In the Matter of the Arbitration Between:

BURLINGTON NORTHERN AND SANTE FE RAILWAY COMPANY

AND

THE BROTHERHOOD OF MAINTANCE OF WAY EMPLOYES

Hearing held October 19, 2001

Before the Board Richard I. Bloch, Neutral Referee

Wendell Bell
Ernie Torske

Arbitration Pursuant to Article I, Section 11 of New York Dock Conditions

Surface Transportation Board Finance Docket #32459

APPEARANCES

For the Union

Donald F. Griffin, Esq.

For the Carrier

Ronald M. Johnson, Esq.
Johnathan M. Krell, Esq.

OPINION

Facts

This arbitration, conducted pursuant to Article I, Section 11 of the New York Dock Employee Protective Conditions, stems from the decision of the Burlington Northern and Santa Fe Railway Company (hereinafter "BNSF") to consolidate seniority districts. The BNSF system includes 33,000 miles of track through 28 states and two Canadian providences. The Carrier employs more than 40,000 people. Of those, some 7,500 are active Maintenance of Way employees, who repair and maintain track as well as performing maintenance of buildings and bridges. BNSF, the result merger of a 1995 Burlington Northern, Inc. and the Santa Fe Pacific

Corporation, is a party to national and local collective bargaining agreements with the Brotherhood of Maintenance of Way Employes ("BMWE"). Maintenance of Way workers are normally organized into "gangs" ranging in size from two to five employees to as many as seventy. The collective bargaining agreements between the parties define the geographic area in which gangs are assigned. Each seniority district carries a separate seniority roster and, for the most part, employees only work on jobs within their own seniority district. However, the contracts also provide for certain gangs to work across seniority districts. Regional System Gangs ("RSG"), for example, can work anywhere in the BNSF system.[1]

The dispute in this case surrounds a 1999 Seniority District consolidation. Prior to that time, the BNSF system was divided into 47 separate seniority districts. The result of this, according to the employer, was a general inefficiency in the utilization of its Maintenance of Way employees and their equipment, including misallocation of work. For this reason, the Carrier decided to "rationalize" seniority districts by combining them into fewer, larger entities. Such a consolidation, however, required modification of the labor agreements that existed between the BNSF and BMWE. Significant to this case, two important procedures are involved, and will be described in some detail below - - (1) the New York Dock implementing agreement procedures and (2) the implementing procedures found in Article XII of the so-called "Imposed Agreement."

New York Dock

According to the Interstate Commerce Act, railroad consolidations require the Surface Transportation Board to impose employee protective conditions on carriers involved in the consolidation. These conditions, as their name implies, exist to temper the impact on rail

[1]There are, however, special rules applicable to the establishment and use of such gangs. For example, RSG's must have at least 20 positions and the employer must provide at least 6 months work for RSG's or pay labor protection if an RSG is cut off before six months. (See Carrier Prehearing submission, p. 7.)

employees that flow from the mergers. For this reason, the New York Dock conditions impose minimum levels of protections applicable to affected employees. Before a carrier can implement operational changes following the STB's merger approval, the carrier must consummate an implementing agreement with its unions. The implementing agreement directs itself to the specifics of how employees are to be selected from the respective carriers for the purpose of performing work in the new entity. Such agreement also accomplishes any necessary change to work rules that would otherwise preclude the necessary combination of workers, equipment and facilities. Following the requisite notice to the unions[2] the carrier will propose specifics as to, for example, which contracts will govern the merged work and the manner in which the various labor agreements need modification to accommodate the new combinations. Foreseeing the possibility of a dispute over these proposals, the New York Dock conditions provide, in Article 1, Section 11, for arbitration.[3] A New York Dock arbitrator has the authority to impose necessary modifications to the labor contracts for the purpose of implementing the various elements of the combination.[4]

To qualify for the various monetary benefits available under the New York Dock conditions[5], the employee must satisfy an initial burden of showing that he or she has been placed in a worse position as a result of a New York Dock "transaction"[6]. An employee seeking to avail

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[2]49 U.S.C. 11343 et seq., App. III, § 11
[3]The arbitration is binding, but subject to review by the STB. (See Carrier's exhibit C-11.).
[4]See for example *Carmen III*, Slip Op at 2; *Delaware and Hudson RY. Co.-Lease and trackage rights-Springfield Terminal RY. Co.*, finance docket #30965(Sub nos. 1 and 2) (Served September 25, 1998); Carrier exhibits C-13.
[5]Among other things, the protective provisions establish certain monthly displacement allowances for workers who end up in lower paying positions.
[6]Appendix III of the New York Dock conditions defines "transaction" broadly:

> 1. Definitions.- (a) "transaction" means any action taken pursuant to authorizations of the this commission on which these provisions have been imposed.
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> The definitions continue to define a "displaced employee":
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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.

himself or herself of the protective conditions must, according to Article I, Section 11(e), "identify the transaction and specify the pertinent facts of that transaction relied upon."[7] If the employee is able to satisfy that burden, the employee would be eligible for certain displacement allowances for up to six years.[8]

Article XII, Imposed Agreement

Significant to this case, there is a second procedure that applies to seniority district consolidation. Article XII of a 1992 Imposed Agreement sets forth a consolidation procedure.[9]

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[7]That provision states: "In the event of any dispute as to whatever or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee."

[8]The displacement allowance is calculated by ascertaining the average monthly compensation earned by the employee in the 12 months prior to the adverse impact (known as the test period average for "TPA"). If, in any month, an employee earns less than the TPA, he or she becomes eligible for the differential allowance.

[9]The term "Imposed Agreement" arises from the failure of the parties to resolve their differences in their 1988 national negotiations. Following the inability of the Carriers and the BMWE to reach agreement, Presidential Emergency Board No. 219 was established pursuant to the processes of the Railway Labor Act. The recommendation of PER 219 included a mechanism for allowing Carriers to consolidate seniority districts, subject to certain notice and dispute resolution provisions Section 9 of the PER Report to the President recommended as follows:

A Carrier desiring to combine or realign seniority districts should give 30 days written notice to the affected employees and their bargaining representative. If the parties are unable to reach agreement within 90 days of serving that notice, the matter may be submitted to arbitration in accordance with the procedure described [in Section 10 of the Report](See Carrier exhibits C-16.) Section 10 provided an interest arbitration procedure for the purpose of settling issues over seniority district consolidations. Following the PER recommendations, Congress enacted Public Law #102-29 to deal with requests for clarification of PER 219's recommendations. The so-called Special Board was to consider recommendations for modification of the PER 219 recommendations. The decisions of the Special Board, however, were to be "imposed" on the parties as if the parties themselves had bargained them.

The Special Board considered, among other things, the BMWE's request for clarification of Section 9 of the PEB 219 Report. It responded as follows:

> The PEB intended to allow the combining or realigning of seniority districts between all carriers under common operation and control. It also intended that the protection of the [Interstate Commerce Act] continued to apply to all such combinations or realignments.

Article XII, Section 1 states:

> A carrier shall give at least thirty (30) days written notice to the affected employees and their bargaining representative of its desire to combine or realign seniority districts, including all carriers under common control, specifying the nature of the intended changes. The protection of the Interstate Commerce Act will continue to apply to all such combinations or realignments.[10]

The parties may arbitrate their differences over seniority district consolidation, according to Article XVI of the Imposed Agreement.

These two documents, both relevant to seniority district consolidation, are important to the case before this Board. In this case, finding it necessary to consolidate the 47 seniority districts into 9 and to create 10 "common zones" in terminal areas within the newly-combined district, containing track of both the former Burlington Northern as well as the Santa Fe and/or Frisco Carriers, BNSF sent a notice to BMWE on April 7, 1998. The notice referenced both Article XII and Section 4 of the New York Dock conditions."[11] Thereafter, the parties carried on extensive discussions directed to, among other things, the question of which aspects of the transaction were to be accomplished pursuant to the New York Dock procedure and which would proceed under Article XII of the Imposed Agreement. The parties resolved this issue by a letter dated July 9, 1998, which stated, in relevant part:

> On June 30, 1998 the parties agreed to resolve the following procedural issues raised by the Carrier's letter of April 7,1998. That part of the Carrier's letter regarding the creation of the New Galesburg, Lincoln, Kansas, Fargo, Montana, Northwest, Texas, Southwest and Southeast seniority districts is considered the Carrier's notice pursuant to Article XII of the Imposed Agreement effective July 29, 1991. That part of the Carrier's letter regarding the selection of force and assignment of

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Subsequently, the recommendations of PEB 219, as clarified by the Special Board, were adopted by the parties, including the recommended procedure for the combination and realignment of seniority districts.

[10] Article XII, Section 1 of the Imposed Agreement.

[11] The April 7th letter stated, in relevant part: this is Notice served under Article XII-combining or realigning seniority districts of the July 29, 1991 PER Implementing Document. This is also Notice under Section 4 of the New York Dock Conditions, as imposed by the ICC in decision no. 38 of the Finance Docket no. 32549 (v. BN-SF Common Control/Merger Proceeding), to implements certain changes in operations pursuant to the common control of Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company...

> employees at the "common points" of Kansas City, Amarillo, Wichita, Fort Worth, Galesburg, Oklahoma City. Chicago, Houston and Enid is considered the Carriers notice under Article I, Section 4 of New York Dock conditions.

Having resolved the notice issue, however, the parties were unable to reach agreement on the substance of either the Article XII or the Article I, Section 4 issues and these were arbitrated before Mssrs. Richard Mittenthal and Joseph Sickles, respectively. The Sickles award ordered the parties to establish implementing agreements, and this was done for each of the Carrier's proposed common zones.[12] Following the Mittenthal award, which dealt with seniority districts consolidation, the parties negotiated a Seniority District Consolidation Agreement, (hereinafter, "The Agreement") in June of 1999.[13] That Agreement is directly tied to the issues giving rise to this case, as will be noted.

The instant case involves the claim of 26 workers who say they were adversely affected, following the seniority district consolidation, by being forced to hold lower paying positions.[14] Section 1 of The Agreement established the nine new consolidated seniority districts, including Consolidated District 8--the Southeast--which, it was agreed, would be under the aegis of the BMWE/Frisco bargaining agreement. By notices dated October 6, 22 and 25, 1999, the Carrier announced the abolishment of all regional B&B gangs in the new Southeast district. Former regional B&B gang employees were urged to bid to new positions in mobile divisional B&B gangs. The substitution of mobile divisional for regional B&B gangs was consistent with the finding by Arbitrator Mittenthal upholding the Carrier's desire for greater flexibility by combining districts in a manner that would "permit a district gang to work a far larger territory

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[12]See Carrier exhibit C-27.
[13]Carrier exhibit C-28.
[14]The Seniority District's Consolidation Agreement is Union exhibit 12.

without the restrictions that apply to regional or system production gangs."[15] In so holding, the Arbitrator balanced the Carrier's operational need for consolidation of districts with the impact of changes on the workers. He found that district mobile gangs would be "sufficiently similar to regional gangs to warrant many of the same benefits"[16] and went on to require that the Carrier apply various new "rule" and "pay" provisions to the district mobile gangs, including travel allowances, bonuses and informational notices concerning the gang's proposed work locations in the upcoming year. Significantly, these were remedies outside those that would have been provided by the New York Dock conditions.

The claimants in this case, however, contend they may be eligible for New York Dock conditions. The Agreement, it is claimed, flowed directly from the merger which, itself, led to elimination of the seven seniority districts that had comprised Frisco and to their replacement with a new Southeast consolidated seniority district. The new "Division" had become the entire former Frisco district and the effect was to allow the Carrier to use divisional gangs in place of regional gangs. Due to the elimination of current positions, some gang employees applied for the district gangs, others exercised seniority to bump into existing classifications. It is undisputed that the claimants each suffered a loss in pay as a result of these moves.[17] The claimants assert, therefore, that they were "displaced employees" entitled to compensation under the New York Dock conditions as a result of the abolition of the regional B&B gangs and the resultant pay cut. The parties differ on whether the claimants can be eligible for New York Dock conditions, and that matter was presented for resolution by this panel.

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[15]Mittenthal award, at 8.
[16]Mittenthal award, p. 21.
[17]See BMWE Opening Brief, pp. 15, 16.

Issue

Do the New York Dock conditions apply in this case?

Union Position

The Union says the adverse economic impacts suffered by the claimants were the direct result of the Carrier's implementation of changes related to the Seniority District Consolidation Agreement. The economic harm to the claimants, says the Union, was direct--the changes served to elimination all regional B&B positions and required all claimants to exercise seniority to positions with lower rates of pay.

Specifically, the dispute is whether or not the claimants are "displaced employees" as defined in Article I, section 1(b) of the New York Dock conditions as "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." A "transaction" is defined as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed."[18] Noting that *New York Dock* construed the term "transaction" broadly in light of the fact that the event actually affecting employees might occur at a later date than the initial transaction, yet still pursuant to approval of the Commission, the Union notes that the consolidation of rosters and changes in operations attendant to the consolidation at issue here, occurred only four years after the ICC's approval of the BN-Sante Fe merger.[19] Here, too, the Union urges this Board to construe the term "transaction" broadly, requesting that the Carrier be ordered to provide claimants with computations of their test period average earnings and hours worked so the claimants may make an informed election between the benefits available under New York Dock

[18]See Article I, Section 1(a).
[19]Union Opening Brief, page 20.

and those available, if any, under other protective arrangements.[20]

Carrier Position

The Carrier urges that the claim for New York Dock protection must fail. The BMWE, it says, has previously entered into a binding settlement wherein the Union waived any such claim by acknowledging that the seniority district consolidation was not a New York Dock transaction. In its April 1998 settlement agreement with BNSF, says the Carrier, BMWE agreed it "would not claim that the Carrier was required to serve notice under Article I, Section 4 of New York Dock conditions in order to propose consolidation of former Santa Fe seniority districts with former Burlington Northern seniority districts." That agreement, it is claimed, means the consolidation of seniority districts was not a "transaction" within the meaning of the New York Dock protective conditions. Says the Carrier:

> Rather than insist that BNSF's seniority district consolidation be treated as a New York Dock transaction for which notice and a New York Dock implementing agreement were required, BMWE agreed that BNSF's seniority district consolidation proposal would be treated as exclusively subject to Article XII of the Imposed Agreement.[21]

In light of this mutual agreement concerning the method by which the consolidation would be handled, it cannot be considered a New York Dock transaction and the Union's claim for New York Dock benefits must be rejected.

Analysis

The parties agree on the applicable burdens in this case: At the outset, the claimant must show (1) that the "transaction" at issue is a New York Dock transaction and that (2) he or she has been placed in a worse position as a result thereof. Absent more, the seniority districts

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[20]Carrier Opening Brief, page 29.
[21]Carrier Prehearing submission, page 26.

consolidation could be a New York Dock transaction. Nothing in the nature of the consolidation itself somehow excludes it from the application of those protective provisions. That it could be such a transaction, however, does not necessarily mean it is. The obligation still remains squarely on the employee to demonstrate the causal nexus that ties the impact, admittedly adverse, to the merger of forces, for the essence of the New York Dock protective provisions is to shield the employee against adverse impacts arising from such events.

In this case, the employees have successfully shouldered that burden. The action directly tied to the dispute in this case was the company's decision, in 1998, to rationalize certain former BN and former Santa Fe seniority districts by combining them into fewer, larger merged districts, each of which incorporated trackage and rosters from both BN and Santa Fe and operated under a single predecessor's collective bargaining agreement. In some instances, that caused employees to change from one prior road collective bargaining agreement to another that had lower pay rates for a particular classification. In other instances, this merger-related consolidation changed how the collective bargaining agreement applied to employees' positions, resulting in lower rates of pay. Unquestionably, that directly impacted the claimants in this case, causing them to assume Divisional, rather than Regional, assignments.[22]

There was a direct nexus, we conclude, between the creation of the Southeast District, where the claimants worked, and the merger itself. In 1994, the corporate parent of BN claimed, as part of its application to the ICC for permission to control and merge with Santa Fe, that a benefit of the proposed merger would be an increase in operating efficiencies and attendant

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[22]The economic impact of the elimination of the Regional B&B positions and their replacement with Divisional positions was substantial. "A Regional St Class Carpenter/Mechanic received $16.96 per hour, the Divisional counterpart received $16.58 per hour. Similar reductions occurred across the other classifications. For example a Regional B&B Foremen received $19.14 per hour, while his Division counterpart received only $18.33." (Union Opening Brief, page 14.)

reduction of costs through the "integration of the productive facilities of the two carriers...[and]...reductions in costs of maintenance of way."[23] Clearly, some rationalization was necessary. Reasonably stated, both the Burlington Northern and the Santa Fe Carriers were awash in seniority districts. As noted by Arbitrator Suntrup, who, described the merged operations in a related case:

> With the large number of former railroads making up the BNSF, each of which has track employees, it is simply a matter of fact that after the 1995 merger was approved by the STB that both the company and the union were dealing with what had become a larger number of seniority districts, under one umbrella, which had been added piecemeal to the growing entity which became, in that year, to be BNSF. According to that company the large number of seniority districts made for inefficiencies in the assignment of track employees. Management of the company wanted to consolidate the BMWE seniority districts. By 1998 it was ready to make this move...
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> In April of 1998 the BNSF advised officials of the BMWE that it wanted to reduce the number of BMWE's seniority districts which existed throughout the system. There had, in fact, that some consolidation of seniority districts for track employees on the former SF in the early 1990's. But the former BN and its merged partners had not appreciably changed its track employees' seniority district structure for some 30 years prior to 1998. After the merger of the BN and SF in 1995, which included all of the predecessor railroads aligned to both parties which had been co-opted into the equation, the BNSF had 47 BMWE seniority districts. In 1998 the company proposed to the Union that the number of system-wide BMWE seniority districts be reduced from 47 to 9. BNSF proposed this to the Union on April 7, 1998. Management of the BNSF wanted to move along quickly on this issue.[24]

Arbitrator Suntrup went on to describe the linkage between the merger and the reorganization:

> As a result of the STB approved 1995 transaction the BNSF went through a wholesale reorganization of its BMWE forces with respect to the selection of forces and assignment of employees.[25]

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[23]Burlington Northern, Inc.--Control and Merger--Santa FE Pacific Corp., lOi.c.2d661, 665(1995), at 671.
[24]BMWE v. BNSF Railway Company, Finance Docket No. 32549 (June 24, 2001), at p. 4.
[25]*Id.*, at page 13. Arbitrator Suntrup went on to characterize the reorganization as "transaction-driven". The company seeks to dismiss this characterization as mere dicta (Carrier rebuttal submission page 9 at *et.seq*). It is true, as management notes, that Arbitrator Suntrup was not asked to, nor did he, render findings on whether the seniority

The Carrier notes, however, that an overwhelming percentage of the newly-created Consolidated District 8 (the Southeast) was comprised of pre-consolidation districts that were former Frisco districts.[26] In fact, says the BNSF, the listed 26 claimants were in no case affected in any way by the incursion of a Santa Fe worker. Indeed, in virtually every case, the claimant's jobs underwent no change at all--they maintained their same positions. But this fact leads to no contrary conclusion. The question before us is whether the claimants were placed in a "worse position". Here, all affected workers were required to accept lower paid positions as a direct consequence of the abolition of their previous positions and the changed application of the collective bargaining agreement to their new positions on the merged BN/Santa Fe district.[27] Clearly, these workers suffered a detriment to their employment status; that their particular

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district consolidation was, *per se*, a New York Dock transaction. This Board rejects the Union suggestion that, therefore, that the Suntrup award should somehow bind this panel. Nevertheless, we note his discussion of the factual framework (Suntrup describes the case as, among other things, "about the mechanics of how to properly honor seniority rights of the BMWE representative employees under the changing structure of the BNSF after the 1995 merger...") as accurately reflecting the facts that we conclude support the finding of a nexus.

[26]Section 1 of the Agreement provided for the creation of nine new consolidated seniority districts. Consolidated District 8, the Southeast, comprised the following pre-consolidation districts, or parts thereof:

BN Hannibal Seniority District *#6 (includes only that portion between AvIP 16.85 and MP 4.22 (North St. Louis));*
SLSF Eastern Seniority District #61 *(Less that portion between Valley Center (M.P. 515.2) and Augusta (MP. 483.5);*
SLSF Northern Seniority District #62 *(Less MP 0.40 to MP 22 (Olathe));*
SLSF Southwestern Seniority District #63 *(except that portion between North Junction and MP 602.6 at Madill);*
SLSF Western #1 Seniority District #64;
SLSF Western #2 Seniority District #65 *(Less Quanah to Snyder);*
SLSF Southern Seniority District #66;
SLSF River Seniority District #67;
ATSF Southern Region Seniority District #1, Zone 1;
ATSF Southern Region Seniority District #1, Zone 2 *(only that portion between A4P 413.6 at Gainesville and Purcell).*

[27]As such, the claimants satisfy the "2 prong test" announced in Transportation Communications International Union and Missouri Pacific Railroad, March 1, 1998 (Union exhibit 21). The first "causation step" seeks to determine whether the employee was directly affected by a transaction to which the protective conditions apply. The second prong requires that "an employee must have been placed in a worse position with respect to either his compensation or rules governing his working conditions." (At p. 10)

situations did not involve displacement by a Santa Fe employee does not devitalize the finding that the adverse impact was meaningfully connected to the transaction covered by the New York Dock protections.

The BNSF argues, however, that BMWE is estopped from claiming the seniority district consolidation can be covered by New York Dock protections. BMWE, it is claimed, has previously entered into a binding settlement agreement with BNSF, wherein the parties agreed that the consolidation was not within the scope of the New York Dock conditions.[28] The Carrier directs the Panel's attention to the 1998 letter that resolved the dispute discussed earlier,[29] concerning the meaning of the April 7 notifications. By that agreement, the Union agreed that creation of, among others, the new Southeast seniority district would be accomplished pursuant to Article XII. The letter states, in relevant part:

> BMWE agreed, in turn, that it would not claim that the Carrier was required to serve notice under Article I, Section 4 of New York Dock conditions in order to propose consolidation of former Santa Fe seniority districts with former Burlington Northern seniority districts.

By these terms, the Carrier argues, the Union waived its right to invoke New York Dock protection in this case.

However, we are not persuaded that this letter should be read as accomplishing that goal. The parties were understandably at odds over how, precisely, to utilize and apply the parallel procedures of Article XII and *New York Dock*. The 1998 Settlement Agreement set that dispute to rest by providing that the Article XII processes would apply, reasonably enough, to the creation of new seniority districts, whereas *New York Dock* would be directed, as it had in the past, to the

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[28]Carrier Prehearing submission, p. 2.
[29]Letter of July 9, 1998.

question of force selection and employee assignment. And, the Union agreed it would not claim that the consolidation proposal was somehow defective by the failure to reference Article I, Section 4 of *New York Dock*. But this relatively brief resolution, directed as it was to some knotty procedural issues, did not serve to divest the BMWE workforce of the statutory protections inherent in *New York Dock*. Nowhere does the Agreement suggest that the Union was abandoning any possibility of showing a nexus between the consolidation and later potential adverse impacts. Beyond the fact that such result cannot be inferred from this language, it would run wholly contrary to the underlying intent of the protective provisions. For these reasons, the finding is that this grievance should be granted.

AWARD

The grievance is granted. The Carrier shall provide Claimants with calculations of their test period average earnings and hours worked, so as to enable the Claimants to make an informed election between the benefits available under New York Dock and those available, if any, under other protective arrangements.

Richard I. Bloch, Esq.

Wendell Bell dissenting

Ernie Toske
Ernie Toske
concurring

August 1, 2002