ARBITRATION COMMITTEE ESTABLISHED PURSUANT TO
ARTICLE 1, SECTION 11 OF THE
NEW YORK DOCK PROTECTIVE CONDITIONS

PARTIES	TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION	)	
TO	and	)	DECISION
DISPUTE	NORFOLK SOUTHERN RAILWAY COMPANY	)	

ORGANIZATION'S QUESTIONS AT ISSUE:

1) Did the Carrier's refusal to pay affected employees displacement allowances violate the provisions of Article I, § 5 of NYD Protective Conditions when such employees exercised existing seniority rights under the terms of the collective bargaining agreement to assignments which did not require a change in residence?

2) If the answer to Question No. 1 is in the affirmative will the Carrier now be required to allow each affected employee his or her displacement allowance and make each whole for its arbitrary action in refusing to abide by the provisions of NYD?

3) Will Carrier be further required to pay the displacement allowance and make whole all other employees that it has denied displacement allowances when such employees displaced to positions not requiring a change in residence?

CARRIER'S QUESTION AT ISSUE:

Are claimants 'displaced employees' as a result of their failure to follow their work to Atlanta, Georgia in connection with a transaction taken pursuant to an implementing agreement under New York Dock?

HISTORY OF DISPUTE:

The Interstate Commerce Commission (ICC) in a Decision in Finance Docket No. 29430 approved the acquisition and control by Norfolk Southern Corporation of the Norfolk and Western Railway Company and its carrier subsidiaries and of the Norfolk Southern Railway Company and its carrier subsidiaries and the coordination of the operations of the various carriers. The transaction was made subject to the employee protective conditions set forth in New York Dock Ry.-Control-Brooklyn Eastern District Terminal, 360 ICC 60 (1980)(New York Dock Conditions).

On March 4, 1996 the Norfolk Southern Railway Company (NSR or Carrier), the operating subsidiary of the Norfolk Southern Corporation, served notice under Article I, Section 4 of the New York Dock Conditions upon the Transportation•Communications International Union (TCIU or Organization) of its intention to coordinate and centralize certain crew calling functions performed at various locations throughout the railroad system into a Crew Management Center (CMC) located in Atlanta, Georgia. Further pursuant to Article I, Section 4, negotiations ensued for an Implementing Agreement applicable to the transaction which was reached on July 3, 1996.

On May 13, 1997 the Carrier served notice upon the Organization pursuant to the Implementing Agreement that crew calling functions from the Tennessee Division at Knoxville, Tennessee would be transferred to the CMC in Atlanta with positions abolished at Knoxville and similar positions established at the CMC. On July 21, 1997 the Carrier served virtually the same notice on the Organization with respect to crew

calling functions on the Kentucky Division. Claimants herein worked on the Tennessee and Kentucky Divisions in positions performing work transferred to the CMC. Those positions were abolished.

Claimants were offered similar positions at the CMC which carried the same rate of pay as those they occupied on the Tennessee and Kentucky Divisions. If Claimants took the positions at the CMC they would be required to change their residence. Claimants did not take the positions offered them at the CMC. Instead they exercised seniority under the applicable schedule agreement (CBA or collective bargaining agreement) to positions on the Tennessee and Kentucky Divisions carrying rates of pay less than the rates of the positions offered them at the CMC but which did not require a change of residence. The CBA did not require them to accept any position requiring a change of residence.

Subsequently, Claimants filed requests with the Carrier for test period averages and for displacement allowances as provided in Article I, Section 5 of the New York Dock Conditions. The Carrier denied Claimants' requests.

The Organization grieved the Carrier's action. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the parties could not resolve the dispute.

Arbitration was invoked under Article 1, Section 11 of the New York Dock Conditions, and the undersigned was selected as Chairman and Neutral Member of this Arbitration Committee. A hearing was held in this matter in Norfolk, Virginia on May

11, 1999. Both parties furnished the Committee with pre-hearing submissions. Additionally, at the hearing the parties were afforded the opportunity for oral argument and to present such additional evidence as they chose.

FINDINGS:

After a thorough review of the record in this case the Committee finds that it has jurisdiction to decide the Questions at Issue in this case and the underlying dispute. This Board further finds that the parties have taken all steps to comply with the procedural requirements of the New York Dock Conditions pertaining to this case, and that the Questions at Issue and the underlying dispute properly are before the Committee for final and binding determination.

The dispute in this case centers upon the following Sections of Article I of the New York Dock Conditions which provide in pertinent part:

> 1. Definitions. -
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> * * *
>
> (b) '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.
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> * * *
>
> 5. 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.

* * *

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

The Organization's position is that inasmuch as Claimants exercised their seniority as provided in the CBA, which did not require Claimants to exercise seniority to positions requiring a change in residence, Claimants complied with all conditions precedent to receiving a displacement allowance under Article I, Section 5. Conversely, the Carrier argues that Claimants do not meet the definition of a displaced employee under Article I, Section 1(b) because they voluntarily chose to exercise seniority to positions paying less than the positions offered them at the CMC in Atlanta which carried the same rate of pay as the positions they had held on the Tennessee and Kentucky Divisions which were abolished. Moreover, the Carrier urges, the New York Dock Conditions contemplate that employees must follow their work when it is transferred to another location, without regard to the requirement that the employees change their residence, in order to continue eligibility for the benefits provided by the Conditions. The Organization disputes the

validity of that contention. Both parties cite ICC, Surface Transportation Board (STB) and arbitral decisions in support of their respective positions. Each has attempted to distinguish the authority cited by the other from the instant case.

The Committee has reviewed thoroughly all authorities cited by the parties. First and foremost in terms of binding precedent are applicable Decisions of the ICC and the STB. It is a proposition too well established to require citation to authority that an Arbitration Committee under Article I, Section 11 of the New York Dock Conditions is bound by such pronouncements and therefore operates as a functionary of the ICC or the STB. This Committee plays the same role in this case.

The ICC and STB authorities cited to this Committee by the parties all involve, either completely or in pertinent part, dismissal allowances under Article I, Section 6 of the New York Dock Conditions and not displacement allowances under Article I, Section 5 of the Conditions. The most relevant of those authorities, involving the question of whether dismissed employees must accept positions requiring a change of residence in order to preserve entitlement to benefits under the Conditions, are Decisions of the ICC in CSX Corp. — Control — Chessie System, Inc. and Seaboard Coastline Industries, Inc., Jan. 4, 1994 and the STB in CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coastline Industries, Inc., Aug. 21, 1997. Both Decisions, cited by the Organization, reviewed awards of Arbitration Committees under Article I, Section 11 of the New York Dock Conditions holding that, absent a requirement in a dismissed employee's working agreement that the employee accept a position requiring a change of residence, a Carrier

mandate that the employee take such a position in order to maintain entitlement to New York Dock benefits is improper. The ICC Decision reviewed an award by an Arbitration Committee of which Rodney E. Dennis was the Chairman and Neutral Member. The STB Decision reviewed an award of an Arbitration Committee of which the Chairman and Neutral Member of this Committee served in that capacity. The ICC and the STB sustained both awards without change.

The STB in its Decision ruled that the Arbitration Committee's award was correct upon two bases, each of which would support the award independently. First, the STB held that under Article I, Section 6(d) containing the proviso that dismissed employees, as a condition of retaining eligibility for benefits under the New York Dock Conditions, cannot be forced to accept positions requiring a change in residence, the Carrier's action was improper. Additionally, as a second and independent basis for its Decision, the STB adopted the ICC's rationale in the Dennis award that unless a dismissed employee's CBA required the employee to accept a position requiring a change of residence, such acceptance was not necessary in order for the employee to continue his or her eligibility for New York Dock benefits including the dismissal allowance.

Significantly, we believe, the STB stated in Note 10 at Page 7 of its Decision:

> The ICC has in the past referred to the fundamental bargain underlying the Washington Job Protection Agreement of May 1936 (WJPA), upon which the *New York Dock* conditions are based, as being that an employee must accept any comparable position for which he or she is qualified regardless of location in order to be entitled to a displacement

> allowance. However, once an employee properly achieves dismissal status, the calculus changes under both WJPA and our *New York Dock* conditions. Unless a dismissed employee requests and receives training under Article II, he or she cannot be forced to take a comparable position that requires a change of residence unless the underlying CBA itself provides for that result.

Note 10, read in its entirety, reveals the STB's view of the difference between the effect of the requirement that employees accept positions requiring a change in residence upon dismissed and displaced employees. Although neither party has cited to this Committee any ICC precedent such as referred to in the first sentence of Note 10, that sentence stands as a very significant pronouncement of a displaced employee's obligation to accept a position requiring a change in residence even if that employee is not required to accept such position by the applicable CBA. The STB's comments in the first sentence of Note 10 may be dicta, but they speak directly to the underlying dispute in this case. They support the Carrier rather than the Organization on this issue.

The STB's Decision noted that the case before it did not involve any issue as to the initial entitlement of a dismissed employee to a dismissal allowance under Article I, Section 6. By contrast, the Carrier has raised that issue in this case by challenging Claimants' status as displaced employees under Article I, Section 1(b) of the New York Dock Conditions. The first sentence of Note 10 specifically states that under ICC precedent ". . . an employee must accept any comparable position for which he or she is qualified regardless of location in order to be entitled to a displacement allowance." (Emphasis supplied). That statement clearly supports the Carrier's argument on this issue

and renders the arbitral authority cited by the Carrier with respect to the issue, although distinguishable factually from the instant case, highly persuasive.

In view of the STB's holdings, the Carrier has the stronger position in this case.

As a threshold, indeed jurisdictional, matter Claimants do not meet the definition of a displaced employee in Article I, Section 1(b) of the New York Dock Conditions. They were placed in a worse position with respect to their compensation not by the abolishment of their positions on the Tennessee and Kentucky Divisions but by their voluntary action in exercising seniority to positions on the Divisions paying less than the positions offered them at the CMC in Atlanta, Georgia even though such positions required them to relocate and in so doing to change their place of residence.

Moreover, even if Claimants met definition of a displaced employee, their actions in this case also would disqualify them from entitlement to a displacement allowance under Article I, Section 5 of the Conditions. The clear language in the first sentence of Note 10 of the STB's Decision so dictates. In view of the STB's distinctions between the obligations of dismissed and displaced employees to accept a position requiring a change in residence, the Organization's reliance upon the rationale of the Dennis award for a contrary result is misplaced. Article I, Sections 5(b) and (c) also are of little or no support to the Organization in view of the language of Note 10.

AWARD

All Questions at Issue are answered in the negative.

William E. Fredenberger, Jr.
Chairman and Neutral Member

H. R. Mobley
Carrier Member

C. H. Brockett
Employee Member
I dissent for reasons
previously given during executive
session of July 19, 1999

DATED: August 5, 1999
10th
CAB

William E. Fredenberger, Jr.
Arbitrator

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August 3, 1999

Mr. H. R. Mobley
Director-Labor Relations
Norfolk Southern Corporation
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Norfolk, VA 23510-2191

Mr. C. H. Brockett
International Vice President
Transportation•Communications
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Rockville, MD 20850

RE: Arbitration Pursuant to Article I, Section 11 of the
New York Dock Conditions - Norfolk Southern Railway Company and
Transportation•Communications International Union

Gentlemen:

This letter is in response to the Executive Session held in Washington, DC on July 19, 1999 with respect to the proposed award in the above-captioned matter.

At the Executive Session the Organization Member of the Arbitration Committee read and then submitted to me a thirteen page document with attachments setting forth the Organization's views with respect to the proposed award. The Carrier Member of the Committee objected to the receipt of the written document in evidence. The Carrier Member particularly objected to portions of the document and attachments thereto which either cited evidence previously rejected by me at the hearing in this case or portions raising new arguments or evidence. The Carrier Member also objected to those portions of the document, as well as the Organization's oral argument, which restated arguments

previously made by the Organization as being beyond the proper scope of an Executive Session.

The Carrier's point is well taken that it is not appropriate to advance arguments in an Executive Session which previously were advanced in written submissions or oral argument at the hearing of the dispute. The Carrier's point also is well taken that new evidence and arguments are not appropriate for consideration in an Executive Session. The same also is true for arguments and proffers of evidence rejected at the hearing. Nevertheless, after a thorough reexamination of the record in this case, the proposed award and the arguments advanced by both partisan members of this Committee at the Executive Session, I believe that full consideration of the evidence and arguments advanced by the Organization at the Executive Session is more appropriate than a rejection of such evidence and arguments on procedural bases.

At the Executive Session I ruled that admission of the basic document and attachments was appropriate either as a written summation of the oral presentation made by the Organization Member of the Committee or, as the Organization Member argued in the alternative, as a motion for reconsideration of the proposed award. After thorough consideration of the issue, that ruling stands.

A detailed review of the evidence and arguments advanced by the parties at the hearing in this case appears in the proposed award and for sake of brevity will not be repeated here. Suffice it to say that the Organization attacks the ultimate finding of the proposed award that Claimants did not meet the definition of a displaced employee in Article I, Section 1(b) of the New York Dock Conditions or qualify for a displacement allowance under Article I, Section 5 of those conditions. That finding was based upon the fact that Claimants had exercised seniority to positions on their respective seniority districts which did not require a change of residence but which paid less than positions the Carrier had offered them at the Crew Management Center (CMC) located in Atlanta, Georgia which carried the same rate of pay as the positions from which they had been displaced as a result of the transaction, i.e., the coordination and centralization of certain crew calling functions performed at various locations throughout the railroad system, but which required a change in residence.

The findings of the proposed award are based upon the Decision of the Surface Transportation Board (STB) in CSX Corp. — Control — Chessie System, Inc. and Seaboard Coastline Industries, Inc., August 21, 1997 affirming an award of an Arbitration Committee on which the Chairman and Neutral Member of this Committee served in the same capacity. The STB ruled that a Carrier could not condition an employee's right to continued receipt of a dismissal allowance under Article I, Section 6 of the New York Dock Conditions upon the employee's willingness to be recalled from furlough and

transferred to a position requiring a change in residence unless the applicable collective bargaining agreement (CBA) required the employee to do so. While the STB's Decision dealt with a dismissal allowance, it stated in footnote 10 at page 7:

> The ICC has in the past referred to the fundamental bargain underlying the Washington Job Protection Agreement of May 1936 (WJPA), upon which the *New York Dock* conditions are based, as being that an employe must accept any comparable position for which he or she is qualified regardless of location in order to be entitled to a displacement allowance. *However, once an employee properly achieves dismissal status,* the calculus changes under both WJPA and our *New York Dock* conditions. Unless a dismissed employee requests and receives training under Article II, he or she cannot be forced to take a comparable position that requires a change of residence unless the underlying CBA itself provides for that result.

The proposed award in this case rests squarely upon footnote 10.

The Organization alleges that the proposed award's reliance upon footnote 10 is misplaced or misunderstood in the context of the STB's entire decision.

In support of its argument the Organization maintains that at pages 3 and 4 of the STB's Decision that agency ". . . couched the issue as to the circumstances under which a displacement allowance may be terminated if a dismissed employee declines to be recalled to work under Article I, Section 6(d)." A review of pages 3 and 4 of the STB's Decision reveals that they deal with arguments advanced by the Carrier. The Organization's position on this point apparently confuses dismissal and displacement allowances. That apparent confusion was repeated throughout the Organization's written and oral arguments advanced at the Executive Session.

As further example of such confusion, the Organization cites the following language at page 7 of the STB Decision: "However, once displaced, an employee cannot be required to do so (accept another position), other than pursuant to the terms of a CBA if the location of the new position would require a change of residence." What the Organization fails to consider is that footnote 10 was attached to that very sentence. As noted in the proposed award, the footnote clearly differentiates between the obligations of dismissed and displaced employees to accept positions requiring a change of residence in order to establish or continue their eligibility for New York Dock benefits. Displaced employees must do so. There is no such requirement for dismissed employees.

The Organization argues that the footnote should be read simply as a reaffirmation of Interstate Commerce Commission (ICC) holdings, based in the WJPA, that a displaced employee must fully exercise seniority rights and not voluntarily place himself in a dismissed status. However, I can find nothing in the language of footnote 10 or the language of the STB Decision to support such a narrow reading.

The Organization's citation of Section 7(c) of the WJPA is but another example of the Organization's confusion of the treatment of dismissed and displaced employees under New York Dock. Section 7(c) speaks to a "coordination allowance," but an analysis of the section reveals that it deals with what New York Dock defines as a dismissal allowance.

Nevertheless, again relying upon Section 7(c) of the WJPA, the Organization contends that under New York Dock a displaced employee has three sequential obligations in order to qualify for a displacement allowance: (1) to exercise seniority to a position at the location where the employee is affected which does not require a change of residence; (2) to exercise seniority to a position on the displaced employee's seniority district which may or may not require a change of residence; and (3) to follow work outside the seniority district to a location which would require a change of residence. The Organization contends that these actually are options. However, as noted above, WJPA Section 7(c) is inapposite. Moreover, the Organization's contention seems clearly contrary to the language of footnote 10. Accordingly, the Organization's reliance upon Article III of the Implementing Agreement applicable to the transaction in this case is misplaced.

The Organization attacks the proposed award for incorrectly stating that the parties' citations to authority all involved dismissal allowances rather than displacement allowances. In fact the proposed award makes that assertion only with respect to ICC and STB authorities cited by the parties. The assertion is correct.

The Organization cited two awards during the Executive Session in support of its position. Docket No. 58 (Bernstein, Referee) of the Section 13 Committee interpreting the WJPA held that under Section 6(a) dealing with displaced employees an employee did not forfeit his protection if he declined to take a position requiring a change of residence which paid the same or more than the position from which he was displaced but instead took a lesser paying position which did not require a change in residence. In an Article I, Section 11 Decision involving Union Pacific Railroad, Western Pacific Railroad, Sacramento Northern Railroad and the United Transportation Union, Feb. 14, 1986 (Rehmus, Referee) the Referee answered a series of questions posed to him concerning employees' rights and obligations under the New York Dock conditions. In so doing he found that under Sections 5(a) and (b) displaced employees were not required to change

their place of residence to preserve their full guarantee or to minimize a Carrier's protection obligations.

At the outset it should be noted that this Committee was not provided with a full copy of Docket No. 58 prior to the Executive Session. The substance of the decision was contained in the Organization's submission, but it was quoted as part of relevant correspondence. Nevertheless, Docket No. 58 will be considered at this time.

While Docket No. 58 and the Rehmus award appear to support the Organization's position, they cannot be accepted as precedent on the same level or footing with pronouncements of the ICC or the STB with respect to the meaning of the New York Dock Conditions. In my opinion, the clear wording of footnote 10 contradicts the holdings of these decisions. Accordingly, I do not find them persuasive precedent for altering the proposed award.

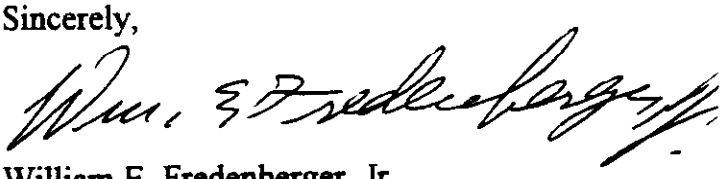
The Organization also cites in support of its position application of the New York Dock Conditions to the issue in this case on the Chessie System (CSXT) as well as other properties. In fact, the Organization urges, the Carrier in this case is the only one pursuing a different application of the New York Dock Conditions. The Carrier's point is well taken that the application on CSXT appears to reflect an agreement between the Organization and the Carrier as to such. Assuming, arguendo, the same application on the other properties cited by the Organization, there is no showing that such application also is not the result of mutual agreement. I fully understand the significance of uniform application of the New York Dock Conditions. However, in view of the language of footnote 10 I do not believe such application can be a justification for disregarding the clearly stated intention of the STB.

Nor is the Organization's point well taken that the interpretation of footnote 10 in the proposed award would reverse the ICC and STB Decisions cited therein. Both Decisions involved dismissed rather than displaced employees. The distinction between such employees by the STB, upon which the proposed award is based, would prevent such a result.

The same is true with respect to the Organization's citation of the New York Dock Condition requiring an employee to accept a "comparable position" in another craft only if it does not require a change of residence. The Organization apparently refers to Article I, Section 6(d) which applies only to dismissed employees. Moreover, where such a restriction applies in the New York Dock Conditions, there is specific language to that effect. No such restriction is applicable to Claimants in this case.

In view of the foregoing, I find no basis upon which to alter or modify the proposed award as requested by the Organization.

Sincerely,



William E. Fredenberger, Jr.
Chairman and Neutral Member

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SEC

SERVICE DATE - LATE RELEASE SEPTEMBER 9, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 29430 (Sub-No. 21)

NORFOLK SOUTHERN CORPORATION
— CONTROL—
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY
(Arbitration Review)

Decided: September 9, 1999

By motion filed on September 3, 1999, Norfolk Southern Railway Company (NSR) requests a 2-week extension, from September 15, 1999, to and including September 29, 1999, of the deadline for replying to the appeal of an arbitration award filed in this docket by the Transportation • Communications International Union (TCU). NSR asserts that it needs additional time as it has retained new counsel and the new counsel have prior professional commitments that will require time in the next several weeks. NSR represents that it has contacted counsel for TCU and that TCU does not oppose the requested extension.

The requested extension will be granted because it appears necessary and is unopposed.

It is ordered:

1. The deadline for filing replies to TCU's appeal is extended to and including September 29, 1999.

2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary