SPECIAL BOARD OF ARBITRATION

Established Pursuant to Article 1 Section II
of the New York Dock II Conditions

CASE NO. 1
AWARD NO. 1

PARTIES TO THE DISPUTE

Transportation-Communications International Union (BRAC)

and

Norfolk Southern Corporation

Hearing Held: September 29, 1988, Room 320, City Centre Building
223 East City Hall Avenue, Norfolk, Virginia

QUESTION AT ISSUE:

Organization's Question

" Are D.G. Kendrick and F.D. Scott, Jr., displaced employees pursuant to New York Dock?"

'Shall Carrier now be required to determine Claimants' (Kendrick and Scott) test period averages as of the date affected and allow their claim for New York Dock benefits?"

Carrier's Question

"Do D.G. Kendrick and F.D. Scott, Jr., meet the definition of a "displaced employee" under the terms of the New York Dock protective conditions? "

CASE NO. 1
AWARD NO. 1

OPINION OF BOARD

By way of background, the Interstate Commerce Commission approved the application of the Norfolk Southern Corporation to obtain control of the separate railroad systems of Norfolk and Western and Southern under Finance Docket No. 29430. The approval order dated March 19, 1982 included the requirement that New York Dock II conditons apply. Pursuant to Article 1, Section 4 of the New York Dock conditions the parties reached a general implementing agreement, dated May 19, 1982, which was applicable to future transactions covered by the New York Dock Conditions.[1] On September 5, 1986, Carrier served notice consistent with Article II, Section 1 of the Implementing Agreement of its intention to coordinate certain clerical work performed in the Norfolk Western Medical Department, Roanoke, Virginia into Norfolk Southern Casualty Claims Department offices at various locations on or about October 20, 1986. This coordination necessitated the abolition of three clerical positions in the Norfolk Western Medical Department, General Office Seniority District No. 01. As a result of this action, Claimants Kendrick and Scott were displaced by senior employees and accordingly, said employees were provided Election Notification Forms dated December 10, 1986 apprising them of the

---

[1]The ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F. 2d 83 (2nd cir. 1979) ("New York Dock Conditions") on the Carrier pursuant to the relevant enabling statute, 49 U.S.C. Sec. 11343, 11347.

protective agreements to which they were entitled. At the time of this coordination, Clerks D.G. Kendrick and F.D. Scott were both assigned to positions on Roanoke Terminal Seniority District No. 45 with a seniority date of August 16, 1974 and July 16, 1974, respectively. Claimants elected for coverage under New York Dock conditions and filed appropriate documentation for benefits. However, by letters dated March 2, 1987, Carrier declined their claims for protective benefits on the grounds that Claimants did not meet the essential threshold criteria defining a displaced or dismissed employee under New York Dock conditions. Carrier's letter of declination dated July 2, 1987 fully sets forth the Employer's interpretative position. It reads, in part,:

"We find that claimants in this instance are ineligible for protective benefits under New York Dock protective conditions inasmuch as they do not meet the necessary criteria in order to be recognized as a displaced or dismissed employee under New York Dock conditions. Under Section 1(b) of New York Dock, a displaced employee is defined as follows:

> "(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."

In these instances claimants obtained or could have obtained in the normal exercise of their seniority rights a position carrying a rate of pay equal to or exceeding the rate of pay of the position from which displaced. Thus, these claimants did not fulfill the threshold burden to be recognized as a displaced employee under the definition of that term in New York Dock."

Simply put, Carrier contended that Claimants were not affected by the coordination of work, since they secured or could have secured an equal or higher paying position in the exercise of their seniority rights.

The Organization, in rebuttal, maintained that Carrier misconstrued the word "position" as contained in Section 1 (b) and Section 5 (a) of New York Dock to mean "assignment" and the term "compensation" to mean "rate of payment." Consequently, Carrier's language construction, according to the Organization is patently inconsistent with several arbitration awards defining the position. In essence, the Organization asserted that the word position was not synonymous with job or assignment but rather clearly connoted status, situation or posture. (See for example, Arbitration Board No. 284, Oklahoma Conditions, Western Maryland v. BRAC, September 9, 1964 and Arbitration Board No. 279 Burlington Conditions, Southern Pacific v. Order of Railroad Telegraphers October 2, 1963.) More pointedly, the Organization observed that a careful analysis of Claimants average earnings during the twelve (12) months preceding their displacement shows that they were placed in a worse position with respect to compensation. For example, for the twelve (12) month period prior to the displacement, Claimant D.G. Kendrick earned $38,427.67 or $3,202.31 average per month as compared to $2,9201.10 for the month of November, 1986, $3,093.65 for the month of December, 1986 and $2,255.61 for the month of January, 1987. In Clerk F.D. Scott's case, the Organization noted that he earned $39,478.98 for the previous twelve (12) months period or $3,289.91 average per month as compared to $2,400.63 for the month of November, 1986, $2,925.13 for the month of December, 1986 and $3,242.90 for the month of January, 1987. The Organization argued that Carrier was confusing rates of pay of positions with compensation earned during the test period, and misapplying the application of Article I, Section II New York Dock, when it (Carrier) concluded that

an employee's worsening condition must be immediately related to the transaction. It cited several arbitral awards under New York Dock Conditions to support its position. (See Union Pacific Railroad Company, Missouri Pacific Railroad Company v. United Transportation Union, (C & T Case No. 3) June 24, 1986 and The Chesapeake & Ohio Railway Company, The Baltimore & Ohio Railroad Company, The Toledo Terminal Railroad Company v. United Transportation Union, May,18, 1987). In sum and substance, the Organization asserted that adversely affected employees are due displacement allowances even if at the time of displacement they displaced to a position producing compensation equal to or exceeding the position from which displaced. In other words, the qualifying litmus test is that the employee has suffered a worsening of compensation when measured against test period average earnings. It contended that a worker may still satisfy the definition of a displaced employee, notwithstanding, the materialization of the adverse effect until well after the implementation of the transaction. As to Carrier's additional contention that Claimant Scott could have displaced to a position which paid a higher rate of pay, the Organization argued that Clerk Scott was effectively a displaced employee and thus Carrier could have offset the earnings he would have earned if he displaced to a position with a higher rate of pay against his test period average. On this point, it referenced Transportation-Communications International Union (BRAC) v. Missouri Pacific Railroad Company, Union Pacific Railroad Company (BRAC) which held in part,

"Should an employee fail to exercise his seniority to an available positio producing compensation greater than the position he elects to retain, Section 5(b) of the New York Conditions allows the Carriers to offset the employee's protective guarantee."

It concluded that Carrier could not eschew its responsibility under the law and minimize its compensatory obligations to employees, since

Congress specifically established a legislative public policy to protect affected employees' interests in the context of railroad mergers during a limited protective period.

Carrier, by contrast, asserted that Claimants did not meet the definition of a "displaced employee" under the New York Dock Conditions, since they were not placed in a worse position with respect to their compensation as a result of the transaction. It pointed out that Clerk Kendrick, in the first instance went from a position carrying a rate of pay of $2245.22 per month to a position carrying a rate of pay of $2257.87 per month. In the second instance, when Clerk Kendrick was again displaced, he went from a position with a rate of pay of $2308.16 per month to an equal paying position. In the latter case, Clerk Kendrick displaced from the position of Westbound Booking-Out Clerk to the position of Relief Clerk No. 3. Clerk Scott was displaced from a position carrying a rate of pay of $2257.87 per month to a position with a rate of pay of $2245.22 per month. In Clerk Scott's case, Carrier observed that he could have obtained readily available positions paying the same or higher rates of pay. It argued that its interpretative position was fully supported by numerous arbitration awards under New York Dock protective conditions and similar protective arrangements, which have consistently denied protection to employees involved in a transaction, who obtained a position carrying a rate of pay equal to or greater than the rate of pay of the positions they occupied prior to the transaction and who sustain no material change, in their objective working conditions. In Award No. 4 United Transportation Union v. Illinois Central Gulf Railroad April 11, 1985, Carrier noted that the Board therein arbitrating under the Oregon Short

Line Conditions held in effect that an employee who was able to obtain a position where his compensation was equal to or greater than his compensation prior to the transaction was not in a worse position with regards to his compensation, and, as such, did not qualify as a "displaced employee". In further support of this position, Carrier referenced Award No. 3 of Special Board of Adjustment involving the United Transportation Union and the Norfolk & Western Railway Company (March 29, 1985), The Board in that case, arbitrating under New York Dock II Conditions, held that the petitioning employee was not adversely affected by the transaction, since he neither lost a regular job, nor was involved in a chain of displacements that resulted in a loss of earnings or compensation. The Board emphasized that an employee must show that he has been placed in a worse position with respect to compensation and rules governing working conditions as a result of a transaction. In addition, see Brotherhood of Maintenance of Way Employees v. Maine Central Railroad Company September 27, 1987 - Mendocino Coast Labor Protection. It was also Carrier's position that the Organization's application of the Section 5 mathematical formula was too rigid and not a proper test for determining if an employee is a "displaced employee" under New York Dock Conditions. It asserted that including overtime in the twelve (12) months test period will inevitably produce average monthly compensation which in some months exceeds the earnings of the employee. It maintained that overtime work which was available to employees on Roanoke Terminal was not related to the instant transaction, since the operational needs of Roanoke Terminal necessitated constant overtime usage. The coordination did not affect

the availability of overtime work on Roanoke Terminal. It pointed out that in the New York Dock Conditions case involving The International Brotherhood of Electrical Workers, System Council No. 6 and the Southern Railway Company, the Board (majority) held that where the reduction of overtime was unrelated to the transaction, the petitioning claimants were not placed in a worse position. (October 8, 1987). It observed, that in the case of Clerk Scott, he occupied four (4) different positions during the twelve (12) month period preceding the transaction and he worked overtime in each position. It argued that since the availability of overtime was contingent upon varying service requirements and the added willingness of the employee to perform overtime work, these variable factors created circumstances that were unrelated to the transaction. In this connection, it noted that in the award of a New York Dock Arbitration Committee United Transportation Union v. Norfolk & Western Railway Company, the Board held in pertinent part, that the New York Dock Conditions did not mention an employee being placed in a worse position with respect to circumstances unrelated to the transaction. The Committee therein also stated:

"It therefore seems evident that the purpose of the New York Dock Conditions was to protect employees against the adverse effects of a transaction, not to insulate all employees against all consequences of an employment relationship." (August 29, 1986)

Carrier also referenced Award No. 1 Special Board of Adjustment No. 927 involving the Brotherhood of Locomotive Engineers and the Norfolk & Western Railway Company. In that Award, the Board held, in part,:

"The fundamental purpose of most, if not all, employee protective arrangements is, or was, to provide protection to employees against adverse effects flowing from the transaction involved and not, as here, from adverse effects arising from other unrelated causes." (January 30, 1984)

In considering this case, the basic question before this Board is whether Claimants were "displaced employees", as that term is defined in Article 1, Section 11(b) of the New York Dock Conditions. Section 1 b states:

" "Displaced employee" means an employee of the railroad who, as a result of transaction is placed in a worse position with respect to his compensation and rules governing his working conditions."

There is no dispute regarding the consummation of a transaction as that term is defined under Section 1(a) of the New York Dock Conditions, but the parties differ as to whether Clerks Kendrick and Scott were placed in a worse position with respect to compensation and rules governing their working conditions. In Award No. 5 of the New York Dock Conditions case involving Transportation-Communications International Union (BRAC) and Missouri Pacific Railroad Company and Union Pacific Railroad Company, March 1, 1988 the Arbitration Committee considering the same essential issue as before us ruled that regular overtime, recurring overtime or casual overtime attached to any assignment was properly included within the test period average earnings. The Committee, in that dispute, also interpretatively concluded that the ICC would not have used the terms "monthly compensation" and "total compensation," if the manifest intention was to restrict the test period average to an amount less than aggregate earnings. It also concluded that excessive overtime performed directly in anticipation of an immiment transaction was a distinguishable exception to the normative overtime inclusions, since this earnings opportunity would not have accrued to the employee if the affected Carrier did not implement a transaction. The Organization relied upon this Award to support its position.

On the other hand, counterpoised to this position, Carrier argued that Claimants were not placed in a worse position with respect to compensation, since the availability of overtime at Roanoke Terminal reflected circumstances unrelated to the transaction and moreover, the coordination of certain work between the Norfolk & Western Medical Department and the Norfolk Southern Casualty Claim Department did not affect the availability of overtime work at Roanoke Terminal. In effect, Carrier maintained that since the New York Conditions did not specifically mention or indicate that circumstances unrelated to a transaction were acceptable as qualifying an employee who has suffered a diminution in earnings for displacement allowance, then Claimants could not logically be considered as definably eligible "displaced employees."

In reviewing these arguments, the Board concurs with the Organization's interpretation that the word "position" as contained in Section 1(b) of the New York Conditions connotes status, situation or posture rather than a specific job or assignment. The pervasive arbitral authority cited by the Organization supports our determination. Further, in a practical sense, the vagaries and uncertainties stemming from a dynamic displacement chain cannot also presuppose stability of employment in a specific job or assignment. We agree with Carrier that an employee affected by a transaction must be placed in a worse position with respect to compensation and rules governing working conditions, but we do not agree that overtime compensation earned in the preceding twelve (12) month test period is precluded from the prescribed computational formula set forth in Article 1 Section 5(a) of The New York Dock Conditions.

Section 5(a) reads:

"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 general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position."

Analysis of the aforesaid computational language within the context of cited decisional authority and the intended application of Article 1 Section 1(b) compels us to conclude that using a dispositive standard herein, rate(s) of pay is too restrictive and inconsistent with the contemplated purposes of The New York Dock Conditions. Prior overtime earnings cannot be excluded from the ascertainment of the twelve (12) month test period, unless said overtime was excessive and performed directly in anticipation of an imminent transaction or palpably unrelated to the transaction. Since overtime was not performed

in anticipation of an imminent transaction, it is permissible to include such overtime earnings in the computation of the twelve (12) month test period average. Article 1, Section 5 speaks of total compensation, average monthly compensation and average monthly time paid which reflect compensatory magnitudes greater than straight-time earnings. Based on this formula, Claimants were able to establish a decrease in earnings for the months of November, 1986, December 1986 and January, 1987, but whether such income diminution was directly attributable to the transaction must now be determined. Carrier has argued that the loss of overtime earnings was unrelated to the transaction, since the coordination of work at Roanoke, Virginia did not affect the availability of overtime at that location. Instead, business fluctuations accounted for the reduced overtime opportunities. As to the facts herein, Claimants displaced to positions carrying equivalent rates of pay. In the case of Clerk Kendrick, he was able to exercise his seniority to obtain the same rate of pay on one position $2257.87 and a slightly higher rate $2308.16 on another position. In the case of Clerk Scott, he displaced from a position paying $2257.87 to $2245.22. In both cases, their monthly earnings for November 1986, December 1986, and January 1987 were less than monthly test period average of $3,202.31 for Clerk Kendrick and $3,289.31 for Clerk Scott. Pursuant to Article 1, Section 5 (a), an employee displaced by a transaction who is unable to secure a position producing <u>compensation</u> not rate of pay, equal to or exceeding the compensation he received in the position from which he is displaced shall be paid a monthly displacement allowance during the protective period. Said allowance shall equal the difference between the monthly compensation in the retained position and the

average monthly compensation of the position from which displaced. Further the allowance is 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 immediately preceeding the transaction. Since this methodology as indicated before includes overtime compensation, the Claimant's prior straight time rate of pay is not the benchmark measurement criterion. As to the correlative question, as to whether the reduction in total monthly compensation for the three (3) months cited was caused by circumstances unrelated to the transaction, the Board cannot conclude that said asserted monthly reductions were unrelated to the transaction. It was the displacement effect of the coordination of work at Roanoke, Virginia, which resulted in the monthly earnings differential herein. Consequently, and in accordance with Article 1 Section 1(b) of the New York Dock Conditions, Claimants were definably displaced employees. Finally, considering the ancillary question as to whether Clerk Scott could have secured an equal or higher paying position in the exercise of his seniority rights, Carrier is correct as to the application of this possibility, but the record is bereft of evidence identifying particular available positions.

AWARD AND ORDER

1. The Answer the First Question at Issue submitted by the Organization is Yes.
2. The Answer to the Second Question at Issue submitted by the Organization is Yes.
3. The Answer to the Question at Issue submitted by the Carrier is Yes.

George S. Roukis, Chairman and
Neutral Member

G.C. Edwards, Carrier Member

J.C. Campbell, Employee Member

Dated: April 19, 1989