaction, fail to prove that the Claimants were placed in a "worse" position. Put another way, the Organization offers no convincing proof that overall earnings were affected by loss of the Akron Branch.

As stated in an Award concerning sale of trackage (Brotherhood of Maintenance of Way Employes and CSX Transportation, Inc., Neutral Nicholas H. Zumas, March 26, 1990):

The BMWE has not sustained its burden of proof in this matter. Fluctuation of levels of compensation and movement of territory are normal characteristics of maintenance of way employment. The fact that some Claimants had their work levels altered or their headquarters points moved does not prove adverse effect nor does it show the causal nexus between the transaction and the adverse effect that is required before imposing NYD protection benefits.

In sum, the Arbitration Committee here must rule on the eligibility for New York Dock benefits for employees not required to terminate their current work assignments as the result of a transaction. While it is within reasonable possibility that such

employees are found to be in a "worse position", there is no convincing showing here of a consistent and clearly measurable diminution of compensation owing solely to the transaction.

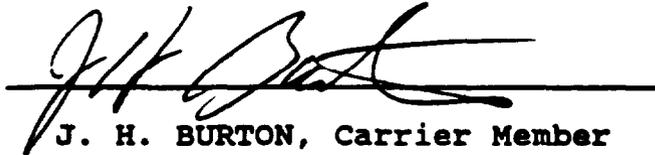
A W A R D

The Question at Issue posed by the Carrier is answered in the negative.

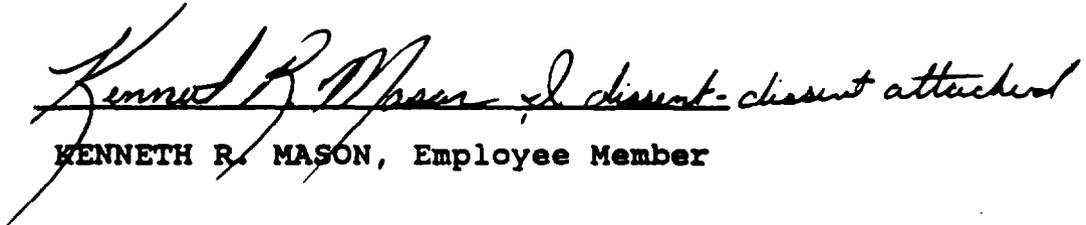
The Question at Issue posed by the Organization is answered in the negative.



HERBERT L. MARX, Jr., Chairman and Neutral Member



J. H. BURTON, Carrier Member



KENNETH R. MASON, Employee Member

NEW YORK, NY

DATED: