ARBITRATION BOARD
NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS
(Imposed by the Interstate Commerce Commission in FD No. 29455)

In the matter of an arbitration between:	
UNITED TRANSPORTATION UNION	FINDINGS & AWARD
and	
NORFOLK AND WESTERN RAILWAY COMPANY	

QUESTION AT ISSUE:

"Was Fireman D. J. Keim properly compensated for various months in 1982, 1983 and 1984 as to entitlement to protective payment amounts under the New York Dock II Conditions?"

BACKGROUND:

The Interstate Commerce Commission (the "ICC" or "Commission") in Finance Docket No. 29455 (Sub-No. 1), which was issued with a service date of June 22, 1981, authorized the Norfolk and Western Railway Company (the "Carrier" or "NW") to purchase the assets of the Illinois Terminal Railroad Company (the "IT").

The Commission, in its decision, stated that approval of the transaction was conditioned upon the imposition of, among other things, the labor protective provisions found in New York Dock Railway - Control - Brooklyn Eastern Dist. Terminal, 360 I.C.C. 60 (1979) (New York Dock), aff'd sub. nom. New York Dock Railway v. United States, 609 F. 2d 83 (2d Cir. 1979) (the "NY Dock Conditions"). It said that these labor protective provisions constituted the minimum protection to be afforded employees in the absence of a voluntarily negotiated agreement.

The Carrier and the United Transportation Union (the "UTU" or "Organization") subsequently became engaged in the negotiation of an agreement concerning implementation of the consolidation. The agreement addressed such matters as the schedule of rules to be applicable at consolidated terminals, the manner in which road employees may be required to perform service throughout the consolidated terminals, where road and yard crews may be required to report, the establishment of extra boards, an equity distribution of work, the consolidation of seniority rosters, special or arbitrary allowances, health and welfare protection, and for the administration and application of the NY Dock Conditions and an election by employees between such conditions and such other ar-

rangements as they might be entitled to and the Implementing Agreement. Attached to the Agreement were letters of understanding on various matters and agreed-upon questions and answers as related to the calculation of monthly displacement allowances.

Although the Carrier and certain of the negotiators for the UTU were in accord that the terms of the Implementing Agreement as finally drafted were fair and equitable, and had signed such an agreement on February 18, 1982, two local chairmen for the UTU would not agree to the proposed Implementing Agreement. It thus became necessary that the matter of an implementing agreement be submitted to arbitration.

In an award which issued under date of March 16, 1982, Arbitrator Leverett Edwards ruled or held that the terms and conditions of the tentative Implementing Agreement as reached in negotiation by the respective representatives of the parties be recognized as a final and binding agreement.

Insofar as the Claimant is concerned, immediately prior to the ICC-approved consolidation he was working as a regularly assigned Engineer for the IT on the extra board at Decatur, Illinois. On the date of the consolidation, the Claimant, through the exercise of seniority, placed himself on a Brooklyn District Road Pool assignment as a Fireman. Thereafter, on or about August 9, 1982, he was displaced from such assignment and he exercised seniority to a position identified as the Main Line Hostler (Fireman) in the Decatur Yards.

On August 20, 1982, the Claimant submitted a request form to be recognized as a protected employee, stating that he had been adversely affected on August 9, 1982 account being displaced to a lower paying assignment.

The Carrier responded to the Claimant by letter dated October 28, 1982, advising that it recognized he had been adversely affected and that he was, therefore, covered by the protective provisions of the NY Dock Conditions. The letter also informed the Claimant that a review of work during his protective test period showed his average monthly compensation to be $2240.50, and his average monthly time paid for (average monthly hours) to be 159.17 hours.

The Claimant thereafter submitted and was granted displacement allowances for the months of August, September and December, 1982 and January, February, and May through November, 1983.

On March 12, 1984 the Claimant addressed a letter to the Carrier, taking exception to the manner in which the Carrier was computing his claims. The Claimant contended that he was entitled to be additionally compensated for time worked in excess of his average monthly time (average monthly hours) paid for during his test period for the months of August and December 1982 and February, May, June, August, September, October, and November 1983. The

number of excess hours claimed ranged from 2.19 hours ($26.88) in May 1983 to 40.83 hours ($487.94) in December 1982, with the total claimed amounting to 146.39 hours, and additional compensation claimed totaling $1,726.94.

The Carrier responded to the claim by letter dated March 28, 1984 and, in part here pertinent, said:

> "The Carrier has noted your quotation from the New York Dock II Appendix 3, Section 5-a, third paragraph; however, attached for your information and use is Appendix 'D' to the Implementing Agreement which sets forth the 'agreed-upon interpretations and application of the New York Dock II (N&W-IT) implementing coordination of operations of both the N&W and the IT.' Your particular attention is directed to both the 'examples' set forth on the bottom of page 2 as well as question and answer No. 9, on page 3. (Copy attached). The interpretations have been applied as agreed to since the consolidation.
>
> Therefore, based upon the agreed to interpretation of the application of the New York Dock II Conditions as set forth in the questions and answers 1 through 22, we find no basis for your request, and as such it is declined in its entirety."

The Organization took exception to the denial of the claim. In a letter dated May 22, 1984 it said:

> "The agreed to Questions and Answers you refer to do not substantiate your position. A certified employee is entitled to the difference between his actual earnings during the test period hours and his test period average monthly compensation.
>
> The claim is being made pursuant to the provisions of the New York Dock II, Appendix III, Section 5-A. The third (3rd) paragraph of Section 5-A reads as follows:
>
> '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, <u>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.</u>' (Underscoring Added by the UTU)

When the claim remained unresolved between the parties it was agreed to submit it to arbitration, with like claims for the months of December 1983, and January, February, March, May and June 1984 being made a part of the claim of record.

POSITION OF THE CARRIER:

The Carrier maintains that the Claimant has been properly compensated, urging that his monthly displacement allowance had been calculated pursuant to agreed-upon questions and answers which were attached to and made a part of the Implementing Agreement dated February 18, 1982.

In this respect, the Carrier directs attention to questions and answers related to an illustrated example whereby a hypothetical employee (Jones) is said to have a test period average monthly compensation of $1,600, and average monthly time paid for of 200 hours. The Carrier especially cites in support of its position, agreed-upon Question and Answer No. 9, which reads as follows:

> "Q. 9. Jones was available for service the entire month and worked 210 hours and earned $1,680. What compensation would be due Jones?
>
> A. The $1,680 he earned."

The Carrier maintains that Question and Answer No. 9 and other agreed-upon questions and answers, i.e., Nos. 10, 11, 12, 13 and 15, support the conclusion that it had properly compensated the Claimant.

It argues that the various examples show that the purpose for the average monthly hours factor is to limit or restrict the number of hours of unavailability, i.e., missing a call or laying off, which could be charged against a protected employee in a given month. Further, the Carrier says that the reference to such time in Section 5(a) of Appendix III of the NY Dock Conditions merely provides that an employee who works in any month in excess of the average monthly test period hours are entitled to be additionally compensated for such work at the rate of the position then being held, or, namely, at the rate of pay of the retained position.

The Carrier submits that the questions and answers which it has made reference to in its defense against the claim were proposed by the Organization during negotiations and that it was willing to incorporate them into the Implementing Agreement because of the fact that the example computations reflected the manner in which protective claims were then being computed on the NW. It thus says that it was simply agreeing with the Organization that the illustrations or examples given in the questions and answers represented proper and correct application of the language in the

NY Dock Conditions as long recognized by the parties on the NW.

The Carrier also says that these same questions and answers have been incorporated into all implementing agreements reached with the UTU since 1982 and that in all of these transactions, the computation of monthly displacement allowances has been consistently applied across the entire system and that this is the only exception taken to the method of computation.

Moreover, the Carrier asserts that the Claimant himself must have believed that he was being properly compensated in accordance with the agreed-upon questions and answers and past practice in that the instant claim was not filed until some 19 months after he had initially been granted a protective allowance.

The Carrier also urges that if the Organization had any belief that the average monthly hours factor was to be applied in the manner it here seeks that it would seem that there would have been an elaboration on agreed-upon Question and Answer No. 9 or some other agreed-upon interpretation.

The Carrier says that the language in question traces its roots to the Washington Job Agreement of 1936, and submits that it has remained substantially intact throughout the history of employee protection in the railroad industry.

While the Carrier submits that one would assume that a standard practice and interpretation would have evolved by this time, it recognizes at the same time that a review of the relatively few arbitration decisions on this subject reveals that the language has been applied in a widely divergent, and what it calls, a sometimes bizarre fashion. It says, the only conclusion which can be drawn from these decisions, without having benefit of the local agreements and practices involved, is that the arbitrators have generally concluded that there was no basis for concluding that a protected employee was entitled to a displacement allowance when their actual monthly earnings exceed average monthly compensation.

In particular, the Carrier cites the decision of SBA 577 (Referee Gilden) involving a dispute between the four former engine and train service organizations and the Santa Fe Railway, and wherein it was held in part as follows:

> "In a month where an employee works miles in excess of his test base average miles he is not entitled to a displacement allowance if his monthly compensation exceeds his test base monthly average."

The Carrier also directs attention to the decision of Referee Rohman in a dispute between the UTU and the Union Pacific Railroad under the Amtrak C-1 Conditions (July 21, 1971) and to a digest of excepts from other arbital decisions relating to the

computation of test period earnings and compensation.

The Carrier asks that the question at issue be answered in the affirmative.

POSITION OF THE ORGANIZATION:

It is the position of the Organization that inasmuch as the Claimant worked in excess of his average monthly (hours) time paid for during the test period that he is entitled to be additional compensated for the excess time at the rate of pay for the retained position.

In support of its position the Organization submits that a review of Section 5(a) of Appendix III of the NY Dock Conditions shows that there are two provisions in the test period year necessary to determine the amount of protection entitlement in the protective period, namely, (1) the average monthly compensation and (2) the average monthly hours. The Organization thus offers that if it was intended that the only factor be compensation that there would not have been a reference to a time factor or to average monthly hours.

The Organization thus maintains that if an employee works over test period average monthly hours that the employee is to be additionally compensated for the over hours. It thus disputes the Carrier contention that the reference to time was to merely provide a means to give consideration to times when an employee would be unavailable for work account missing a call, laying off, etc.

In regard to the Carrier contentions relative to the agreed-upon questions and answers having disposed of the issue in dispute, the Organization says that the questions and answers address specific areas of concern and place interpretations only on those areas for the sole purpose of eliminating some of the built in disputes. It says there are no questions and answers on the formula for handling excess hours worked, and that due to the lack of an agreed to interpretation, the language of the rule or the provisions of the NY Dock Conditions stand for themselves as to the meaning to be given such a circumstance.

In this latter regard, the Organization says that it questions the Carrier offering Question and Answer No. 9 as support for its denial of the claim. The Organization rather asserts that Question and Answer No. 9 shows that since the hypothetical employee (Jones) worked 210 hours, or 10 hours beyond his test period average hours or 200 hours, that he was entitled to an additional $80, or the $1680 which he had received as opposed to test period average compensation of $1600.

Further, the Organization asserts that the reason no question and

answer was made a part of the agreement is account the parties not having been able to agree upon such a matter or issue.

The Organization, as with the Carrier, makes reference to various decisions of past boards as being in support of its position. In particular it directs attention to the Washington Job Protection Agreement decisions of Referee Bernstein in Docket Nos. 62 and 65.

The Organization requests the Board render a sustaining award, affirming the Claimant's right to the additional compensation as claimed.

FINDINGS AND OPINION OF THE BOARD:

It is evident from study of the record that the parties entered into a collective bargaining agreement, albeit this Implementing Agreement was formally imposed by arbitration, to provide for the orderly and effective application of the ICC-approved consolidation and to embellish upon the minimum labor protective conditions afforded by the ICC under the NY Dock Conditions.

The record also reveals that the parties reached understandings in the form of agreed-upon Questions and Answers relative to the manner that, among other things, job protective displacement allowances related to application of the Implementing Agreement and the NY Dock Conditions would be calculated and administered.

The Board does not doubt the Organization argument that it was not possible for the parties to reach agreed-upon language in answer to every question that existed at the time that the agreement was executed. The Board can understand, therefore, that it was to be expected that disputes would arise in connection with application of the Implementing Agreement, including grievances over the calculation of displacement allowances, or matters that might not have otherwise been addressed by the agreed-upon Questions and Answers which attached to the Implementing Agreement.

However, it seems to the Board that if the reason that no agreed-upon Question and Answer was established to specifically address the question at issue in this dispute was account the parties not being able to reach agreement on such matter, as the Organization suggests, that the Organization would not have waited for almost two years for some individual grievant to submit a claim but that it would have initiated a claim after the Implementing Agreement had become effective and individual protected employees began to receive monthly displacement allowances.

Certainly, in the absence of any record of a claim having been initiated within a reasonable period of time following imposition of the Implementing Agreement and adoption of the agreed-upon Questions and Answers, it must be considered that agreed-upon

Question and Answer No. 9 was intended to cover the circumstances of the claim here at issue. We say this particularly in view of the Carrier having stated that the manner in which it had calculated the Claimant's displacement allowance and compensated him was consistent with past practice on the property, or a statement which was essentially unrebutted by probative evidence to the contrary.

It may well be, absent the Implementing Agreement and the agreed-upon Questions and Answers, and in particular Question and Answer No. 9, that the language of Section 5(a) of Appendix III of the NY Dock Conditions which is in dispute, is susceptible to being read in the manner sought by the claim. However, this Board does not have the right to here make such determination.

The Board does not have the authority to abrogate, much less to either modify or amend the terms and conditions of the agreement which the parties themselves adopted in the quid pro quo of collective bargaining negotiations.

It thus being evident that the parties, in negotiation of their collectively bargained Implementing Agreement and agreed-upon Questions and Answers, provided for the resolution of a question not unlike that here at issue, principally agreed-upon Question and Answer No. 9, this Board has no basis upon which to offer or provide a different answer.

Under the circumstances, it must be concluded that the claim is lacking in agreement support and that the Claimant had therefore been properly compensated pursuant to the dictates of the agreed-upon Questions and Answers which attached to the Implementing Agreement.

AWARD:

The Question at Issue is answered in the affirmative. Claimant Keim was properly compensated for the various months in 1982, 1983 and 1984 pursuant to the terms of the Implementing Agreement which was placed in effect by Award of the Arbitration Board on March 16, 1982.

Robert E. Peterson, Chairman
and Neutral Member

G C Edwards
Greg C. Edwards
Carrier Member

Lloyd W. Swert - Dissent
Lloyd W. Swert
Organization Member

Norfolk, VA
November 27, 1991