In the Matter of the Arbitration	:	
Between	:	Opinion and Award
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	:	RE: Leroy J. Parker *New York Dock* Benefits
and	:	
CSX TRANSPORTATION, INC.	:	

Before: Joan Parker
Arbitrator

Appearances

For the Carrier:

James T. Klimtzak
Director – Labor Relations
Judy B. Curtis
Director – Employee Protection

For the Organization:

Highsaw, Mahoney & Clarke, P.C.
By John O'B. Clarke, Jr., Esquire
William G. Mahoney, Esquire

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Pursuant to Article I, § 11 of the *New York Dock* conditions,[1] the undersigned was designated to arbitrate the instant dispute concerning Leroy J. Parker. The parties forwarded ex parte submissions to the Arbitrator on January 27, 2005. A hearing was held in Miami Beach, Florida, on February 4, 2005, at which time both parties were afforded full opportunity to present their respective positions.

[1] The labor protective conditions set forth in *New York Dock Ry. – Control – Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979).

The Issues

The parties did not stipulate to the issues to be determined in the instant case. Having reviewed the case in its entirety, however, the Arbitrator finds that the issues are appropriately set forth as follows:

1. Do the *New York Dock* conditions allow the Carrier to treat Parker, a displaced employee, as occupying a higher-paying non-agreement position he allegedly declined, for the purpose of calculating the monthly displacement allowance payable to him, where the declined position would have required Parker to change his place of residence?

2. Do the *New York Dock* conditions require the Carrier to adjust Parker's displacement allowance for subsequent general wage increases where the URSA Schedule Agreement under which Parker was covered prior to his displacement is defunct?

3. If the Carrier overpaid Parker by applying BMWE Agreement general wage increases to his displacement allowance, can the Carrier recoup the alleged overpayment from future benefits payable to Parker?

Background

In March, 1998, Leroy J. Parker was employed by Consolidated Rail Corporation (CRC) as a Track Supervisor at South Kearney, New Jersey, and represented for purposes of collective bargaining by the United Railway Supervisors Association (URSA). On June 23, 1997, the Carrier, along with Norfolk Southern Corporation (NS), filed an application with the Surface Transportation Board (STB), regarding the proposed acquisition of control of CRC and the division of use and operation of CRC's assets. In anticipation that the application would be approved and that the STB would impose *New York Dock* labor protective conditions on the transaction, the Carrier, NS, CRC, and URSA entered into an implementing agreement (IA) (in accordance with Article I, § 4 of the *New York Dock* conditions) on March 23, 1998. Article I, § 2 of the IA provided that CRC employees "holding an URSA-represented position on March 6, 1998 will be

offered, on a one-time basis, a similar non-agreement position with CSXT, NSR or CRC...." Article II of the IA provided that the URSA/CRC Schedule Agreement covering those CRC employees (including Parker) would be terminated upon the STB's approval of the transaction.

The STB approved the transaction in Finance Docket No. 33388, Decision No. 89, issued July 20, 1998, imposing *New York Dock* labor protective conditions. By letter dated July 22, 1998, the Carrier offered Parker a non-agreement position as an Assistant Roadmaster at Elizabethport, New Jersey, effective June 1, 1999. Parker accepted. In July 1999, Parker submitted to the Carrier a claim for *New York Dock* benefits based on his having been displaced from the Track Supervisor position he had held with CRC. He submitted the request a second time, in October 1999.

In December 1999, Chief Regional Engineer Dave Evers told Parker that Parker's position was targeted as one of approximately four hundred non-agreement positions the Carrier intended to abolish. Evers told Parker that an Assistant Roadmaster position was available in West Springfield, Massachusetts. According to Evers, he also told Parker an Assistant Roadmaster position was available in Cumberland, Maryland, and Parker declined both positions because, after conferring with his family, he did not want to relocate.[2]

On January 3, 2000, the Carrier issued Parker (and others) a letter stating in part:

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[2] According to Parker, in his September 17, 2000 letter to the Carrier (Car. Exh. J):

> [W]hile on vacation in December [1999], I received a phone call from the Division Engineer saying that my position in Elizabeth was being targeted for elimination along with 400 other jobs. At that time, he mentioned to me that there was a position in Springfield, Massachusetts that I might consider.... At no time was I made an Official[sic] offer by the company to relocate my residence and family either by phone or in writing and it was never brought to my attention again.

> You have previously been advised by your Department that your position has been targeted for elimination. If you did not receive a job offer to fill a position, or if you were unable to accept an offer which was extended to you, we are inviting you at this time to review the attached list of remaining Operating vacancies.
>
> We encourage you to indicate your interest for specific positions/locations on the reverse side of the enclosed Vacancy List and return by noon on January 10, 2000. Please include the specific Job#(s) for which you have interest, as well as a copy of your resume or work history.

Parker did not indicate an interest in any of the vacant positions. On January 26, 2000, the Carrier officially notified Parker by letter that his position would be abolished effective January 31, 2000, stating, "Based on business necessity, CSX Transportation has determined that it must eliminate a number of positions in its Operating Departments. This is to advise you that your employment is being terminated as a result of this determination." The letter outlined the separation procedure, advising that employees could seek another position via job postings and that outplacement services would be available. The letter also stated, "If you have seniority under a union contract, you may have the right to exercise it in lieu of executing the Agreement and receiving Separation Pay...." Parker exercised seniority he had maintained with BMWE to obtain a Basic Track Foreman position at Elizabethport, New Jersey, effective February 1, 2000.

On February 23, 2000, the Carrier responded by letter to Parker's July 1999 claim for *New York Dock* displacement benefits. The Carrier calculated the average monthly compensation Parker had received during his last twelve months at CRC as $6,722.72, and his monthly compensation as Assistant Roadmaster as of June 1, 1999, as $4,652.55.[3] The Carrier acknowledged that Parker was

[3] The Carrier explained the evaluation performed to determine whether Parker was entitled to a monthly wage guarantee:

entitled to a monthly allowance under the *New York Dock* conditions for a protective period of up to six years, "to offset the loss in compensation you have sustained."[4]

On August 11, 2000, the Carrier sent Parker a letter stating:

> [Y]our guarantee of $6,722.72 will remain in effect subsequent to January 31, 2000. However, your monthly compensation ($4,652.55) as a former management employee will be used as a minimum offset in calculating any additional displacement allowance now due.... [I]t was your decision to obtain a position covered by the BMWE agreement rather than accept a management position which was offered to you as Assistant Roadmaster at either West Springfield, MA or Cumberland, MD.

Parker appealed the Carrier's action by letter dated September 17, 2000. The Carrier declined the appeal by letter dated November 17, 2000, stating in part, "In light of the fact that you declined an Assistant Roadmaster position, I find that it is proper to use the salary of that higher rated position as an offset against any displacement allowance due, which is permissible under Article I, Section 5(b) of the New York Dock conditions."

At BMWE's request, the matter was discussed in conference on March 15, 2001. The Carrier subsequently affirmed its decision by letter dated March 19, 2001. The parties again discussed the matter in conference on July 23, 2002. By letter dated October 14, 2002, the Carrier again affirmed its decision. Thereafter, the parties exchanged additional letters. By letter dated February 21, 2003, BMWE requested a breakdown of Parker's monthly earnings from August 2000 to January 2003 to evaluate whether his monthly compensation as Basic Track Foreman had ever actually dropped

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> The base rate of pay of your non-agreement position is the same as the base rate for the position you previously held on Conrail. As a non-contract employee, you are paid a monthly salary and are not eligible for additional overtime pay as you were on Conrail. However, your non-contract compensation at CSXT also includes other items which you did not receive as a Conrail contract employee, such as a 401k plan with a 3% matching contribution from CSXT, a pension plan fully funded by CSXT, stock options, life insurance, disability coverage and the chance to earn substantial future cash bonuses.

[4] The Carrier paid Parker a lump sum of $16,561.36 for the period June 1999 through January 2000.

below $4,652.55 and determine whether the parties truly had a dispute. The Carrier responded by letter dated April 10, 2003, providing BMWE with the information requested, and stated:

> [D]uring the reconstruction of Mr. Parker's monthly earnings, it was discovered that his displacement allowance was erroneously increased by general wage increases and cost-of-living adjustments beginning July 1, 2000, and through July 1, 2002, that applied to the BMWE craft. Inasmuch as Mr. Parker's displacement allowance of $6722.72 was not established as a BMWE represented employee, it was not subject to general wage increases provided by the BMWE National Agreement. Therefore, Mr. Parker has received an overpayment of his New York Dock protective benefits.... It is the Carrier's intention to recover this overpayment amount from future guarantee payments, if possible.

Further correspondence between the parties, and a third conference on October 29, 2003, failed to resolve the matter. Therefore, the matter was presented to this Arbitrator for final decision.

Relevant Contract Language

The *New York Dock* conditions provide in pertinent part:

Article I

1. Definitions. –

...

(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.

...

(d) 'Protective period' means the period of time during which a displaced ... employee is to be provided protection hereunder and extends from the date on which an employee is displaced ... to the expiration of 6 years therefrom....

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.

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 services 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 wage increases) to which he would have been entitled, he shall be paid the difference....

(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.

...

Article IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

Contentions of the Carrier

The Company contends that it is proper to consider Parker as occupying one of the Assistant Roadmaster positions he allegedly declined for the purpose of calculating the displacement allowance payable to him after January 31, 2000. The Carrier submits that there is no dispute that the January 2000 elimination of Parker's Elizabethport Assistant Roadmaster position was due to the transaction that was the subject of the Implementing Agreement. Under the IA, Parker was offered and accepted a non-

agreement position. As a non-agreement employee, the Carrier argues, Parker's *New York Dock* rights derive from Article IV of the conditions, under which he was required to exhaust his rights to available non-agreement positions. According to the Carrier, Parker "had at least three occasions to indicate his desire to acquire an Assistant Roadmaster position" after his Elizabethport position was eliminated (Car. Subm. at 12): (1) in December 1999, when Evers offered him such a position in either West Springfield, Massachusetts or Cumberland, Maryland; (2) in January 2000, after Parker was notified by January 3, 2000 letter of Operating vacancies for which he could apply; and (3) on January 26, 2000, when Parker was notified by letter that he could apply for another non-agreement position via job postings. Parker chose to exercise seniority to assume a position as Basic Track Foreman instead. The Carrier contends that the *New York Dock* conditions were designed to protect employees only against adverse effects flowing from a transaction, not from a voluntary exercise of rights to a craft position.

In response to the Organization's argument that Parker was not obligated to accept a new Assistant Roadmaster position that would have required him to change his place of residence in order to maintain his *New York Dock* benefits, the Carrier cites arbitral precedent for the proposition that an employee who refuses an offered position loses his entitlement to *New York Dock* benefits even if the position would require the employee to relocate (***Norfolk Southern Ry. and Lawrence J. Ferek* (Hockenberry, 9/24/02); *Railroad Yardmasters of America and Southern Ry.*, Award No. 1 (Peterson, 5/__/87); *American Train Dispatchers Ass'n and Seaboard System R.R.*, Award No. 2, PLB No. 3820 (Weston, 8/24/85)**). In addition, the Carrier argues that in approving the transaction in this case, the STB specifically considered whether that relocation

requirement should be waived and decided:

> ... A basic part of the bargain embodied in the Washington Job Protection Agreement upon which the *New York Dock* conditions are based is that rail carriers are permitted to move employees around in order to achieve the benefits of a merger transaction in return for up to 6 years of income protection .... Such displacements do result in hardships for employees whenever they are required to move their place of residence ... however, *New York Dock* compensates the employee for the cost of the move and provides for up to 6 years of income protection.... [T]o provide that monetary allowances are paid to employees who are offered continued employment, but refuse to take advantage of it, [is] a result not envisioned under the *New York Dock* conditions.
> (Finance Docket No. 33388, Decision No. 89 at 127-28.)

The Carrier submits that this Arbitrator sits as an extension of the STB and is required to adhere to the STB's decisions.

The Carrier argues that Article I, § 5(b) of the *New York Dock* conditions is inapplicable to Parker. According to the Carrier, Parker does not qualify as a displaced employee for purposes of § 5(b) because he voluntarily placed himself in the lower-paying position of Basic Track Foreman. Parker also does not fit within the terms of § 5(b) because he was not covered under a "working agreement" in January 2000, and because no exercise of seniority as contemplated by § 5(b) was required for him to accept one of the offered non-agreement positions. The Carrier argues that § 5(b) applies only where a position not requiring a change of residence is available under a current agreement applicable to the employee (citing ***American Train Dispatchers Ass'n and Burlington Northern R.R.*** **(Marx, 5/21/87)**).

The Carrier further argues that Parker's monthly guarantee should not have been adjusted for general wage increases provided under the National BMWE Agreement. Parker was not covered by such agreement either in his position with CRC prior to the transaction or in the Assistant Roadmaster position he occupied with the Carrier. The

Carrier submits that although Parker was covered by the URSA/CRC Schedule Agreement prior to the transaction, that agreement was abrogated as a result of the transaction, so that "any resource from which future increases applicable to the displacement allowance ... could be based" (Car. Subm. at 25) was eliminated. The Carrier contends that arbitral precedent supports its right to recoup the overpayments that resulted from the Carrier's mistaken application of BMWE general wage increases to Parker's guarantee.

Contentions of the Organization

The Organization contends that the Carrier's decision to offset Parker's wage guarantee by compensation he might have received in an Assistant Roadmaster position he allegedly declined violates the *New York Dock* conditions. Parker was a contract employee at the time of his displacement on June 1, 1999. Therefore, the Organization argues, Article I, § 5 of the *New York Dock* conditions, not Article IV, applies to Parker. According to the Organization, Parker is entitled to his *New York Dock* wage guarantee for the full length of the six-year protective period regardless of the reason for any subsequent adverse impact that may occur (citing ***Lighter Captains' Union, Local 996 and Erie-Lackawanna R.R.*, WJPA Docket No. 129 (Bernstein, no date)**).[5] Therefore, the Organization contends, there can be no dispute that Parker continued to be entitled to

[5] The Organization argues that where any interpretation of the *New York Dock* conditions' plain language is necessary, the basis for such interpretation is provided by Article V of the conditions. Article V states:

> the terms of [the conditions] are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

According to the Organization, 49 U.S.C. 11347 (the *New Orleans* conditions) and section 565 of Title 45 (Appendix C-1) were based on the protections afforded by the 1936 Washington Job Protection Agreement (WJPA). Therefore, the Organization submits, the manner in which the WJPA's provisions were applied is instructive as to how the *New York Dock* conditions should be applied in the instant case.

his wage guarantee when his Elizabethport Assistant Roadmaster position was abolished on January 31, 2000, and he exercised his BMWE seniority to obtain the Basic Track Foreman position.

The Organization argues that the Carrier has no right under the *New York Dock* conditions to offset Parker's wage guarantee by treating him after January 31, 2000 as if he occupied one of the Assistant Roadmaster positions he allegedly declined. Section 5(b) of the *New York Dock* conditions provides a right of offset only when a displaced employee declines a higher-paying position that would not have required a change in the employee's place of residence. Both positions the Carrier alleges Parker declined would have required him to relocate. Therefore, the Organization submits, no right of offset is applicable in Parker's case. Moreover, the Organization contends, even if a right of offset did exist where a declined position required a change in place of residence, the Carrier never made a written or formal offer of an alternative Assistant Roadmaster position to Parker. The Carrier acknowledged in its January 26, 2000 letter to Parker that Parker had the option of exercising any seniority he might have under a union contract to obtain a new position upon the abolishment of his Elizabethport Assistant Roadmaster job. According to the Organization, by exercising his seniority rights to secure the highest paying job available to him that did not require a change in his place of residence, Parker met his obligations under the *New York Dock* conditions.

The Organization further contends that Article I, § 5(a) of the *New York Dock* conditions requires the Carrier to adjust Parker's wage guarantee for subsequent general wage increases. The Organization submits that although the source of the required increases may be "uncertain" (Org. Subm. at 18) because the URSA Schedule Agreement

was terminated by the transaction, the Carrier is not therefore excused from making the adjustments. The Organization argues that there is nothing in the language of § 5(a) that limits the required adjustments to general wage increases of the craft from which an employee was displaced. According to the Organization, such a limitation would be meaningless in any event because wage increases in the rail industry are expressed as percentages and, through pattern bargaining, set by the first organization to reach agreement with the carriers. The Organization argues that, in fact, the Carrier's application of the BMWE general wage increases to Parker's guarantee demonstrates that the Carrier had no trouble determining an appropriate way to provide the increases required by § 5(a).

Opinion

There is no dispute in the instant case that Parker was adversely affected by the transaction in which the Carrier and NS acquired and divided CRC. When Parker accepted the Elizabethport, New Jersey, Assistant Roadmaster position with the Carrier, he was placed in a worse position with regard to his compensation than he had been in as Track Supervisor for CRC. As a result, Parker was a displaced employee as defined by the *New York Dock* conditions and entitled to a displacement allowance. The Carrier's original calculation of Parker's *New York Dock* wage guarantee, and the monthly amount to which he was entitled while occupying the Elizabethport Assistant Roadmaster position, also is not disputed.

1. The Carrier's Claim to a Right of Offset in Calculating Parker's Displacement Allowance in the Basic Track Foreman Position

The purpose of Article I, § 5 of the *New York Dock* conditions with regard to displaced employees is to protect such employees from adverse effects to their compensation caused by a transaction on which the conditions have been imposed. This protection against reduced compensation is provided for six years, barring the employee's "resignation, death, retirement, or dismissal for justifiable cause." Art. I, § 5(c). Section 5's protection against reduced compensation is not limited to the initial impact of the transaction on the employee:

> *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.... (emphases added)

Under the plain language of § 5, as long as an employee cannot obtain a position compensating him at the same level at which he was compensated prior to displacement, a displacement allowance making up the difference must be paid. If there is a subsequent worsening of the employee's position with regard to compensation, the allowance must be increased to make up that difference as well. Section 5 guarantees that displaced employees will receive the same wage they received prior to a displacing transaction for six years after their displacement:

> 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 wage increases) *to which he would have been entitled, he shall be paid the difference*.... (emphases added)

The Carrier first argues that Parker's *New York Dock* entitlement derives from Article IV of the conditions rather than Article I, § 5. An employee's status at the time of the displacement that makes the employee eligible for *New York Dock* benefits determines which article is the source of the employee's eligibility. An employee covered by a labor agreement at that time is provided protective benefits under the *New York Dock* conditions through Article 1, § 5. An employee who is not covered by a labor agreement at that time is afforded protective benefits through Article IV, which requires such an employee to be provided "substantially the same" level of protection as an employee covered by a labor agreement. At the time Parker suffered the displacement that made him eligible for *New York Dock* benefits, he was a Track Supervisor covered under the URSA/CRC Schedule Agreement. Therefore, the Arbitrator finds that Parker was covered by a labor agreement and his entitlement to *New York Dock* displacement benefits derives from Article I, § 5, not Article IV. The Arbitrator notes, however, that even if Parker's entitlement to *New York Dock* benefits derived from Article IV, Article IV says nothing that would make § 5 inapplicable to non-agreement employees (nor does the Carrier offer any support for such an interpretation). Either § 5 applies directly to employees because they are covered by a labor agreement at the time of the transaction, or the benefits mandated by § 5 are provided indirectly through Article IV—either way § 5 is applicable to all employees adversely affected by a transaction, as Parker undisputedly was.

The Carrier next contends that Parker's displacement allowance does not cover his second change of position into the Basic Track Foreman job because that "worsening of position" with regard to compensation was caused by Parker's voluntary action. The

Arbitrator finds this contention to be without merit. This is not a case in which a displaced employee simply decided to leave his position for a lower-paying position. Parker did not choose to leave his Elizabethport position—the Carrier decided to abolish it. The Carrier argues that Parker's decision to exercise seniority into the Basic Track Foreman position was voluntary in light of the opportunities he was given to assume either the West Springfield, Massachusetts, or Cumberland, Maryland, Assistant Roadmaster position.[6] However, it is not clear from the record that any real offer of either position was ever made to Parker. The Carrier's internal e-mail discussion (Car. Exh. G) demonstrates that no specific terms for these positions were ever decided upon or communicated to Parker either verbally or in writing. Only retrospectively did the Carrier determine that the two positions would have paid the same as Parker's Elizabethport position.

More importantly, accepting either of the two Assistant Roadmaster positions allegedly offered to him would have required Parker to change his place of residence. The Carrier contends that Parker was not permitted to refuse the West Springfield and Cumberland Assistant Roadmaster positions on the ground that he would have had to relocate, and cites precedent in support of its argument that an employee who refuses an

[6] The Carrier also argues that Parker was required to accept another non-agreement position in order to maintain eligibility for *New York Dock* benefits received under the IA, apparently reasoning that the IA limited URSA-represented employees to non-agreement positions. The Arbitrator notes that the Carrier's underlying assertion that the abolishment of Parker's Assistant Roadmaster position was directly due to the transaction that was the subject of the IA is not clearly supported by the record. The Carrier stated in its January 26, 2000, letter to Parker that the elimination of his position seven months after the transaction had placed him into it was due to "business necessity." More importantly, the Carrier implies in its reasoning that a second displacement due to the transaction covered by the IA somehow throws an employee back to the beginning and requires him or her once again to accept a non-agreement position in order to qualify for a continuation of his or her *New York Dock* displacement allowance. A second (or subsequent) displacement of an employee originally displaced by a transaction does not trigger a second (or subsequent) application of an implementing agreement. Once the implementing agreement has been put into effect and an employee has been displaced, thus falling under the *New York Dock* conditions' protective umbrella, the effect of any subsequent changes in position on an employee's *New York Dock* benefits is governed by the terms of the *New York Dock* conditions themselves.

offered position, even if it requires relocation, forfeits his *New York Dock* benefits.[7] The Carrier's reliance on these cases is misplaced. The cited cases examined whether an employee must accept an offered position, even if it requires him to relocate, at the time of a transaction's *initial impact* on the employee, and therefore are not analogous to the instant case.[8] An employee who refuses the position offered by an acquiring carrier arguably removes himself from the transaction entirely and therefore is not entitled to the protection of the *New York Dock* conditions because he was neither displaced nor dismissed due to the transaction. Whatever an employee's obligations may be in order to become eligible for *New York Dock* benefits, such obligations do not govern the issue presented here, where Parker undisputedly had already achieved eligibility. When Parker accepted the Elizabethport Assistant Roadmaster position the Carrier offered him at the time of the initial impact of the transaction, Parker became a displaced employee protected under the *New York Dock* conditions and entitled to a displacement allowance. The Arbitrator finds that the effect on that allowance of the January 31, 2000 elimination of Parker's Elizabethport position, and the nature of any obligations he may have had in the face of that elimination, is governed by the terms of the *New York Dock* conditions themselves, including § 5(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.

[7] The Arbitrator notes that this is not the conclusion the Carrier seems to have reached in practice. The Carrier did not terminate Parker's benefits.

[8] The STB's decision in approving the transaction not to waive the requirement that an employee must accept the "continued employment" offered by the carriers even if it requires relocation, in order to qualify for *New York Dock* benefits, is inapposite to the instant case for the same reason.

The Carrier argues that by its own terms § 5(b) is inapplicable to Parker because (1) no "working agreement" covered Parker at the time his Elizabethport Assistant Roadmaster position was abolished, and (2) no exercise of seniority was necessary for Parker to obtain either of the Assistant Roadmaster positions allegedly offered. This argument is unpersuasive. The Arbitrator notes that the Carrier does not want to throw away the entire provision: the Carrier would like the Arbitrator to enforce that part of § 5(b) that benefits the Carrier and allow it to treat Parker as occupying one of the allegedly declined Assistant Roadmaster positions. However, the Arbitrator must enforce all of the language of § 5(b). Article IV of the *New York Dock* conditions requires that non-agreement employees be given substantially the same protection as agreement-covered employees. Therefore, § 5(b) must be interpolated to apply to Parker's situation. The Arbitrator finds that the "working agreement" under which Parker held the Elizabethport position was comprised of the terms and conditions applicable to non-agreement employment with the Carrier. Thus, the offset mechanism provided by § 5(b) would apply if Parker had failed to exercise any right he may have had as a non-agreement employee to secure another available and higher-paying non-agreement position *that did not require a change in place of residence*. It is undisputed that the two Assistant Roadmaster positions allegedly offered to Parker upon abolishment of his Elizabethport job required him to relocate. Therefore, the Carrier cannot properly claim the right of offset provided by § 5(b).[9]

[9] The Carrier cites ***American Train Dispatchers Ass'n and Burlington Northern R.R.*** **(Marx, 5/21/87)** for the proposition that § 5(b) applies only where a position not requiring relocation is available under a current agreement applicable to an employee. The actual issue in that decision, however, was whether employees qualified for *New York Dock* benefits under *§ 5(a)* if they did not accept a transfer that constituted the initial impact of the transaction involved on the employees in question. Therefore, ***ATDA and BN*** is inapposite to the instant case and the questionable interpretation of § 5(b) presented therein is of no weight here.

The Arbitrator finds that the Carrier cannot treat Parker as occupying the Cumberland, Maryland, or West Springfield, Massachusetts, Assistant Roadmaster positions in calculating the monthly displacement allowance payable to him under the *New York Dock* conditions. The *New York Dock* conditions do not require a displaced employee such as Parker to mitigate the Carrier's obligations thereunder through subsequent relocations. In fact, § 5(b) explicitly protects Parker from such a requirement. Parker mitigated the amount the Carrier must pay him under the *New York Dock* conditions by exercising his BMWE seniority into the highest paying position available to him. The Arbitrator finds that Parker is entitled to the difference between his monthly wage guarantee and his current monthly compensation under Article I, § 5 of the *New York Dock* conditions.

2. *New York Dock* § 5(a)'s Requirement That Wage Guarantees Be Adjusted for Subsequent General Wage Increases

The Carrier argues that because Parker was not covered by the BMWE National Agreement in either his CRC Track Supervisor position or his Assistant Roadmaster position with the Carrier, it was improper for the Carrier to adjust his monthly wage guarantee for the general wage increases provided by the BMWE Agreement. The Carrier acknowledges that Parker was covered by the URSA/CRC Schedule Agreement in his CRC position, but submits that because that agreement was terminated as part of the transaction, "any resource from which future increases applicable to the displacement allowance ... could be based" was also eliminated. Therefore, according to the Carrier, the adjustments it made to Parker's wage guarantee between July 1, 2000 and July 1, 2002, constitute overpayments to him that the Carrier is entitled to recoup.

The plain language of Article I, § 5(a) of the *New York Dock* conditions mandates that a displaced employee's monthly wage guarantee by adjusted for subsequent general wage increases: "such allowance shall also be adjusted to reflect subsequent general wage increases." This language provides no limitations, caveats or excuses. Were such adjustments not required, as the Organization points out in its submission, the real value of the wage protection provided by the *New York Dock* conditions would be eroded over the six-year protective period. Therefore, Parker's monthly guarantee must be adjusted. The question is what general wage increases should be applied to Parker's guarantee.

The Arbitrator notes that the Carrier has the burden of proof on this issue, because the Carrier is seeking to reverse adjustments to Parker's wage guarantee between July 1, 2000 and July 1, 2002, and recoup amounts already paid to Parker. The Carrier had the opportunity to suggest a suitable substitute for the general wage increases eliminated with the URSA Agreement, but has made no recommendation. The Organization argues (although without offering any support for its argument) that the BMWE Agreement increases make as much sense as any, pointing out that wage increases in the rail industry tend to be set through pattern bargaining, so that each craft receives the same percentage increase.

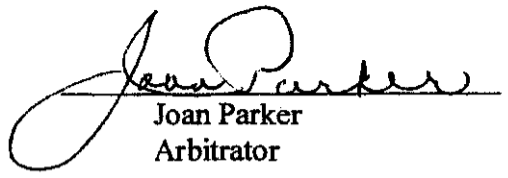
In the interests of closure to all parties as well as fairness to Parker, and in light of the Carrier's failure to offer any alternative method of providing § 5(a)'s required increases, the Arbitrator finds that it is appropriate in the unique circumstances of Parker's case for the general wage increases of the BMWE Agreement to be applied to his monthly guarantee. The adjustments the Carrier already has made, therefore, do not constitute an overpayment and there is nothing for the Carrier to recoup. The issue of

whether the Carrier would have been entitled to recoup any overpayment thus need not be addressed.

Award

The Organization's claim is sustained. The Carrier is not permitted under the *New York Dock* conditions to offset Leroy J. Parker's displacement allowance by the amount of compensation he might have received in an Assistant Roadmaster position he does not occupy. As required by Article I, § 5 of the *New York Dock* conditions, in any month in which his compensation as Basic Track Foreman is less than his monthly compensation as Track Supervisor prior to the transaction at issue, he shall be paid the difference. In addition, Parker's wage guarantee must be increased for subsequent general wage increases as required by Article I, § 5(a), which shall be deemed equal to the general wage increases provided by the BMWE National Agreement. The Carrier has made no overpayment to Parker, and is not entitled to recoup from him any amounts.

March 2, 2005



Joan Parker
Arbitrator