In the Matter of the Arbitration Between:	)	
TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION,	)	Pursuant to Article 1, Section 11 of the New York Dock Conditions
Organization,	)	
and	)	
UNION PACIFIC RAILROAD COMPANY,	)	Case No. 1 Award No. 1
Carrier.	)	

Hearing Date: November 2, 1989
Hearing Location: Sacramento, California
Date of Award: June 29, 1990

MEMBERS OF THE COMMITTEE

Employees' Member: F. T. Lynch
Carrier Member: L. A. Lambert
Neutral Member: J. B. LaRocco

QUESTION AT ISSUE

Can the Carrier reduce New York Dock Condition test period averages when an employe is involuntarily reduced to a position covered by Article VII of the 1986 National Agreement?

Carrier File No. 881014
Organization File No. R-15-1334-143

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad Company (UP), the Missouri Pacific Railroad Company (MP) and the Western Pacific Railroad Company (WP). [ICC Finance Docket No. 30000.] To compensate and protect employees affected by the merger, 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 UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

This Committee is duly constituted by a letter agreement dated September 11, 1989. The parties filed pre-hearing submissions with this Committee. Inasmuch as the Carrier filed a rebuttal submission at the hearing, the Committee granted TCU leave to file a post-hearing rebuttal submission which the Neutral Member received on December 4, 1989. At the Neutral Member's request, the parties waived the Section 11(c) time limit for issuing this decision.[1]

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[1] All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will cite only the particular section number in this Opinion.

II. BACKGROUND AND SUMMARY OF THE FACTS

Prior to 1986, Claimant occupied a regular clerical position and was affected by a New York Dock transaction. The Carrier developed Claimant's New York Dock test period average earnings in January, 1986. According to the Carrier, Claimant's average monthly test period earnings and hours amounted to $2,333.75 and 175.7 hours. The Organization asserted that Claimant's test period monthly average earnings were $2,487.24. The Carrier submits that the Organization's figure was Claimant's monthly New York Dock protected rate adjusted for subsequent general wage increases.

Pursuant to an implementing agreement, Claimant bid on and was assigned to a Customer Service Representative position at St. Louis beginning July 16, 1986. Thereafter, Claimant occupied several positions at St. Louis and Omaha. In addition to the wage attached to these positions, the Carrier paid Claimant (starting in January, 1986) a displacement allowance under Section 5 of the New York Dock Conditions. As of December, 1987, the displacement allowance was computed as the difference between $2,487.24 per month and the amount Claimant actually earned.

Due to job abolishments on or about January 1, 1988, Claimant lacked sufficient seniority except to displace to a janitor position. Following Claimant's involuntary displacement to a janitor position, the Carrier paid Claimant a displacement allowance in the amount of the difference between $2,333.75 per month and the corresponding rate of the janitor's job.

The janitor position which Claimant was relegated to filling is considered a service position within the meaning of Article VII, Section 1 of the April 15, 1986 National Agreement. Article VII, Section 3 of the Agreement provides that employees occupying service and intermodal positions will receive lump sum compensation in lieu of general wage increases allotted to clerical employees holding other than intermodal and service positions.

On August 19, 1986, the Organization and the National Carrier's Conference Committee executed a Side Letter supplementing the April 15, 1986 National Agreement. The pertinent portions of the August 19, 1986 Letter of Understanding read:

> Referring to our discussion during negotiations of the BRAC National Agreement of April 15, 1986 concerning numerous protective agreements or protective arrangements which provide that protected rates and protective allowances (such as dismissal, displacement and coordination allowances) be adjusted for "subsequent general wage increases."
>
> Since the general wage increases under Section 2, 4 and 6 of Article I of the BRAC agreement do not apply to all employees, question arose as to how such protected rates and allowances shall be adjusted.
>
> It was understood that all protected rates or protective allowances subject to adjustment by "subsequent general wage increases" will be adjusted by the general wage increases provided under Section 2, 4 and 6 (and COLA's, if any) irrespective of the position currently worked by the protective employee, and will be denominated "new protected rates."

> Both the protected rates which existed prior to application of general wage increases under this agreement (old protected rates) and the new protected rates will be maintained in tandem. In determining benefits to be paid under such protective agreements or arrangements, the old protected rate will be used with respect to employees working on a position identified in Article VII, Section 1 (Service and Intermodal Work), and the new protected rate will be used with respect to employees other than on service and intermodal positions. A weighted average of the old and new protected rates will be used in determining benefits to be paid with respect to claim periods in which both types of service are performed. Days on which no service is performed during a claim period will be treated the same as the last day on which the protected employee performed compensated service.

III. POSITIONS OF THE PARTIES

A. The Organization's Position

The Carrier unilaterally and arbitrarily reduced Claimant's average monthly test period earnings from $2,487.24 to $2,333.75. Section 5 of the New York Dock Conditions does not allow the Carrier to decrease an employee's test period average earnings. Section 5 only calls for the original test period average to be adjusted upward to reflect subsequent general wage increases.

More importantly, applicable statutory and case law prohibit the parties, both the Organization and the Carrier, from reducing New York Dock protective benefits. 49 U.S.C. § 11347 mandates that employees will not be placed in a worse position with regard to their employment including their compensation. The August 19, 1986 Letter of Understanding appended to the 1986 National Agreement cannot operate to reduce the amount of compensation afforded employees by the New York Dock Conditions. If the parties were attempting to lower the level of protective

compensation in the New York Dock Conditions, the agreement is void. Norfolk and Western Railway Company v. Nemitz, 404 U.S. 37 (1971). However, the August 19, 1986 Letter Agreement does not reduce New York Dock displacement and dismissal allowances because the Agreement is applicable only to those protective arrangements negotiated by the parties. The Letter Agreement is irrelevant to employee protection imposed on the Carrier by law. In any event, this Committee, which is constituted under Section 11 of the New York Dock Conditions, lacks the authority to even interpret the provisions and riders to the 1986 National Agreement.

The second paragraph of Section 5(a) of the New York Dock Conditions clearly and unambiguously provides that a displacement allowance shall be adjusted to reflect subsequent general wage increases. Thus, Claimant's protected rate was $2,487.24 per month and the Carrier could neither recalculate nor reduce the aggregate displacement allowance.

B. The Carrier's Position

The Carrier did not recompute Claimant's test period average earnings. Claimant's test period average earnings equalled $2,333.75 per month according to the formula in Section 5 of the New York Dock Conditions. Thus, the Carrier never recalculated Claimant's test period earnings to a rate lower than the amount originally fixed in January, 1986.

With the advent of the 1986 National Clerical Agreement and the August 19, 1986 Letter of Understanding, the Carrier began to maintain, in tandem, new and old protective rates for affected

employees. The old protected rate applied to employees occupying service and intermodal positions while the new protected rate, which was periodically raised to include subsequent general increases, determined the displacement and dismissal allowances for employees not holding intermodal or service jobs. Thus, the Organization's characterization of Claimant's test period earnings as $2,487.24 is incorrect because this sum represents Claimant's new protected rate. However, at the time of the claim, Claimant occupied a janitor's position (a service position under the 1986 National Agreement), and so, the Carrier compensated Claimant according to his old protective rate ($2,333.75). The Carrier simply complied with the August 19, 1986 Letter of Understanding.

The August 19, 1986 Side Letter does not carve out any exceptions for protective arrangements imposed by law or the Interstate Commerce Commission. If the parties wanted to restrict the coverage of the Letter Agreement to just privately, bilaterally negotiated protective arrangements, the national negotiators would have expressly stated such a constraint in the Letter Agreement. Also, the Letter Agreement refers expressly to displacement and dismissal allowances which are terms found in the New York Dock Conditions. Clearly, the national negotiators intended for the Letter Agreement to cover New York Dock protective benefits.

Norfolk and Western Railway Co. v. Nemitz is inapposite to the facts in this case. The parties, in their implementing contract, went beyond the requirements of the New York Dock

Conditions. The 1986 National Agreement amended a local collective bargaining agreement without altering the substance of the New York Dock Conditions. Moreover, in this case there was no pre-merger collective bargaining agreement which eventually became the ICC imposed conditions.

IV. DISCUSSION

The Committee initially notes that the question at issue literally asks whether or not the Carrier reduced Claimant's New York Dock test period average earnings because Claimant involuntarily displaced to a janitorial job, a position described in Article VII, Section 1 of the 1986 National Agreement. However, the facts herein reveal that the Carrier did not reduce Claimant's test period average earnings. The Carrier persuasively explained that Claimant's test period monthly average earnings were $2,333.75 and, at no time, did the Carrier recompute this amount. Claimant's test period and hours were unchanged. Therefore, a technical answer to the question at issue is "No" the Carrier may not reduce New York Dock Conditions test period averages simply because an employee exercises his seniority to a service or intermodal position but, as a matter of fact, the Carrier did not make such a reduction in this case. The Committee, however, infers a broader inquiry in the question at issue, that is, did the Carrier properly calculate Claimant's displacement allowance after he placed on a position referred to in Article VII, Section 1 of the 1986 National Agreement.

This Committee is mindful of the limits on its jurisdiction. Section 11(a) of the New York Dock Conditions restricts our adjudicatory power to interpreting, applying and enforcing the New York Dock Conditions and, by implication, implementing agreements negotiated under those conditions. Therefore, this Committee lacks the jurisdiction to interpret and apply the August 19, 1986 Side Letter, even if, as the Carrier contends, the Letter Agreement modified local implementing agreements negotiated under the auspices of the New York Dock Conditions. There is insufficient evidence in the record showing that the August 15, 1986 Letter Agreement can be characterized as a New York Dock implementing agreement.

Disregarding the August 15, 1986 Side Letter, the Committee nonetheless finds that the Carrier properly computed Claimant's displacement allowance. Section 5(a) of the New York Dock Conditions, states that an employee should be paid a monthly displacement allowance "...equal to the difference between the monthly compensation received by him in the position which he is retained and the average monthly compensation received by him in the position from which he was displaced." This language contemplates that employees will not be placed in a worse position with regard to their compensation due to a New York Dock transaction but neither shall affected employees enjoy a better position simply because the Carrier engaged in a transaction. Employees occupying positions described in Article VII, Section 1 of the 1986 National Agreement receive lump sum payments in lieu of subsequent general wage increases. The lump sum payments are

not considered "general wage increases." If Claimant's protected rate included upward adjustments reflecting general wage increases accruing to employees occupying other than service and intermodal positions, Claimant could conceivably receive duplicative payments (lump sum and general wage increase) as long as he occupied the janitorial position. First, Claimant could receive a lump sum payment instead of a wage increase. Next, if Claimant's protected rate was $2,487.24 per month, he would be paid the difference between that amount and the rate of his janitorial position even though Claimant could have already received a portion of this difference in the form of the lump sum payment. Put differently, the lump sum payment given to employees in Article VII, Section 1 positions would be duplicated in the displacement allowance if the protected rate for these workers was increased to include subsequent general wage increases received by incumbents of other than service or intermodal positions. As discussed earlier in this paragraph, while the New York Dock Conditions protect employees from suffering a reduction in their compensation due to a transaction, the Conditions were not designed for employees enjoy a better position as a result of the transaction.

Similarly, Norfolk and Western Railway v. Nemitz is inapplicable to this case since the Carrier's utilization of the $2,333.75 test period monthly average earnings figure did not substantially abrogate Claimant's protective benefits. Rather, the Carrier applied the New York Dock Conditions to prevent Claimant from securing both the lump sum payment and the general

wage increases. If Claimant's allowance was premised on the inflated rate advocated by the Organization, Claimant could receive in excess of $2,487.24 per month on an average basis because he occupies a position whose incumbent was scheduled to receive periodic lump sum payments.

AWARD AND ORDER

The answer to the Question at Issue is the Carrier properly calculated Claimant's monthly displacement allowances subsequent to January 1, 1988 and the Carrier did not reduce Claimant's New York Dock test period average earnings.

DATED: June 29, 1990

E. T. Lynch - Dissenting
E. T. Lynch
Employees' Member

L. A. Lambert
Carrier Member

John B. LaRocco
John B. LaRocco
Neutral Member