AWARD NO. 1
CASE NO. 1
ISSUES "A" - "E"

ARBITRATION BOARD
NEW YORK DOCK LABOR PROTECTIVE CONDITIONS
(IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET 29430)

UNITED TRANSPORTATION UNION)
)
vs.) FINDINGS & AWARD
)
NORFOLK & WESTERN RAILWAY COMPANY)

QUESTION AT ISSUE:

"Do the individuals as catalogued under the separate Issues, 'A' thru 'E' which are listed herein, meet the criteria of either a 'displaced' or 'dismissed' employee as set forth in the New York Dock II Conditions?

ISSUE 'A'

All the individuals set forth below had a seniority rank of 351 or higher and were 'furloughed' on the date of the consolidation (June 1, 1982):

Rank	Name	Rank	Name
351	T. B. Barnes	381	J. B. Jones
355	G. M. Watters	383	D. E. Hill, Jr.
356	J. M. Balok	385	M. I. Lowell
367	J. H. VanLandingham	386	S. A. Brinkley, Jr.
368	J. L. Machen	388	R. D. Croft
371	E. B. Joyner	390	V. L. Elliott
372	Y. D. Hale	392	D. R. Yates
374	J. C. Booher	394	D. Ore, III
375	J. L. Webster	397	D. V. Bayse, Sr.
378	J. E. Polansky	399	W. D. Ramsey
		548	S. O. Loftin

ISSUE 'B'

Employees who were regularly assigned to the yard extra board on the date of the consolidation and were subsequently 'furloughed' on June 5 or 7, 1982. These individuals are:

Rank	Name	Rank	Name
341	A. E. Edwards	350	L. O. Myers, III
342	M. E. McCoy	360	G. W. Thorne
		363	L. Harris

ISSUE 'C'

Employees who were either on regular assignments or on the yard brakemen's extra board on the date of the consolidation (June 1, 1982) and subsequently displaced due to the one day annulments under wage schedule rules. These employees are:

Rank	Name	Rank	Name
48	J. J. McKinney	302	C. E. Gipson
95	R. A. Odom	308	J. D. Castello, Jr.
221A	M. B. Land	312	R. L. Henderson
269	Z. Artis, Jr.	329	C. W. Askew
299	C. Gist		

ISSUE 'D'

The individuals herein allege that when the carrier placed 14 former Southern employees, who were 'furloughed' at the time of the consolidation and on the bottom of the consolidated seniority roster, that they were adversely affected. They are:

Rank	Name	Rank	Name
200	E. L. Futrell	293	C. G. Yurko
240	R. Webb	299	C. Gist
264	W. E. Myers	303	K. R. Minsterman
268	T. B. Brooks	305	D. K. Lee
272	J. R. Roberson	308	J. D. Castello, Jr.
275	L. W. Burns	310	F. E. Pettus, Jr.
276	B. L. Riddick	311	G. W. Johnson
279	L. W. Sewell, Jr.	314	K. L. Simmons
281	J. C. Taylor	317	B. J. Whitley
282	J. E. Lassiter	326	D. L. Cyrus
283	W. E. Askew	329	C. W. Askew
287	A. W. Patrick	333	G. E. Revell
289	W. E. Troester	341	A. E. Edwards
290	L. G. Peoples	342	M. E. McCoy
291	J. Futrell	348	R. E. Felton
292	J. Orsini	359	J. R. Kasney

ISSUE 'E'

This case involves 23 employees that were either assigned to regular positions or on the yard extra board on the date of the 'transaction,' and were subsequently displaced and/or furloughed due to the fluctuations in the volume of traffic at Norfolk Terminal, which result-

ed in the abolishment of regularly assigned positions or the regulation of the yard extra board. These individuals are:

Rank	Name	Rank	Name
272	J. R. Roberson	314	K. L. Simmons
274	L. W. Burns	315	M. H. McCotter
282	J. E. Lassiter	316	J. C. Swope
283	W. E. Askew	317	B. J. Whitley
299	C. Gist	320	C. M. Kirkland
303	K. R. Minsterman	326	D. L. Cyrus
304	V. A. Roberts	332	D. A. Felts, Jr.
305	D. K. Lee	333	G. E. Revell
306	V. O. Owes	339	C. R. Wamsley
308	J. D. Castello, Jr.	348	R. E. Felton, Jr.
311	G. W. Johnson	359	J. R. Kasney
		363	L. Harris"

JOINT STATEMENT OF FACTS:

The instant claims were filed pursuant to Article 1, Section 11, of the New York Dock II protective conditions (Finance Docket No. 28250, 354 ICC, 399, modified at 360 ICC 60 (February 9, 1979); New York Dock Railway, et al v. United States of America and ICC, 609 F2d. 83 (Second Circuit, 1979)) which were imposed by the Interstate Commerce Commission (ICC), in connection with its decision to approve the coordination of operations, facilities and personnel of the Norfolk and Western Railway Company (NW) and the Southern Railway Company (SR) in Finance Docket 29430 (Sub-No. 1) (ICC in Finance Docket No. 29430 (Sub-No. 1), service date of March 25, 1982).

In anticipation of the ICC approving said coordination, Implementing Agreements were entered into between the Carriers and the Employees represented by the United Transportation Union (UTU) covering consolidations at certain "common points" (Cincinnati, Ohio; Norfolk, Lynchburg, Danville, and Bristol, Virginia; Durham and Winston-Salem, North Carolina), but unless there was to be an integration of personnel (rosters), no implementing agreements were negotiated.

The parties also entered into an agreement (Memorandum of Agreement dated May 5, 1982) to establish a procedure to facilitate timely handling of claims filed pursuant to FD 29430 (Sub-No. 1). Said agreement contains forms to be used by employees who believe themselves to be entitled to the benefits and provides for the handling of appeals culminating in arbitration prescribed by Article 1, Section 11, of the New York Dock II Conditions. All

claims involved in the instant proceedings have been handled on the property in compliance with the agreement and are properly before this Board for adjudication.

The New York Dock II Conditions contain the following definitions:

> "Transaction" means any action taken pursuant to authorization of this Commission on which these provisions have been imposed.
>
> "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.
>
> "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolishment of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.
>
> "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."

POSITION OF THE EMPLOYEES (UTU):

It is the position of the Employees that these claimants are entitled to the benefits enunciated in New York Dock II Conditions because each of them were "placed in a worse position with respect to compensation and/or rules governing working conditions" as they each became either "displaced" or "dismissed" employees, as those terms are defined in New York Dock II, when the seniority rosters were combined. This resulted in a lower standing on the rosters by all except the first 19 NW employees.

New York Dock II defines a "transaction" as any action taken pursuant to authorization of the ICC on which these (NYD II) employee protection conditions have been imposed. It certainly cannot be said that the employees of the Southern Railway could have been added to the Norfolk and Western Railway rosters and the work force thereby consolidated without the express authorization of the ICC. The combining of the rosters was, therefore, a "transaction" within the meaning as defined in NYD II.

These claimants have made a prima facie case that they each have been placed in a worse position with respect to compensation when earnings dropped below the average in any period equal to less than the "average monthly time paid for." Because of the many variable (new schedule rules, possible differences in size of the work force, probably differences in volume of work, and a host of other factors) the drop in average compensation is inferentially caused by the consolidation. The amount of each claimant's compensation is the test of whether or not he has been placed in a worse position and the eligibility of an employee for an allowance depends upon whether any of the difference in compensation is a result of the "transaction."

While we recognize that in order to be recognized as either a "displaced" or a "dismissed" employee, a claimant must establish that his "worse position" is "as a result of a transaction," we maintain that the whole of the consolidation of the NW and the SR as requested in their application was a "transaction," but that is not to say that no other action taken pursuant to the ICC authorization (such as job abolishments or the combining of seniority rosters as was done here) is not also to be considered "transactions." If this were not so, then certainly the definition of the term "transaction" would have been worded differently in the NYD II Conditions. As it stands, the Implementing Agreements between the parties to this dispute were made "pursuant" to the ICC authorization and the application of the terms of those agreements trigger many "transactions," or actions that could not have taken place without ICC authority contained in its Service Order in FD 29430 (Sub No. 1).

It has been the position of the Carrier in the handling of these claims on the property, that the accepted touchstone for determining whether an employee qualifies for either a displacement or a dismissal allowance is the loss of a job or the loss of earnings due to being involved in a chain of displacements that resulted from a "transaction." In deciding questions of this nature, other Boards of Arbitration have considered, among other things, (1) the loss of a pretransaction assignment, (2) the claimant being involved in a chain of displacements, or (3) his post-transaction assignment being so changed that the employee suffers a money loss -- all of which must flow from a transaction and result in the claimant's loss of earnings. Claimant is entitled to the average monthly compensation of his test period "so long after (his) displacement as he is able, 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. . ." Each of the claimants in the instant case was placed in a worse position when he was repositioned to a lower relative ranking on the seniority roster which was placed into effect by the Implementing Agreement (NS-02-OPS-Norfolk Terminal). Each claimant's loss of earnings can readily be seen by a glance at the Earnings Record attached to this submission in the "Issue" section under which his claim is categorized.

It is expected that the Carrier will quote from several awards involving what may be deducted from an employee's guarantee. The Employees would object to this and request the Board not to consider that position as having any relevance to the Issue at Question because that issue is not now before this Board. It is, rather, to be determined here whether or not the involved claimants are "displaced" or "dismissed" employees and, therefore, entitled to the employee protective benefits of the New York Dock II Conditions.

In conclusion, the Employees are confident that we have sufficiently shown that the claimants in the instant case are each "displaced" or "dismissed" employees in that they each have been placed in a worse position with respect to their compensation and/or rules governing their working conditions as a direct result of a "transaction" (i.e., the integration of the seniority rosters of the two carriers and the resulting combining of the work forces at Norfolk Terminal, Portlock and Lambert's Point Yards.) To say it another way, each of these claimants has suffered a loss in his earnings and has amply established that said loss is at least in part attributal to the consolidation of the operations and personnel of the NW and the SR at Norfolk as explicitly approved by the ICC in Finance Docket No. 29430 (Sub No. 1).

It is our further position that the Question at Issue should be answered in the affirmative in the case of each and every individual claimant listed in this submission. We, therefore, respectfully request that this Honorable Board answer the Question at Issue in the affirmative.

POSITION OF THE CARRIER:

It is the position of the Carrier that the request to be recognized as protected employees under the provisions of the New York Dock II Conditions due to the NW-SR Consolidation, by the individuals named in ISSUES "A" thru "E," is completely without merit and should be denied, for the reasons set forth below. The Carrier will address each issue separately.

ISSUE "A"

The employees listed in Issue "A" were in furlough status as yardmen at the time of the consolidation. They were subsequently recalled to service on June 7, 1982, and again furloughed on July 12, 1982 due to the normal operations on the Norfolk Terminal, and the day to day fluctuation of traffic to be handled at that location. The Carrier asserts that in order to be recognized as either a "displaced" or a "dismissed" employee, one must be able to establish a direct causal relationship between the transaction, which New York Dock Conditions define, as "*** any action taken pursuant to authorization of this Commission ***," and the alleged adverse effect. However, in the instant complaint, neither the Organization, nor the individuals making the claim, have yet to provide a factual basis establishing a causal relationship between their furlough subsequent to June 1, 1982 and a specific event flowing from the transaction. Rather, they have been content to rely upon the mere allegation that their furlough was somehow precipitated by the NW and SR consolidation. As stated previously, the claimants herein were already in a furloughed status on the date of the "transaction," and did not meet the criteria of a "displaced" nor a "dismissed" employee.

In support of this statement, the Board's attention is directed to the following excerpts extracted from awards which have dealt with this identical issue:

Issue No. 4 of Amtrak Board of Arbitration No. 15:
(Referee Moore)

"*** In order for an employee to receive the dismissal allowance outlined in Article I, Section 6, he must fall within the definition of 'dismissed employee'set forth in Article I, Section I(c).

The protective conditions do not require the Carrier to speculate on which furloughed employee might have been working at some future date had the Carrier not joined Amtrak." (Underscoring added)

Award No. 4 of Special Board of Adjustment No. 922:
(Referee David H. Brown)

"QUESTION AT ISSUE: Is R. P. Robertson entitled to the benefits of the protective conditions set forth in the New York Dock II Conditions in view of the NW and IT decision to consolidate their respective facilities, operations and services at St. Louis, Missouri and Decatur, Illinois on May 8, 1982.

STATEMENT OF FACTS: Mr. R. P. Robertson is a former Illinois Terminal train service employee with seniority date of February 15, 1980, and was in furloughed status on May 8, 1982, when the N&W-IT Consolidation took place.

ANALYSIS AND FINDINGS: Amtrak Board of Arbitration No. 15 (Preston J. Moore, Referee) in its Issue No. 4 resolved an analogous case. In answering the issue in the negative, the Amtrak Board observed:

> '*** In order for an employee to receive the dismissal allowance outlined in Article I, Section 6, he must fall within the definition of, "dismissed employee" set forth in Article I, Section I(c). The protective conditions do not require the Carrier to speculate on which furloughed employees might have been working at some future date had the carrier not joined Amtrak.'

We affirm the reasoning and the decision of such Board.

AWARD: The issue is answered in the negative." (Underscoring added)

In summary, the Carrier would point out the following basic facts:

> 1. The claimants herein were "furloughed" as yardmen at the time of the "transaction" (June 1, 1982), and, therefore, could not, under the definitions as set forth in the New York Dock II Conditions, be either "displaced" or "dismissed" employees.
>
> 2. Claimants Barnes, Watters and Balok even though recalled on 5-27-82 elected to wait until after June 5, to mark-up, and therefore could not hold a place on the Extra Board, they did however, continue working in the

Maintenance of Way Department until recalled on June 7, 1982.

3. Previous Arbitration Boards have held that "furloughed" employees are not entitled to protection due to the fact that they could not show a causal connection resulting in their being "furloughed."

We, therefore, respectfully request that the "QUESTION AT ISSUE" -- ISSUE "A", be answered in the Negative.

ISSUES "B", "D" AND "E"

A number of the claimants involved in Issues "B", "D" and "E" have filed various claims alleging to have been adversely affected due to one or more of the following:

(1) During the period June 5 and/or 7, 1982 there were approximately six (6) former Southern employees working from the consolidated roster while claimants were furloughed. These employees were identified by claimants as:

Name	Seniority Rank	Seniority Date
S. E. Hudson	19	10-20-55
M. L. Myers	72	01-10-67
C. W. Smith	97	06-07-67
J. M. Smith, Jr.	201	01-07-72
D. D. Hill	227	01-10-72
A. L. Stokes	251	10-20-72

(2) That due to the Carrier (NW) recalling fourteen (14) additional yardmen, who were all furloughed at the time of the "transaction," the employees on the yard extra board alleged that they lost earnings for the period June 21 thru July 12, 1982. The employees added to the yard extra board on June 21, 1982 were:

Name	Seniority Rank	Seniority Date
G. W. Hunter	423	10-25-72
H. W. Cleaver	511	10-03-74
A. E. Gatling	520	02-10-75
P. Newby, Jr.	522	09-15-75
F. A. Foreman	526	06-19-75
C. D. Fulford	528	06-23-76
J. T. Banks	537	10-09-78
W. W. Wilson	540	04-09-79
W. O. Roundtree, Jr.	546	05-07-79
H. E. Golden, III	547	05-08-79

S. K. Potter	553	01-01-80
K. W. Burgess, Jr.	555	06-14-80
B. L. Little	557	09-27-80
J. H. Stuart	559	06-12-81

(3) That displacements and/or furloughs which occurred subsequent to the "transaction" caused a loss of earnings, which they allege was as a direct result of the NW-SR Consolidation.

In addressing these three issues generally the Carrier would point out that: First, the allegations made under (1) do not have credence due to the fact that the Consolidated Seniority Roster for Brakemen at Norfolk Terminal was negotiated and agreed to under "ARTICLE III," of the Implementing Agreement for Norfolk Terminal, and that the former Southern employees named therein were "slotted" (placed on the consolidated roster) in accordance with the percentages set forth in Section A of Article III. Second, the regulation of the yard extra boards has always been provided for under the applicable Wage Schedule Agreements, as a method of attempting to maintain a normal level of earnings for employees on such extra boards. In this regard the Board's attention is directed to Article 41, Section 3 of the United Transportation Union-T Wage Schedule Agreement covering yardmen, effective January 1, 1970, which states in part as follows:

> "The yardmen's extra list will be adjusted as follows:
>
> The number of yardmen assigned to the yardmen's extra list will, upon request of the local chairman, be reduced when the monthly wages or yardmen assigned to the list average less than 20 basic days' pay. It is understood that this amount is not to be regarded as maximum pay. For the purpose of adjusting the extra list, the actual earnings of extra brakemen during the previous semi-monthly payroll period ('checking period') will be used. Check will be made on the 5th and 20th of each month. In addition, if the local chairman can show at the end of any work week that the extra list is not averaging the equivalent of five (5) basic days for such week, the extra list will be reduced accordingly."
> (Underscoring added)

Therefore, any employee regularly assigned to the yard brakemen extra board on the date of the consolidation, and who was subsequently furloughed by the regulation of said board, was affected by the operations of the Wage Schedule Rules Agreement and not the "Consolidation."

Claimants' position on issue (2) relative to the fourteen (14) "Southern" employees being placed on the extra board, also, lacks merit in that the former SR employees were recalled to service in accordance with the applicable schedule agreement and as a direct response to the Carrier's need for additional yardmen due to the temporary increase in the coal traffic at that time.

Neither the claimants nor the Organization have shown that the need to recall additional employees did not exist. In fact, under Article 41, Section 3, quoted above, from June 21 thru July 12, 1982, there were four (4) Mondays on which, if the crews were not making five (5) days or forty (40) hours per week, the Local Chairman could have requested the board be reduced. However, at no time during the said period did the Local Chairman make such request. The Carrier affirmly states that the need for additional (employees) did exist and the Carrier acted accordingly.

Issue (3) involves various dates wherein the claimants were effected subsequent to the date of the "transaction" due to the fluctuations in the volume of traffic, and in accordance with the Wage Schedule Rules their positions were abolished or they were in a chain of displacements as a result thereof. The Carrier has stated time and time again that the employees that make claim for protective benefits under the New York Dock II Conditions, have the responsibility to show a causal connection between their loss of earnings and the Norfolk and Western -- Southern Consolidation as opposed to mere allegations, as in the instant claims herein involved.

In support of the Carrier's position the Board's attention is directed to the following awards that have previously dealt with the effects of application of Wage Schedule Rules in the matter of protective benefits and employees rights thereto:

> Special Board of Adjustment No. 770, UTU vs. NW, Paul N. Guthrie, Chairman and Neutral Member:
>
> "*** A review of the applicable agreement reveals that they were designed to protect employees from adverse affects which might flow from the merger transactions involved. They were clearly not designed to protect employees from other possible adverse affects which might flow from other causes or situations ***." (Underscoring added)
>
> Special Board of Adjustment No. 868, Award No. 1, UTU-(E) vs. NW, Arthur T. Van Wart, Chairman and Neutral Member:

"Employee Protection Agreements such as the Washington Job Protection Agreement of 1936 and the January 10, 1962, Merger Protection Agreement, were designed, as their names indicate, to provide protection to employees against adverse effects flowing from the transactions authorized by the various Finance Dockets issued by the Interstate Commerce Commission, and not adverse effects arising from other causes." (Underscoring added)

Special Board of Adjustment pursuant of Section 11 of the New York Dock II Conditions, Case No. 4, UTU vs. NW, Mr. Robert E. Peterson, Chairman and Neutral Member, held in part:

"*** In the Board's opinion, the protective benefits of the New York Dock II Conditions were designed to provide protection to employees against adverse affects flowing from an authorized transaction, not adverse affects flowing from other causes, or, as here, a reduction in compensation as a consequence of contractual payments for a previously earned vacation. As stated in Special Board of Adjustment No. 842, and also held by several other boards of adjustment, contractual unavailability is the same as voluntarily electing to make oneself unavailable. The Question at Issue must be answered in the negative.

AWARD:

Claimant R. W. Collins is not found to be entitled to the benefits of the protective conditions set forth in the New York Dock II Conditions in view of the NW and IT decision to consolidate their respective facilities, operations and services at St. Louis, Missouri and Decatur, Illinois on May 8, 1982." (Underscoring added)

In conclusion, the Carrier reiterates that the claimants involved in ISSUES "B", "D" and "E" are not supported by the provisions of the New York Dock II Conditions for all the reasons previously stated and therefore, respectfully requests that the QUESTION AT ISSUE: ISSUES "B", "D" and "E" be answered in the negative.

ISSUE "C"

Although some of the claimants herein also filed claims under either Issues "D" or "E", the underlying factor in this case is that subsequent to the "transaction" the Carrier annulled various assignments at various times due to day to day fluctuations in the number of cars to be handled.

The annulment of assignments is provided for under the Wage Scheudle Rules Agreement UTU-T, as Article 3, Section 7(a), (b),

(c) and (d) and reads as follows:

"Section 7

(a) In event a regular or regular relief job or assignment is annulled for one day or more the yard service employee or employees holding the job or assignment may exercise their seniority in accordance with the rules.

(b) If assigned yardmen do not elect to exercise their seniority under the above paragraph, they may fill any open vacancy on a day or days their assignments are annulled and their rights to fill such an open vacancy will be on the basis of their seniority in the grade of the vacant position and their qualifications for the position. Exercise of seniority to fill an open vacancy will be permitted only on a vacancy in the same ninety minute starting time period of the annulled assignment. A yardman taking an open vacancy under this paragraph will be paid the rate of pay covering the grade of the open position he fills, and at straight time rates. Service in excess of eight hours for each tour of duty will be paid for under the overtime rules. When yardmen under this paragraph have been placed and there are additional vacancies, schedule rules will apply except when necessary to use yardmen from the emergency list.

When an open vacancy exists for yard conductor, and a regular or emergency yard conductor from an annulled crew elects to take the open vacancy under provisions of this paragraph (b), the senior regular or emergency yard conductor used on the crew will work as conductor of such crew. If a vacancy for yard brakemen is thus created on the crew, the regular or emergency yard conductor from the annulled crew will be permitted to fill the yard brakeman vacancy if his seniority as yard brakeman entitles him to such yard brakeman vacancy.

(c) When an assignment, excepting work trains, is to be annulled, the yardman regularly assigned to such assignment will be given not less than three hours notice ahead of the starting time of the assignment for the purpose of providing opportunity for exercise of seniority under above paragraphs (a) and (b). An employee desiring to exercise seniority under above paragraphs (a) and (b) will do so not less than three hours ahead of starting time of his annulled assignment.

(d) In the event yardmen do not elect to exercise their

seniority as provided for in paragraphs (a) and (b) above they may mark up on the extra list for the day or days their assignments are annulled and take vacancies in their turn either as conductor, brakeman, car retarder operator or switchtender according to their qualifications and be paid the rate covering the grade of service for which they are called. They will take their turn on the extra list in accordance with rules covering the operation of extra lists. A yardman will not mark up on the extra list earlier than 12:01 A.M. of the calendar day the annulment is effective.

A yardman marking up on the extra list may remain thereon for the calendar day or days his assignment is annulled. When known sufficiently in advance when his assignment will be restored, he will not be called for extra service at or after the beginning of the ninety minute starting time period of the shift preceding the starting time of his regular assignment.

When a yardman, under the provisions of this paragraph, stands first out on the extra list and is not qualified for the first vacancy he will remain first out on the list until he stands for a vacancy for which he is qualified.

When a yardman marks up on the extra list under the provisions of this paragraph he will be compensated for service while on the extra list at straight time rates. Service in excess of eight hours for each * * *."
(Underscoring added)

The claimants listed under Issue "C" have based their claims on the fact that a "former Southern" employee, who had already displaced into the consolidated terminal, either had his position annulled for one or more days and elected, under Article 3, Section 7(a), to exercise his seniority; or, a "former Southern" employee was in the chain of displacements and subsequently displaced the claimant, thereby creating a causal connection.

The Carrier's position has consistently been that:

(1) The so-called "Southern" employees involved, were "active employees" and displaced onto position in the Consolidated Terminal on June 1, 1982, the date of the "transaction." Since June 1, 1982 they were no longer "Southern" but Norfolk Southern employees operating under former NW Wage Schedule Rules Agreements with the the United Transportation Union. They therefore

had the same rights under Article 3, Section 7, as any former NW yard service employee. The rule in question had the same provisions prior to the consolidtion and therefore, the same situation could have occurred regardless of the consolidation. The Carrier affirmly states that, the employees that were adversely affected by the initial displacement into the terminal on June 1, 1982, were certified and that subsequent displacements by them under wage schedule rules do not trigger adverse effects.

(2) The displacements complained of were entirely due to the operation of the Rules Agreement and not the "transaction."

(3) The same situation could have occurred regardless of whether the consolidation had taken place or not.

The Carrier would again call the Board's attention to Board Awards previously cited in this submission.

The Carrier, therefore, respectfully requests that the QUESTION AT ISSUE -- ISSUE "C" be answered in the negative.

FINDINGS AND OPINION OF THE BOARD:

The Board has given careful consideration and study to the respective positions of the parties as hereinbefore recorded; the record as presented and developed on the property and presented to this Board through a Joint General Submission; the oral and rebuttal arguments offered at the Board's hearing on the issues; and, the awards of past boards of adjustment as included in both the ex parte submissions and in the Joint General Submission.

In making determinations with respect to each issue, the Board has kept in mind that Section 11(e) of the New York Dock Conditions places the burden of proof upon the parties to a dispute in the following manner:

> "(e) In the event of any dispute as to whether 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."

The Board will also here note with respect to a general argument offered by the Employees, that the Board does not find that the entering into of either an Implementing Agreement or the combining of seniority rosters may be construed as a "transaction" in application of the New York Dock Conditions.

Section 4 of Article 1 of the New York Dock Conditions provides for the negotiation of an implementing agreement. It states, in pertinent part:

> "Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4."

It thus appears evident that while the parties are encouraged by New York Dock Conditions to enter into implementing agreements to especially provide for the selection of forces from all employees involved, that such action is not defined as lessening the necessity of an aggrieved party to show a direct causal nexus between a transaction and an adverse affect upon their employment relationship in meeting the definition of of a "Displaced" or "Dismissed" employee, supra, under the New York Dock Conditions.

As has been held in decisions of past boards of arbitration, the New York Dock Conditions neither contemplate nor extend blanket certification to employees as being adversely affected or entitled to a "displacement" or "dismissal" allowance merely because they are on a roster in either an active or inactive status on the date of a consolidation or transaction. Entitlement to such protective benefit status flows from each transaction as authorized by the ICC, not, as here, from an implementing agreement or the consolidation of rosters.

Issue "A"

Before commenting upon the merits of the dispute at issue, the Board would note the record shows that although Claimants Barnes, Watters and Balok had been recalled to service from furlough as yardmen on May 27, 1982, that each of these individuals had elected at that time to remain in the Maintenance of Way Department. They did not thereafter mark up on the brakemen's extra board until after the June 1, 1982 consolidation of the Norfolk Terminal operations and services, i.e., on June 10, 1982 and July 9, 1982 for Claimants Barnes and Balok, respectively, and on an unspecified date with respect to Claimant Watters.

The record also shows that all employees on the consolidated roster below Claimant VanLandingham (Seniority rank No. 367) were in a "furloughed" status on the date of the consolidation (June 1, 1982), and that such employees had been furloughed on various dates prior to June 1, 1982. In this latter regard it is noted,

for example, that the first named Claimant with respect to Issue "A" (Claimant VanLandingham), with a seniority date of July 22, 1980 on the NW, was furloughed by NW on May 20, 1982. The last named Claimant for Issue "A" (Claimant Loftin - No. 548), with a seniority date of May 17, 1979 on the SR, had been furloughed by SR on October 16, 1981.

A total of 559 active and inactive employees from both the NW and the SR are shown to have been placed on the consolidated roster for Norfolk Terminal, the consolidated seniority roster being attached to the Implementing Agreement of February 9, 1982 as Appendix C-2.

The consolidated seniority roster was established on an equity basis by integrating the respective seniority rosters of yard service employees of the SR Albemarle District into the rosters of the NW Norfolk Terminal Yard Service employees on a percentage basis (Yard Conductors: 93% NW - 7% SR; Yard Brakemen: 95% NW - 5% SR), with employees hired subsequent to the effective date of the agreement in the consolidated Norfolk Terminal to be placed on the bottom of the roster. (Article III-A and Article IV of Norfolk Terminal Implementing Agreement dated February 9, 1982.)

Turning now to the merits of the issue. In studying the composition of the New York Dock Conditions, the Board thinks it significant that the authors of such protective conditions elected to restrict a "Transaction" to be: "Any action taken pursuant to authorizations of the Commission on which these provisions have been imposed." It is significant in that it is not provided within such definition, or in other provisions of the New York Dock Conditions, that the protective provisions were to be imposed with respect to any action taken by a carrier relative to operation of its facilities and services

This finding is further supported in study of those provisions of the New York Dock Conditions which govern entitlement to a "Displacement Allowance." The Conditions stipulate payment of such an allowance to an employee who is placed in a worse position with respect to compensation and rules governing working conditions "as a result of a transaction." No mention is made of an employee being placed in a worse position with respect to circumstances found to be unrelated to a transaction.

In this same respect, the New York Dock Conditions restrict its definition of a "Dismissed" employee to: "[An] employee who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction." Here,

it is significant that no mention is made of an employee deprived of a position as the result of work force determinations made under normal operating circumstances, much less to those employees deprived of positions as a result of having been furloughed prior to a transaction.

It therefore seems evident that the purpose of the New York Dock Conditions was to protect employees against the adverse affects of a transaction, not to insulate all employees against all consequences of an employment relationship.

Thus, it must be concluded that merely because previously furloughed employees came to be placed on a consolidated seniority roster in connection with the consolidation of operations and services did not automatically entitle them to protective allowances pursuant to the New York Dock Conditions. It must be presumed that even had the rosters not been consolidated the Claimants would nonetheless have remained in a furloughed status with respect to work opportunities on their former railroads.

Since the Claimants in Issue "A" are found to have been in a "furloughed" status on the date of the consolidation as a result of past work force determinations by both the NW and SR, and not as a direct result of the consolidation on June 1, 1982, this Board has no alternative but to hold that the Claimants are not found to meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.

ISSUE "B"

Article I, entitled "Schedule Agreement," of the Norfolk Terminal Implementing Agreement of February 9, 1982 states in part:

> "A. NW Schedule Agreements will be effective in Norfolk Consolidated Terminal for all yard service employees."

Included in the aforementioned NW Schedule of Rules Agreement is provision for the regulation of yard extra boards, namely, Section 3 of Article 41, supra. This rule stipulates the yardmen's extra list will be adjusted at various times upon request of the local chairman of the Organization. In this respect, the Board understands the accepted practice with respect to application of the rule to permit the Carrier to make adjustments to the board and the local chairman to request subsequent adjustments off the board. It is evident, therefore, that work opportunities for employees on the yard extra board are governed by the rise and fall of business conditions.

In the case of the five named Claimants in Issue "B", they were furloughed on June 5 or 7, 1982 as the result of the regulation

of the extra list which was purportedly made in pursuance of the provisions of the aforementioned rule which stipulate the board may be adjusted when extra brakemen are found not to have been averaging the equivalent of five basic days for the prior work week.

There is no showing of record that adjustment of the yard extra list in this instance was handled in a manner any different from the normal regulation of the board, or that there was a causal connection between Claimants being cut from the extra board and the consolidation of the Norfolk Terminal.

On the basis of the record, it must be held that the change in Claimants' employment status was attributable to factors related to regulation of the extra list in pursuance of applicable agreement rules, and not as the direct result of the June 1, 1982 consolidation.

In view of the above findings and determinations, the Board must hold that Claimants in Issue "B" are not found to meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.

ISSUE "C"

As the Carrier points up in its ex parte submission to the Board, the underlying factor in this case is that subsequent to the consolidation on June 1, 1982, it annulled various assignments in concert with day to day fluctuations in the number of cars to be handled at the consolidated Norfolk Terminal. It submits the annulment of assignments is provided for under Section 7 of Article 3 of the applicable Schedule Rules Agreement, supra, and is related to unforeseen changes in operational needs of service, and that jobs at the Norfolk Terminal have been regularly annulled in direct proportion to the supply of coal available for loading.

Although we do not find it on claim forms as submitted, there is a suggestion of record that some of the Claimants believed they had been adversely affected because the employee from the consolidated roster who displaced them either as the result of a direct bump or a series of bumps was a former SR employee.

The Board has reviewed the circumstances in each of the claims listed and is satisfied, in the absence of probative evidence to the contrary, that the assignments were annulled on a daily basis as the result of normal fluctuations in business and not the direct result of the consolidation of the Norfolk Terminal. The fact that in some instances a former NW employee may have been displaced by a former SR employee on the basis of the manner in

which seniority was slotted on an equity basis may not be considered as dictating that the annulment or displacement was in some manner directly related to the consolidation.

As has been held by many past boards of arbitration, once employees have exercised seniority to other positions or assignments, and displacements have been completed, other employees who may be affected by subsequent rearrangements of forces or displacements are not entitled to protective benefits upon assertion that such circumstance had an indirect relationship to the transaction. In this respect, see Award 23-11 in application of Appendix C-1 Protective Conditions (Dr. Jacob Seidenberg, Referee) whereby it was stated:

> "[Protection] provisions in the railroad industry have been in effect since 1936 when the Carriers and the major Labor Organizations negotiated the Washington Job Protection Agreement providing for protection for railroad employees effected by railroad coordinations. . . . Consequently, there is a respectable body of case 'law' or decisional authority to help in determining what is a 'displaced employee'. . . .
>
> We find that the prevailing and almost unanimous weight of arbitral authority is that the mere loss or reduction in earnings per se does not render or place an employee in the status of a 'displaced employee.' Neither the Congress of the United States, nor the Secretary of Labor or the contracting parties to protective benefit agreements, intended to affirm absolute and complete financial protection to any railroad employee who might be in some way tangentially adversely effected by a merger, coordination, or as in the instant case, by a statutorily authorized discontinuance of railroad passenger service.
>
> [It] was the loss of a regular job that was to be the basis for affording protection. . . .
>
> [Because] the Claimant had less ready access to temporary passenger assignment after the transaction . . . does not make him an employee displaced from his regular position as a result of the transaction.
>
> [A] reduction in earnings from work performed in an extra capacity other than his regular assignment does not establish the Claimant to be a displaced employee under Appendix C-1."

It must, therefore, be concluded from the facts of record that

the Claimants in Issue "C" do not meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.

ISSUE "D"

Basically, the issue in dispute is drawn from the statements of claim as initially filed by several of the Claimants, such as by the first of the named Claimants, Claimant Futrell, whereby he stated, as is here pertinent, the following:

> "I was affected from June 21, 1982 through July 12, 1982 by the call office of the N&W calling Southern men at the bottom of the roster to report for work on the N&W Extra List.
>
> Southern men listed below:
>
> * * * * * * * * *
>
> The Southern men above called to work the N&W Extra List was not really needed as you can see they worked about three weeks which affected my earnings.
>
> The above Southern men were not part of the five per cent slotted in with the active N&W roster. They were at the bottom of the N&W Roster List, which affected my earnings."

Another Claimant, Claimant Revell, described the claim to be related to the following concerns:

> "I am requesting this claim because of the Southern Railway men that marked up on the Extra Board on the date of June 21, 1982. In which I could have been working the eight on and eight off shift. But because of the Southern men that did mark up, after being called to mark up on the date of June 21, 1982, I George E. Revell feel that I have a claim of claiming for Adversely Affect Benefits under the Attachment "A" of the New York Dock II."

Claimant Johnson described the basis of the claim to be as follows:

> "The Southern trainmen above were not included into the five percent merged with N&W trainmen's seniority roster in accordance with the NW-Sou merger agreement on June

> 1st 1982. The Southern trainmen I wrote about marked up on the N&W trainmen's extra list from June 21, 1982 thru June 25, 1982 and remained on the extra list until July 12, 1982. During this time work that was normally here and available for me was diverted to former Southern trainmen; (See Attachment 'B') that were not part of the five percent equity allocation as provided for [in] the Southern & N&W merger agreement of 6-1-82. The records reflect that from June 21, 82 thru July 12, 1982 (See Attachment 'A') I, Gary W. Johnson, was on the trainmen's extra list and was adversely affected and lost time and money due to these Southern men merging with N&W trainmen June 1, 1982."

Contrary to contentions of the Claimants that the additional employees were not needed or that it was not proper to have called the former Southern employees, the record as presented to the Board shows that Carrier's Chief Clerk had recorded the following statement with respect to the claims:

> "Southern trainmen were recalled to service June 21, 1982, due to a temporary increase in export coal business. Norfolk and Western trainmen hired after the Southern trainmen were also recalled to service. Extra list was affected in the same manner as if 'new hires' had been added to list. Trainmen were recalled in accordance with UTU agreed-to equity slots."

The record also shows that the Carrier had denied the claims in view of, as it stated, the fact that the Claimants were assigned to the yard extra list prior to and after the consolidation and as such were not adversely affected by the NS consolidation.

The record further indicates the Carrier had advised the majority of the Claimants as follows in denying their individual claims:

> "The fact that former Southern men were able to work at various times in June or July of 1982, when you were unable, does not entitle you to be recognized as having been adversely affected. Past boards have repeatedly ruled that fluctuations in the volume of traffic are outside the umbrella of protection afforded by any protective agreement. Besides which, when the parties agreed to integrate the seniority rosters of the two properties on an equity basis, they gave each individual the same relative standing on the roster they had prior to the consolidation. Therefore, the fact that Southern employees appear ahead of NW employees in sequential order or vice versa, is irrelevant, since everyone is in the same position they were prior to the consolidation."

In the Board's opinion, that Claimants may have suffered a loss of earnings subsequent to the consolidation as a result of the regulation of the extra list, or the use of former SR employees off the consolidated roster, may not be held to presume that they were adversely affected by the consolidation. In this respect, we think it clear that the same affect or impact on hours and wages might well have been experienced had employees called for increased work needs not been former SR employees but employees of the former NW, or, in other words, any employee off the consolidated roster.

In regard to the suggestion made by Claimants that the former SR employees who were called for service were not in fact on the consolidated seniority roster. The roster which is attached to the February 9, 1982 Implementing Agreement lists the names of the 14 former employees of SR who have been identified by Claimants. Further, data contained on the roster reflects the fact these former SR employees had attained seniority dates on the former SR which predated the Norfolk Terminal Implementing Agreement or the consolidation of rosters.

If some question remains, as certain of the Claimants appear to suggest, as to whether former SR employees were properly slotted on the consolidated seniority roster, or that certain former SR employees should not have been placed on the roster, then that is not a matter for this Board to here decide.

The Board would note, however, that it appears some individual Claimants may be confused with respect to the manner in which the seniority rosters of the former NW and SR were consolidated. The rosters were integrated on the basis of total man-hours worked during a specified 12-month period by employees in the separate yards of both the NW and SR. The consolidation of the rosters in this manner does not, in the Board's opinion, suggest that there was to be an allocation of assignments per se with respect to future work opportunities in the consolidated Norfolk Terminal. It would therefore seem to the Board that once an employee, regardless of past carrier affiliation, attained a position or rank on the consolidated roster, that such employee was entitled to exercise seniority in accordance with all rights and privileges embodied in the applicable (NW) Schedule of Work Rules Agreement. In other words, once the rosters were consolidated both the NW and the SR employees became as one, and there was no division of work applicable to the number of assignments or work that could thereafter be performed by employees of one or the other of the former railroads in the consolidated Norfolk Terminal.

In regard to the need for additional employees at the times in question, as the Carrier hereinabove set forth in its position,

neither the Claimants nor the Organization have shown that the need to recall additional employees did not exist and, further, at no time during the periods in question had the local chairman made a request to have the board be reduced. In this same connection, the record reveals that in one letter of claim, albeit from an individual not here listed as a claimant, but otherwise listed as a Claimant in Issue "A" (Claimant VanLandingham), but who likewise protested the use of the former SR employees as having affected his work opportunities, stated, among other things: "The increase in coal export was the reason these [former SR] men were called to work . . ."

In the circumstances of record, the Board must conclude that the Claimants in Issue "D" do not meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.

ISSUE "E"

As set forth in the description of this issue, it concerns the fact that on various dates the Claimants, who were either assigned to regular positions or on the yard extra board on the date of the consolidation (June 1, 1982), were subsequently displaced and/or furloughed due to fluctuations in the volume of traffic at Norfolk Terminal and which had resulted in abolishment of regularly assigned positions or the regulation of the yard extra board.

There is no question from review of the record but that Claimants were displaced or furloughed subsequent to the date of consolidation (June 1, 1982) as the result of such things as a general decline in business, the coal miners vacation (which caused the abolishment of 14 assignments on July 2, 1982), and other fluctuations or declines in business as demonstrated by the Carrier in the presentation of various statistical data.

Since it is evident from the record as presented and developed that neither the Claimants nor the Organization have been able to show by clear and convincing probative evidence that the position of the Carrier with respect to Claimants having been affected by a decline in business is not without basis in fact, this Board has no alternative but to hold that the affects of such decline in business be viewed as a circumstance beyond the scope of protection contemplated by the New York Dock Conditions. This is a principal which has been adopted or endorsed by innumerable past decisions of boards of arbitration. It was recently set forth in an Award issued in a dispute between the United Transportation Union and the San Diego & Arizona Eastern Railway (Chairman and Neutral Member Gil Vernon), which likewise involved

application of the New York Dock Conditions. In this Award it was stated:

> "The Carrier contended that several factors, including a decline in business adversely affected the Claimant. Before discussing how these and other factors affected the Claimant, a major argument by the Union must be addressed. They contend that a decline in business defense is not available or valid in arbitrations under the 'New York Dock' conditions. They point out that under other protective provisions such as the Washington Job Protection Agreement and the Amtrak C-1 conditions, the language specifically mentions fluctuations and changes in the volume of employment. They submit that in (sic) the absence of such language in the 'New York Dock' conditions is significant. Being aware of such provisions, if the framers of the language intended to make such a defense available, the organization suggests they would have included them in the instant conditions.
>
> The Neutral does not find the absence of specific references to changes in the volume of employment sufficiently significant to conclude that a reduction in business defense is not available. This is so because the language of the conditions clearly sets forth that, to be considered protected, an employe must be adversely affected as a 'result' of a transaction. Thus, it is clearly implied that factors other than a transaction which may adversely affect an employe do not turn on the protective provisions. Only adverse effect as a 'result' of a transaction qualifies an employe for protective benefits and no benefits flow from adverse impact due to other causes. Certainly the Neutral cannot ignore that the use of the word 'result' requires a causal relationship between the transaction and the adverse impact. Therefore, on the other hand, the Neutral cannot ignore any evidence which suggests that the adverse situation was a result of other causes. One must draw the inference from the language that any causes of adverse impact other than a transaction must be weighed and considered by the Arbitrator.
>
> The fact that the writers of the language failed to enumerate any specific examples of other possible causes, such as a decline in business or fluctuations in employment, does not overcome the implied requirement to show, to the exclusion of other reasons, a causal nexus between the transaction and the employe's adverse employment situation. Contrary to the Union's argument,

> it seems that in view of the unqualified requirement for a causal nexus between a transaction and adverse impact, that if the writers wished to preclude certain defenses, they would have explicitly stated so. It is noted that other Arbitrators have held the reduction in business volume is a legitimate defense under New York Dock conditions. For instance see SBA No. 915 - New York Dock Railway v. Brotherhood of Railway, Airline and Steamship Clerks (Arbitrator Zumas)..."

For the reasons stated above, this Board has to conclude that the Claimants in Issue "E" do not meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.

AWARD:

The Question at Issue is answered in the negative. The individuals as catalogued under the separate Issues "A" thru "E" as listed hereinbefore do not meet the criteria of either a "Displaced" or "Dismissed" employee as set forth in the New York Dock II Conditions.

Robert E. Peterson, Chairman
and Neutral Member

G. C. Edwards
Carrier Member

J. R. Burge
Employee Member

Roanoke, VA
August , 1986