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. 2 Award No. 2
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

Did Carrier properly calculate the employe's test period earnings by excluding the lump sum payments provided to the employe under the 1986 National Agreement?

If the answer to the above is to the negative, what calculation with respect to test period hours should be added as a result of the payment of the lump sum amounts?

Carrier File No. 880962
Organization File No. M-14-2384-NW

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

From June 1, 1987 to May 31, 1988, Claimant worked as a Payroll and Production Assistant in the Carrier's GMS Department at Kansas City, Missouri. During this twelve month period, Claimant received periodic lump sum payments as provided in the April 15, 1986 National Clerical Agreement. These twelve months also represented Claimant's New York Dock test period since he was affected by a New York Dock transaction on June 1, 1988. When the Carrier computed Claimant's test period earnings it deliberately omitted the lump sum payments Claimant received pursuant to the 1986 National Agreement.

The issue herein is whether the lump sum payments Claimant received between June 1, 1987 to May 31, 1988 should have been included in the calculation of Claimant's test period average earnings.

III. THE POSITIONS OF THE PARTIES

Both parties incorporate into this case all the arguments and contentions which they raised in Case No. 1.

In sum, the Organization argues that the second paragraph of Section 5(a) of the New York Dock Conditions unequivocally provides that an employee's displacement allowance shall be based on the "...total compensation received by the employee..." during the twelve month test period. Total compensation, the Organization asserts, includes bonuses, lump sum payments and earnings from any

source. [See Docket No. 62 of the Section 13 Washington Job Agreement Disputes Committee (Bernstein).] While the Carrier relies on Side Letter 2 to the April 15, 1986 National Agreement, the Organization submits that the Side Letter implicitly pertains only to lump sum payments disbursed in accord with private, bilaterally negotiated protective arrangements as opposed to protective benefits, like the New York Dock Conditions, which are imposed by law.

The Carrier contends that it properly excluded lump sum payments paid to Claimant pursuant to Side Letter 2 of the April 15, 1986 National Agreement. Side Letter 2 provides:

> It is understood that any lump sum payment provided in the Agreement of this date will not be used to offset, construct or increase guarantees in protective agreements or arrangements.

The Carrier avers that there is not any language in Side Letter 2 exempting the New York Dock Conditions from the Letter's coverage.

IV. DISCUSSION

The New York Dock Conditions were promulgated by the ICC to prevent employees from being placed in a worse position with respect to their compensation and working conditions. The New York Dock Conditions were not designed to place employees in a better position with respect to their compensation and working conditions.

In this case, including lump sum payments when calculating Claimant's test period average earnings would improperly inflate his average so that Claimant would

receive a displacement allowance covering the difference between the rate of his position and the inflated monthly average earnings even though Claimant had received a portion of this difference in the form of a lump sum payment. A duplicative payment would arise because the lump sum is not factored into the basic wage rate. The New York Dock Conditions do not contemplate that an employee will be better off as a result of a transaction.

In addition, the record reflects that the Carrier has been handling lump sum payments in a manner consistent with the spirit and intent of the New York Dock Conditions. The Carrier has not been using lump sum payments to offset displacement allowances which is compatible with excluding the lump sum payments when computing an employee's test period average earnings. The term "total compensation," appearing in Section 5(a) of the New York Dock Conditions has a connotation slightly at variance with the literal meaning of the words. This Committee concludes that the lump sum payments are outside the definition of "total compensation" to avoid a result which would not only be absurd but also contrary to the purpose of the New York Dock Conditions.

Finally, the Carrier's computation of Claimant's test period average earnings did not substantially abrogate the level of Claimant's protective compensation and therefore, the Carrier's calculations did not run afoul of Nemitz v. Norfolk and Western Railway Co., 404 U.S. 37 (1971). By

omitting lump sum payments from Claimant's test period average earnings, the Carrier simply prevented Claimant from receiving excessive protective benefits.

AWARD AND ORDER

1. The Answer to the First Question at Issue is "Yes."

2. The Second Question at Issue is Moot.

DATED: June 29, 1990

F. T. Lynch
Employees' Member

L. A. Lambert
Carrier Member

John B. LaRocco
Neutral Member