AWARD NO. 1
CASE NO. 1

ARBITRATION BOARD
(ARBITRATION PURSUANT TO SECTION 11
OF THE NEW YORK DOCK CONDITIONS)

UNITED TRANSPORTATION UNION (YARDMASTERS DEPARTMENT)	)	
	)	FINDINGS & AWARD
vs.	)	
THE BALTIMORE AND OHIO RAILROAD COMPANY	)	

QUESTION AT ISSUE:

AS PRESENTED BY UNITED TRANSPORTATION UNION (YARDMASTERS DEPARTMENT) (Organization):

"Which of the following methods of computation should be used in figuring displacement allowances under the provisions of Section 5, Paragraph 2 of the New York Dock Protective Conditions?

'1. By dividing separately by 12 the total compensation received by the employee during the test period.

'2. By dividing separately by 12 the total compensation received by the employee for service performed during the test period.'"

AS PRESENTED BY BALTIMORE AND OHIO RAILROAD COMPANY (Carrier):

"Should guarantee payments resulting from a previous transaction be included as an element in the total compensation when determining a displacement or dismissal allowance resulting from a subsequent transaction under the New York Dock conditions?"

BACKGROUND:

On September 25, 1980 the Interstate Commerce Commission (ICC or Commission) in Finance Docket No. 28905 (Sub. No. 1) and related proceedings approved the application of the CSX Corporation to control, through merger, the railroad subsidiaries of Chessie System, Inc. (The Baltimore and Ohio Railroad Company (B&O) and The Chesapeake and Ohio Railway Company (C&O)) and The Seaboard Coast Line Industries, Inc. (The Seaboard System Railroad Company (SBD) and The Louisville and Nashville Railroad Company (L&N)).

In granting such authority, the ICC imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979), commonly known as the New York Dock conditions.

On November 9, 1983, pursuant to Article I, Section 4, of the New York Dock conditions, the Carrier served notice to the Organization of its intent to coordinate the job functions of yardmasters employed on the SBD, or more specifically those employees on the the L&N, with the job functions of yardmasters on the B&O in the Greater Cincinnati, Ohio, terminal area.

An Implementing Agreement covering the above subject matter was entered into between the Carrier and the Organization on January 31, 1984.

Pursuant to Section 12 of the January 31, 1984 Implementing Agreement, the Carrier served notice to the Organization by letter dated May 21, 1984, that the coordination of the separate yardmaster job functions would take place on June 18, 1984.

By letter dated September 21, 1984, the Carrier, in pursuance of Section 5(a) of the New York Dock conditions, provided the Organization with a listing of its compilation of the average monthly compensation and average monthly time paid for in the "test period" of yardmaster employees affected by the coordination.

Upon receipt of the test period averages, the Organization, by letter dated October 18, 1984, advised the Carrier that it took exception to the manner in which the Carrier had calculated the test period averages of certain affected employees, namely, Yardmasters C. S. Bruce, J. L. Weiss, B. W. White, P. M. Gray, J. C. Baker, and E. Mallory.

The dispute here at issue thus concerns the unresolved dispute between the parties as to manner in which test period averages should properly be calculated in pursuance of Section 5(a) of the New York Dock conditions.

The provisions of Section 5(a) of the New York Dock conditions the subject of this dispute read, in pertinent part, as follows:

> "Each displaced employee's displacement allowance shall be determined by dividing by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed service immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases."

POSITION OF THE ORGANIZATION:

The Organization says that test period averages compiled by the Carrier for certain affected employees are "well below the total compensation" which these yardmasters were paid during the test period. In this regard, the Organization states that by having restricted test period compensation to what it refers to as "on duty compensation" or "service performed compensation," the Carrier violates the meaning and intent of Section 5(a) of the New York Dock conditions by denying affected employees benefit of "total compensation received" during the test period.

As concerns the manner in which it believes test period averages should be calculated pursuant to the New York Dock conditions, the Organization states: "The unambiguous language of Section 5(a), supra, guarantees total compensation will be used in computing an average monthly compensation [and] total compensation means every cent of compensation received from the Carrier by whatever manner in the twelve months prior to the coordination, i.e., service performed at straight time and overtime, holiday pay, vacation pay, [and] claim payment."

In support of its position that test period averages have heretofore been recognized as including all elements of total compensation received by the affected employee, the Organization directs attention to test period averages calculated in pursuance of what is commonly known on the property as the Master Coordination Agreement of July 1, 1978. This is an agreement which had been entered into by the Organization with the B&O, C&O, The Western Maryland Railway Company, The Baltimore and Ohio Chicago Terminal Railroad, and The Staten Island Railroad Corporation.

The Organization submits that in handling a dispute involving the Master Coordination Agreement, the Carrier recognized all elements of compensation as being properly included in the calculation of test period averages. In this connection, it points to the following excerpt from a Carrier letter dated September 12, 1983:

> "As you know, in determining a yardmaster's guarantee under the Master Agreement, the Carrier includes all compensation received during the test period, including claim payments." (Emphasis by Organization)

The Organization also directs attention to the Master Implementing Agreement having provided for expansion of protective benefits not envisioned by Section 5(a) of the New York Dock conditions, such as, but not limited to, eligibility for a displacement allowance not being affected by failure of a displaced

yardmaster to exercise seniority to a lower job classification when yardmaster work is not available.

In this latter regard, the Organization argues that the Carrier should not be permitted to now penalize employees because in some instances, in exercise of contractual rights under the Master Implementing Agreement, protected employees came to be entitled to payment of protective allowances when the elected, for example, not to work a lower job classification when yardmaster work was not available to them.

The foregoing position notwithstanding, the Organization states that it is absurd for the Carrier to maintain that payments made pursuant to Schedule Agreement rules, such as, vacation, holiday, runaround claims, would not be included in computing test period averages under the New York Dock conditions. It argues that payments made in application of such rules have long been held to be elements of recognized compensation to employees.

In response to a Carrier defense that a past board of arbitration had held that computation of a second protective allowance may exclude guarantee payments made under an earlier coordination, the Organization says that board erred in its decision, and, in any event, that the decision has no application to the instant dispute since, unlike the situation in the cited dispute, the test period averages here in question may not be properly considered as recomputation of a previous guarantee, but rather computation of a new test period averages under a new coordination agreement.

As concerns establishment of test period averages under the Section 5(a) of the New York Dock conditions, supra, as compared with the Master Coordination Agreement, the Board will here note that Section 1(c) of Article II of the Master Coordination Agreement reads as follows:

> "Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employe during the last twelve (12) months in which he performed compensated service more than fifty (50) per centum of each of such months based upon his normal work schedule, immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the 'test period') and by dividing separately the total compensation and the total time paid for by twelve (12), thereby producing the average monthly compensation (adjusted to include subsequent general wage increases) and average monthly time paid for which

> shall be the minimum amounts used to guarantee the displaced employe. If his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation (adjusted to include subsequent general wage increases), he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period."

POSITION OF THE CARRIER:

The Carrier maintains that since yardmaster employees affected by the instant transaction were already receiving protective payments as the result of a prior coordination between the B&O and C&O at the Queensgate Terminal, effective February 1, 1980, that calculation of current test period averages properly excluded "guarantee payments" made pursuant to the Master Coordination Agreement applicable to the prior transaction.

The Carrier contends that use of past guarantee payments as an element of computation for test period averages for a second coordination would result in an improper extension of the protective period of the first coordination and the wrongful pyramiding of benefits.

The Carrier says that exclusion of the guarantee payments in calculating the new or current test period average results in no unfairness to an affected employee. In this respect, the Carrier says the protected employee remains free to choose the higher of the two separate test period averages as the protective benefit allowance.

The Carrier argues that support for this latter position is to be found in Article I, Section 3 of the New York Dock conditions. This section reads as follows:

> "3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security

> or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement."

In reply to the Organization's argument that monetary allowances for claims payments had been included as an element of total compensation in application of the Master Coordination Agreement, and more especially in response to the Organization's reference to Carrier comments made in connection with settlement of a past dispute, the Carrier directs attention to its response to the Organization as set forth in a letter dated April 22, 1985. It directs particular attention to the following excerpt from this letter:

> "Initially, J. L. Weiss who was involved in the matter covered by our file 2-YG-414 did not possess a guarantee pursuant to the New York Dock Conditions but under the June 22, 1978 Master Coordination Agreement. Therefore, any reference to such dispute has no bearing on the instant dispute. Secondly, the claim involving Mr. Weiss was for attending an investigation and had Carrier allowed the time lost by Mr. Weiss it would have been deducted from his monthly guarantee payment. Under the Master Coordination Agreement Carrier has included the payment of claims where the claimant lost time as a result of attending investigation, runaround, etc. as compensation. However, claim payments are not included in the test period averages under the New York Dock Conditions. Nevertheless, Carrier fails to see what connection the inclusion of claim payments under a different agreement have to do with your request that guarantee payments allowed under a previous agreement be included in the calculation of a new guarantee

covering a totally different transaction."

The Carrier, not unlike the Organization, makes reference to awards of various boards of arbitration as support for certain of its arguments. In particular, the Carrier cites the following excerpt from Docket No. 132 of Special Board of Adjustment No. 605 (Referee Bernstein) as having been dispositive of what it says was a dispute identical to that dispute which is here before this Board:

> "But the second Carrier Members' argument, that the Organization view would result in a guarantee preserving compensation levels pre-dating the first coordination for a period longer than the five year maximum provided in Section 6(a), is persuasive. The result argued for by the Organization would be justified only if it could be concluded that in the absence of the coordination an employee normally could expect to continue his pre-first coordination earnings even beyond the first five year guarantee period. But such an assumption is wholly unwarranted. The five year guarantee (along with other procedural and benefit provisions) is the quid-pro-quo exchanged by the Carriers for a relaxation of the ban upon shifting work from under rules agreements; it is meant to approximate appropriate compensation for the adverse effects of coordinations. But it also may be true on occasion that in the absence of coordination carrier losses would lead to job losses. Hence it seems appropriate to limit the guarantee payments to their compensatory role for the initial period of five years following the first coordination. Any recomputation due to the adverse effect of a second coordination should be based upon compensation for services actually rendered; on occasion, this could lead to a higher guarantee due to such variables as more overtime worked or rates reflecting post-coordination increases.
>
> A lower guarantee resulting from such a recomputation should not cancel eligibility for the amounts due under the original for the full period of that first guarantee. If eligibility derives from more than one coordination no reason appears not to pay benefits under the one which provides the highest guarantee for whatever period that guarantee is in effect. Of course, adverse effect from the second coordination starts a new guarantee period."
> (Emphasis added by the Carrier.)

FINDINGS AND OPINION OF THE BOARD:

Section 5(a) of the New York Dock conditions was patterned by the ICC after Section 6(c) of the Washington Job Protection Agreement of May 1936 (WJPA), or that industry-wide agreement established through joint negotiation between most of the nation's rail carriers and the rail unions to protect certain defined employees for specified periods of time from the adverse affects of a coordination by placing them in generally the same position that would have obtained for them had a covered or authorized coordination not taken place.

The protection stipulated is the minimum amounts to be used to guarantee displaced employees from the adverse affects of a coordination. The carriers and representatives of covered employees remain free to enhance protective benefits for various and sundry reasons by means of implementing agreements, such as those agreements represented or referenced in this dispute by the Master Coordination Agreement of July 1, 1978 and the Implementing Agreement of January 31, 1984.

The Carrier and the Organization negotiated a number of protective benefit modifications into the Master Coordination Agreement of July 1, 1978. They did not do the same with respect to the the Implementing Agreement of January 31, 1984.

It was apparently decided by the parties to have the Implementing Agreement be of rather limited scope, for it essentially incorporates the labor protective conditions as set forth in the New York Dock conditions as being applicable to the transaction. In this regard, as basically contained in Article I, Section 3, of the New York Dock conditions, supra, the Implementing Agreement states: "Each employee entitled to the protective benefits and conditions referred to in paragraph (a) above [the New York Dock conditions] and who is also otherwise eligible for protective benefits and conditions under other protective agreements or arrangements shall be notified by the Carrier of his monetary protective entitlement under this [Implementing] Agreement [and] such employee(s) will elect between the protective benefits and conditions of this [Implementing] Agreement and the protective benefits and conditions under such other arrangement."

The Implementing Agreement further states: (1) "Should any employee fail to make an election of benefits during the period set forth in this paragraph (b), such employee shall be considered as electing the protective benefits and conditions of this [Implementing] Agreement." (2) "After expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to

protection under the other arrangement for the remainder, if any, of the protective period under that arrangement."

In the Board's opinion, we think it is to be properly concluded from the above provisions which the parties negotiated into the Implementing Agreement relative to application of protective benefits that it was intended to give particular recognition to the fact that there could be a monetary difference as between protective benefit allowances calculated under the Master Implementing Agreement as opposed to those calculations which were to determine a protective allowance under the current Implementing Agreement.

Turning then to the question of whether guarantee payments under one transaction or coordination are to be included or applied in calculation of a second or more current protective allowance to which an employee may be entitled, we believe that the decision of SBA No. 605 in interpretation of the WJPA is deserving of particular consideration, as urged by the Carrier.

The referenced dispute before SBA No. 605 concerned an employee adversely affected by two separate elements in the coordination of operations, services and facilities that were subject to but the one protective agreement, namely the WJPA. It involved abolition of a former position and subsequent establishment of a new one in the relocation of a passenger station. The situation did not, as here, involve two separate and distinct protective arrangements and transactions, but in addressing the question at issue the decision did, as the Carrier urges, go the matter of whether guarantee payments under a first displacement or protective arrangement are to be applied or included in calculation of a second or more current protective allowance. Here, it is noteworthy that in addressing such issue, SBA No. 605 stated:

> "As to Mr. Littell's request for a recomputation of test period, the Carrier agreed that where, as here, the Claimant has been adversely affected in one merger and is subsequently caught up in another, the test period average should be recomputed when he is adversely affected by the second coordination. However, Carrier Members of the Committee indicated at the last round of argument that they did not endorse this view. The Organizations insisted that such notification came too late. In turn Carrier Members indicated that if the Organizations pressed the point, they in turn would insist upon a decision as to how such a recomputation should be made; the Organization did not object to a resolution of the

latter difference. Argument on the issue was had and, having been posed, it seems best to resolve it.

In dispute is whether the recomputed test period earnings should include amounts paid under Section 6(c) by virtue of the guarantee for the first coordination. The Organizations contend such amounts should be included, the Carriers contend that they should not. Under Section 6(c) the amount payable to an employee continued in service is the difference in any month between his compensation for time actually worked and the guarantee (derived by averaging the total compensation received in the 'twelve months in which [the employee] performed service immediately preceding displacement'). Carriers contend that the guarantee should not include amounts paid by virtue of the guarantee for the first coordination because such payments, they argue, are not 'compensation.' The Organizations declare that they are and point out that Section 6(c) payments are treated as compensation for purposes of Railroad Retirement and Unemployment Compensation. On this aspect of the argument the Employees seem to have the better of it for this reason and further because if such payments were not treated as 'compensation,' employees adversely affected by two coordinations might be entitled to two guarantee payments which partly duplicate each other (otherwise in computing the amounts due for the second no credit would be given the carrier for guarantee payments in computing what compensation had been received). The language of the Section alone does not clearly point to a conclusion because there is no verbal clue as to whether 'compensation' does or does not include guarantee payments paid for the first displacement; the formula can be applied either way."

As indicated above, the parties did not mutually agree to expand upon the benefits protection imposed by the ICC in the New York Dock conditions with respect to the current coordination. The parties did, however, mutually agree that employees entitled to protective benefits in application of the more current Implementing Agreement and "other protective agreements or arrangements," would have a right to elect between the protective benefits and conditions of the Implementing Agreement and the protective benefits and conditions under such other arrangement. Clearly, the Master Implementing Agreement falls within the category of such other arrangement.

It would appear, therefore, that by reason of their Implementing

Agreement the parties were in agreement to what Referee Bernstein had held in his decision in Docket No. 132 of SBA No. 605, i.e.:

> "The result argued for by the Organization [for inclusion of amounts paid by virtue of the guarantee for the first coordination] would be justified only if it could be concluded that in the absence of the coordination an employee normally could expect to continue his pre-first coordination earnings even beyond the first five year guaranteed period."

In the circumstances of record, this Board finds no reason not to follow the well-reasoned conclusion of Referee Bernstein in Docket No. 132 of SBA No. 605 in holding that the protective guarantee is a quid pro quo for the relaxation of the ban upon shifting work from under rules agreements and that any recomputation due to the adverse effect of a second coordination should be based upon compensation for services actually rendered. However, the Board likewise believes that in application of the rationale offered by Referee Bernstein, that it must be taken into consideration in the instant case that except for the Master Implementing Agreement having permitted protected employees not to have eligibility for a protective allowance affected by failure to exercise seniority to a lower job classification when yardmaster work is not available, that such employees would normally have worked such positions absent the coordination. Thus, as Referee Bernstein also indicated, we think that as concerns this element of a protective allowance, that it could be expected that protected employees in the instant case would normally have been expected to have continued the normal exercise of seniority to earn such compensation by working the lower jobs classifications when no yardmaster work was available. Thus, we believe that any protective allowances provided employees in this respect should be treated as service performed during the test period. In this same connection, and to clarify the record, the Board would note that while it finds reason to here hold that certain other protective allowances granted in application of other protective agreements or arrangements not be considered as payment for services actually rendered, this Board does believe it proper in computing or recomputing an average monthly compensation allowance that payments for services performed at straight time and overtime, holiday pay, vacation pay, and other payments made in pursuance of the Schedule of Work Rules Agreement are to be properly used in the computation of test period earnings.

Accordingly, subject to the above conditions for determination of services performed in this particular instance, the Board will hold that the method of computation to be used in figuring displacement allowances for employees involved in this dispute shall

be determined as set forth by the Organization in Item 2 of its Question at Issue, namely, by dividing separately by 12 the total compensation received by the employee for service performed during the test period. Or, in response to the Question at Issue as framed by the Carrier, the guarantee payments resulting from a previous transaction should not be included as an element in the total compensation in the computation of test period earnings related to the ICC imposition of the New York Dock conditions as further mentioned in the Implementing Agreement of January 31, 1984.

In application of this Award, it will also be the Board's decision that the time limitations set forth in Section 2(a) of the Implementing Agreement of January 31, 1984 shall be considered to not have meantime tolled, and that adversely affected employees will have the right within 30 days of being currently advised of their monetary protective entitlement under the Implementing Agreement to elect between the protective benefits and conditions under the Implementing Agreement and the protective benefits and conditions under other protective agreements or arrangements to which they are eligible, including the Master Implementing Agreement.

AWARD:

The Question at Issue is disposed of as set forth in the above Findings and Opinion of the Board.

Robert E. Peterson, Chairman
and Neutral Member

W. C. Comiskey
Carrier Member
Dissenting

R. C. Arthur
Organization Member

Baltimore, MD
July 22, 1986