Arbitration Committee
Established Under Article I, § 11
of
"New York Dock" Protective Conditions

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| In the Matter of the Arbitration Between<br><br>CSX Transportation, Inc. (formerly Chesapeake and Ohio Railway Company)<br><br>- and -<br><br>Transportation Communication International Union | Subject: Test Period Average of Clerk G. L. Wimsatt |

ARBITRATION COMMITTEE:

Cassaundra D. Anderson,
Manager Employee Relations, Carrier Member

Carl Brockett,
International Vice President, Union Member

Dana Edward Eischen, Neutral Chairman

Appearances

For the Company: James A. Bowen, Jr.,
Manager Employee Relations

For the Union: Darwin B. Kubasiewicz,
Assistant to the General Chairman

## PROCEEDINGS

A dispute arose between the Transportation Communications International Union, C & O System Board of Adjustment (TCU or Union) and the CSX Transportation Company, Inc. (CSX or Carrier) concerning the interpretation and application of the second paragraph of § 5 (a) of the New York Dock Conditions (NYD), which had been incorporated by reference in a Memorandum Agreement between these Parties, effective October 24, 1987. Pursuant to § 11 of the NYD, the Parties mutually designated Dana Edward Eischen to serve as Chair and Neutral Member of an Arbitration Committee to hear and determine that dispute. By agreement of the Parties, the arbitration hearing was held at Richmond, Virginia on April 2, 1992, prior to which prehearing briefs were submitted and exchanged. At the hearing on April 2, 1992, both Parties were represented and afforded full opportunity to present oral and documentary evidence in support of their positions. The record was closed with submission of additional documentation received by the Committee in mid-April 1992. The Parties acquiesced in an extension of time to render the Award and Opinion of the Arbitration Committee.

## ISSUE

The Parties were unable to stipulate to a joint framing of issue for submission to the Arbitration Committee. At the hearing the TCU framed the question as follows: "What is the proper method for computing test period averages when the test

period includes both agreement and non-agreement earnings?" For its part, CSX proposed that the following question was at issue in this case: "Was the Test Period Average of Clerk G. L. Wimsatt properly arrived at by the Carrier's method of computation?" The Chair of the Arbitration Committee observed that there was no substantial or material difference in the respective formulations of issue put forward by the Parties, but suggested that each might be embraced within a statement of issue posited in terms of whether the Carrier violated its contractual obligations in this case, as follows:

1. Did the Carrier violate § 5 (a) of the New York Dock Conditions in its computation of the Test Period Average of Clerk G. L. Wimsatt?

2. If so, what shall be the remedy?

PERTINENT CONTRACT PROVISIONS

MEMORANDUM AGREEMENT

Effective October 24, 1987

BETWEEN

CSX TRANSPORTATION, INC.
(formerly The Chesapeake and Ohio Railway Company)
(formerly Seaboard System Railroad)

AND THEIR EMPLOYEES REPRESENTED BY
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

Whereas, CSX Transportation, Inc. (CSXT) served notice July 23, 1987 pursuant to Article I, Section 4 of the "New York Dock" Labor Protective conditions of its intent to transfer, coordinate and otherwise reorganize certain clerical functions presently being performed for the CSXT (formerly Chesapeake and Ohio Railway, hereinafter referred to for convenience as C&O) by employees located on the C&O Western Division, District No. 7, at Cincinnati, Ohio, with certain

clerical functions being performed for CSXT (formerly Louisville & Nashville Railroad, referred to for convenience as L&N) by employees located on L&N Corbin Division District No. 12 at Corbin, Kentucky.

* * *

4. CSXT (former C&O) employees assigned by bulletin to positions, including guaranteed extra board positions, located on C&O District No. 7 will be afforded the opportunity to bid on advertised positions which are to be established at Corbin, Kentucky. Those employees not awarded any of positions as their jobs are abolished will exercise their seniority in accordance with the terms of the C&O Clerks' General Agreement.

* * *

10. (a) Employees adversely affected as a result of the implementation of this agreement will be entitled to the protective benefits of the New York Dock Conditions or option to elect benefits existing under other job security or protective conditions as more specifically set out in Section 3 of the New York Dock Conditions.

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NEW YORK DOCK CONDITIONS

Finance Docket No. 28250

APPENDIX III

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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 transition (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.

* * *

10. Should the railroad rearrange or adjust its force in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

* * *

11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except Sections 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the

involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect a though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 hays, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representative so as to equal the number of labor organization representative.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(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.

* * *

BACKGROUND

Mr. G. L. Wimsatt, (Claimant) began his career in May, 1971, as a yard clerk on a CSX predecessor line. IN 1976 he was promoted to a non-contract supervisor and in 1982, he was transferred to Corbin, Kentucky as an Assistant Trainmaster.

During the second half of 1987, CSX Transportation, Inc. implemented a systemwide force reduction of its management (non-contract) work force. The Carrier initially offered voluntary separation allowances equaling one year's salary to employees with five years or more service and one-half year's salary for employees with less time with the Company. The number separated in this fashion did not equal the target number of management employees to be reduced. Carrier then applied a system of rating and ranking, and any additional cuts deemed necessary within each department or office were made on the basis of the scores obtained during the rating and ranking process. Any employee whose position was abolished as a result of this downsizing had several options, among them exercising whatever seniority he held or accepting separation pay in the same amount that was previously offered on a voluntary basis.

As a result of his relatively low ranking (as compared to other non-contract supervisors in like job categories) Claimant's position of Assistant Trainmaster at Corbin, Kentucky was abolished on September 20, 1987. Mr. Wimsatt elected to exercise his clerical seniority at Cincinnati, Ohio, in lieu of accepting separation pay as provided in the offers made to management employees. He returned to contract status effective October 1, 1987.

In the meantime, at about the same time Mr. Wimsatt returned to the clerical craft, the Carrier coordinated certain clerical functions at its facilities at Cincinnati, Ohio, and transferred

some of those duties to its offices at Corbin, Kentucky. Following extended negotiations, on October 24, 1987 CXS and TCU executed the Implementing Agreement in connection with this coordination of work. That Agreement read in pertinent part as follow:

* * *

> 4. CSXT (former C&O) employees assigned by bulletin to positions, including guaranteed extra board position, located on C&O District NO. 7 will be afforded the opportunity to bid on advertised positions which ar to be established at Corbin, Kentucky. those employees not awarded any of the positions as their jobs are abolished will exercise their seniority in accordance with the terms of the C&O Clerks' Agreement.

* * *

> 10. (a) Employees adversely affected as a result of the implementation of this agreement will be entitled to the protective benefits of the New York Dock Conditions or option to elect benefits existing under other job security or protective conditions as more specifically set out in Section 3 of the New York Dock conditions.
>
> (b) Each employee entitled to the protective benefits and conditions referred to in subsection (a) above and who is also otherwise eligible for protective benefits and conditions under other protective agreements or arrangements shall within thirty (30) days from date affected be notified of his monetary protective entitlement under this agreement. Within fifteen (15) days of being advised of their monetary protective entitlement under the provisions of the attached Protective Benefits, such employee(s) will elect between the Protective Benefits and conditions attached hereto and the protective benefits and conditions under such other arrangement. Should any employee fail to make an election of benefits during the period set forth in this subsection (b), such employee shall be considered as electing the protective benefits and conditions attached hereto.

* * *

As a result of the exercise of seniority rights and

progressive displacements ensuing after the implementation of this Agreement, Claimant Wimsatt was displaced form his assignment of Relief clerk at the Piggyback Ramp at Cincinnati, Ohio by Clerk K. A. White on December 9, 1987. As Ms. White was a "displaced employee" as defined in Article I, Section 1 (b) of the conditions of New York Dock Labor Protection Conditions, Claimant Wimsatt was extended an election of benefits as reflected in Section 10 of the Memorandum Agreement, effective October 24, 1987 (*supra*).

The following letter of March 9, 1988 from Carrier, extending NYD benefits to Mr. Wimsatt, set forth a method of calculating his Test Period Average (TPA) which generated the present dispute:

> It has been determined the you [were} affected on December 21, 1987 and are therefore entitled to the protective conditions provided for in Section 10 of the aforementioned agreement [October 24, 1978 Implementing Agreement]. In order to compute a Test Period Average (TPA) under the New York Dock Protective Agreement it would be necessary to average your clerical earnings for the twelve (12) months prior to December 21, 1987. However, it has been determined that you were working as a non-contract official until October 1987. Therefore, in order to properly compute your TPA, TPA's were computed for the clerical employees immediately above you and below you on the seniority roster for the ten (10) months you had no clerical earnings. These two figures were then averaged and your actual earnings were added to determine the NYD benefits shown on the attached option sheet.

On March 9, 1988, Carrier also advised Claimant that, by its method of calculation, he was entitled to a monthly guarantee of $2,425.43. Claimant and the Organization took exception to Carrier's calculation and, by letter of June 7,

1988, the TCU Local Chairman/Vice General Chairman filed a claim reading in pertinent part as follows:

> The Carrier figured Mr. Wimsatt's base period average compensation by averaging the employee salary ahead of him on the roster and the employee behind him, This procedure is not mentioned in the Finance docket No. 28250. They arrived with a monthly compensation of $2,425.43. Mr. Wimsatt's guarantee by Section 5 of the New York Dock Conditions should be $3,503.97 per month.
>
> It is our position that the Carrier violated the New York Dock Conditions and continues to do so by the way they computed Mr. Wimsatt's average monthly compensation. It is our further contention that the Carrier should figure Mr. Wimsatt's average monthly compensation as stated in Section 5 of Finance Docket No. 28250.

The issue thus was joined on the property and remained unresolved through all levels of appeal until eventually the Organization invoked the arbitration provisions of Article I, § 11 of NYD. Subsequently, the Parties mutually created this Arbitration Committee to resolve the questions at issue in final and binding arbitration.

## POSITIONS OF THE PARTIES

The following statements are extrapolated and edited from the respective prehearing submissions of the Parties.

### Union

Briefly stated, Article I, § 5 (a) of the New York Dock (NYD) conditions was modeled by the ICC After Section 6 (c) of the Washington Job Protection Agreement of May 1936 (WJPA). Numerous awards of the WJPA Section 13 Committee have decided what constitutes the basis of the TPA of the displaced employee. See Dockets No. 62 and 63.

The Carrier, in its placement of Claimant Wimsatt in an arbitrary status in regard to position and compensation utilizing this as the basis of his TPA, has attempted to add exceptions to the conditions under which he gained protection where no such exceptions were expressly stated. The implementing agreement concerning the coordination created no exception, nor modifications, to the method and procedures provided in NYD for the calculation of the protected individual's TPA. Further, the accepted mode and method was, and still is, fundamentally set-forth in the conditions of New York Dock Labor Protection Conditions - Article 1, Section 5 (a).

Of concern to the Carrier, as reflected in its declination of this claim dated May 11, 1989 is that Claimant Wimsatt might gain a "windfall" in monetary protective benefits by his being affected by the coordination and the subsequent loss of his position. A universal accepted meaning of the term "windfall" is that of an unexpected piece of good fortune, or a sudden and large increase. In the Claimant's case, the elements made the basis of the calculation of his TPA do not fall within the accepted meaning of such a term as they correctly reflect his compensation received during his measurement period. It is also not an unexpected piece of good fortune but a benefit mandated by the provisions of the ICC imposed conditions of NYD in response to the Carrier's contemplated changes in operations. Additionally, it is not a sudden and large increase as it is the normal compensation that the Claimant received in his various positions held during the measurement period. There can be no question that the benefits described in Article I, Section 5 of New York Dock are the price to be paid (shared jointly by the employee in his loss of employment opportunities, as well as the employer in the mandated level of monetary protection), even if only borne by the employer for a limited period of time, for the meditated actions of management - actions that go on forever.

Clearly, the conditions of NYD are now, in the present, the extension of the WJPA and the basis of the elements to be included in the formula and subsequent figures arrived at in the individual's Test Period Average are historically well settled. Any support cited should address those specific provisions and benefits, not other provisions and benefits arising from disputes not associated with the matter at hand.

The salient fact of the dispute before you now is that the Claimant was affected by the transaction and there should not be a dispute in regard to the calculation of his monthly displacement allowance. The method and elements to be used are well defined in Article I, Section 5 of NYD and have long been applied uniformly throughout the rail industry. To rewrite the conditions of NYD, as the Carrier has attempted to accomplish by the stoke of its compensation pen, is well outside the jurisdictional parameters and managerial prerogative that any

Carrier might dope to enjoy.

Turning to supportive NYD arbitration awards, reference is made to Arbitrator John B. LaRocco's decision in Case No. 4, Award No. 5 of the Arbitration Committee between TCU and the MP railroad (March 1, 1988).

Finally TCU relies heavily upon the decision of Arbitrator Lamont E. Stallworth in the Arbitration Committee TCU and the UP Railroad (February 28, 1988).

> As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon 'total compensation' in the service of the Carrier 'during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction.' The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the carrier for the year prior to the transaction. [Underscoring added]

Arbitrator Stallworth, based upon the literal language of Article I, Section 5 of NYD and the intended wishes of the ICC, found in his award that: "The proper method for computing test period averages is to include both agreement and non-agreement compensation earned during the test period." The Organization fully supports this decision and has continually expressed its direct and logical application to the Carrier in relationship to the case before you. However, the Carrier has chosen to disregard the pure logic and application of this and all the other historically applicable awards entwined within this dispute.

TCU respectfully submits that the proper method as found in the arbitration awards cited and with the historic perspective couched therein - there exists but one correct method for the calculation of Claimant Wimsatt's TPA. That method is to apply the literal language of Article I, Section 5 of the New York Dock Protective Conditions and allow all railroad earnings by Claimant Wimsatt as a CSXT employee, whether it be on agreement or non-agreement positions, to become equally weighted elements in the proper calculation in arriving at the Claimant's entitlement. This calculation is literally described and prescribed in the Conditions of NYD as it relates to the transaction that affected the Claimant on December 8, 1987. Further, the Carrier should now retroactively pay Claimant Wimsatt that past due allowance since the December 21, 1987 inception of the erroneous calculations to which the Claimant has been subjected.

Carrier

Ideally, the Claimant's TPA should have been drawn from earnings made as a clerk at Cincinnati for the test period December 22, 1986, to December 21, 1987; however, the Claimant was working in a non-contract capacity during most of that time. In such situations, most awards on the subject have advocated going back to an employee's time in the craft to determine his TPA. In this regard, we direct the Board's attention to Special Board of Adjustment No. 605 Award No. 433 (Eischen). See also Award No 434 (Eischen). However, since it had been many years since Mr. Wimsatt had worked as a clerk, the necessary payroll records to calculate his TPA in that manner were no longer available.

The Carrier has faced this situation at other times in the past and has developed such TPA's by averaging the TPA's of employees above and employees below the individual on the seniority roster. As was explained in Carrier's letter dated March 9, 1988, the earnings of the clerical employees directly above him and below him on the seniority roster for the period of December 22, 1986, to October 1, 1987 were averaged to calculate a portion of the Claimant's TPA.

The way in which Mr. Wimsatt's TPA was developed is consistent with prior arbitration awards on the subject. See Award No. 1 of Special Board of Adjustment No 860 Conrail/TCU (J. Seidenberg, November 20, 1976), as follows

> In light of the existing payroll record, the Board concludes that the fairest and most reasonable resolution of the issue is to construct a base period earnings figure from date that should reasonably approximate the Claimant's earnings during the base period.
>
> The Carrier's Post Hearing Brief contains average monthly guarantee figures for six passenger conductors as of January 1, 1975 on the same seniority roster as the Claimant. Even though the Claimant had no test period earnings as a passenger conductor, the Board finds that it would be it would be appropriate to use the average monthly guarantee of the two conductors immediately receding the Claimant and the two conductors immediately following the Claimant on the roster, and thus construct both an average monthly guarantee and the average time paid as the protected hours during the base period, based on this data.
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> * * *
>
> The Board finds that this is an appropriate resolution of the matter in dispute in view of the lack of substantial conclusive and probative evidence to

sustain the position of either party.

Arbitrator Seidenberg also found in a New York Dock arbitration between this Carrier and the IAMAW on October 3, 1990 as follows:

> In light of the aforestated Findings, the Committee finds that the Carrier could properly construct the Claimant's protected rate based on the earnings of those Machinists who occupied positions immediately above and below him on the Machinist Seniority roster at Louisville at the time of the coordination since the Carrier had no record of his machinist earnings when he worked as a machinist.

Given the limitations in the instant case, i.e., that the Claimant had not worked as a clerk for several years and records of his earnings were no longer available, The Carrier took the most reasonable and fair course of action by developing his TPA using the average of the TPA's of the employees above and below the Claimant on the seniority roster.

It is clearly stated in the New York Dock Conditions that the protection afforded therein is meant to guard against the adverse effects resulting from covered transactions only. See Article I, Section 1 (b), which provides:

> '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. (Underscoring added)

It is the Carrier's position that for the displacement allowance to cover more than an adverse effect resulting from the transaction would clearly violate the intent of the protective conditions.

The Carrier has shown that the Claimant's entitlement to protection derives from protective conditions executed in connection with the transfer of work from Cincinnati to Corbin. On this basis, the Carrier acted correctly in developing Mr. Wimsatt's test period average hours and compensation based on the approximate amount of work he would have had as a clerk in the twelve months prior to the transfer of work using the wages of the clerks just senior and junior to him on the seniority roster.

## OPINION OF THE CHAIRMAN

Both Parties recognized that the fundamental issues which are presented for determination in this case are not questions of

first impression by Boards of Arbitration in the railroad industry. Related, if not similar, disputes have arisen in the past under various protective conditions and have been arbitrated before various tribunals. Accordingly, the Parties to the present dispute each have presented the Committee with voluminous citations of authority which, they argue, support the countervailing positions they advance in this matter. In pursuing their "battle of awards", one or sometimes both of the Parties has cited as "authoritative precedent" one or more of the following interpretations of protective conditions by arbitration tribunals: **Washington Job Protection Agreement of May 1936** (WJPA § 13 Committee Dockets 62 and 63); **February 7, 1965 National Preservation of Employment Agreement** (SBA No. 605, Award Nos. 130, 195, 433 and 434); **1966 Merger Protection Agreement between the former Pennsylvania Railroad Company and the New York Central Railroad** (SBA No. 860, Award No. 1); **New York Dock Conditions** (UP Railroad/Bond, Topolasky, et. al., ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, September 25, 1985), (Norfolk & Western Rwy./Huggins, et. al., ICC Fin. Doc. 29455, Arbitration Committee Chair Robert O. Harris, November 24, 1985), (Delaware & Hudson Rwy./Gilchrist, ICC Fin. Doc. No. 29772, Arbitration Committee Chair Jacob Seidenberg, December 2, 1985), (Missouri Pacific Railroad/Currley, et. al., ICC Fin. Doc. No. 30,000, Arbitration Committee Chair David H. Brown, May 11, 1987), (UP Railway/BRAC Kelly, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, June 15, 1987),

(Delaware & Hudson Railway/Adams, et. al., ICC Fin. Doc. No. 29720, Arbitration Committee Chair Robert M. O'Brien, November 27, 1987), (UP Railroad/Maeser, et. al., ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Jacob Seidenberg, December 17, 1987), (Missouri Pacific Railroad and UP Railroad/TCU, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair John B. LaRocco, March 1, 1988), (UP Railroad/BLE, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, April 5, 1988), (UP/TCU, ICC Fin. Doc. No. 30,000, Arbitration Committee Chair Lamont E. Stallworth, February 28, 1989), (Norfolk and Southern Corporation/TCU, ICC Fin. Doc. No. 29430, Arbitration Committee Chair George S. Roukis, April 19, 1989), (CSX/IAMAW, ICC Fin. Doc. Nos. 28905 and 30053, Arbitration Committee Chair Jacob Seidenberg, October 3, 1990); **Mendocino Coast Line Protective Conditions** (Boston & Maine Railroad/UTU, ICC Fin. Doc. No. 30965, Arbitration Committee Chair Robert E. Peterson, August 30, 1990).

Each of the Parties argues that one or more of the above cited antecedent cases requires an outcome favorable to their respective position, asserting the legal principles of *stare decisis* and/or *res judicata*.

Strictly speaking, the court-developed doctrines of *stare decisis* and *res judicata* do not apply in labor-management arbitration. No later arbitrator is bound in any legal or technical sense to follow the decision of a predecessor. Yet although prior arbitration awards are not binding in exactly the

same way that authoritative legal decisions are, as a practical matter they do have considerable authoritative force. In that connection, a leading commentator on the arbitration process makes the following important distinction: Giving authoritative force to prior awards when the same issue subsequently arises (stare decisis) is to be distinguished from refusing to permit the merits of the same event or incident to be relegated (res judicata). Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award. See Elkouri & Elkouri, How Arbitration Works, pp. 421-22, 4th edition (BNA, Washington, DC., 1985). See also Timkin Roller Bearing Company, 32 LA 595, 597-599 (Boehm, 1958).

Where a prior decision covers the same parties, issues, facts and contract language, a subsequent arbitrator often will consider that earlier award a binding part of the agreement. Even those who refuse to hold prior awards binding would give them serious and weighty consideration. One of the pioneer labor-management arbitrators stated the majority view to be: "Where a prior decision involves the interpretation of the identical contact provision, between the same company and union, every principle of common sense, policy and labor relations demands that it stand until the parties annul it by a newly worded contract provision." Pan American Refining Corp., 2 ALAA ¶ 67,937, ¶ 69,464 (Whitley McCoy, 1948). Time and again reported decisions by respected arbitrators have reaffirmed the

notion that an arbitrator with a proper regard for the arbitration process and for stability in collective bargaining, even though not technically bound, should accept an interpretation by a prior arbitration, if in point and if based in the same agreement, as binding. O & S Bearing Company, 12 LA 132, 125 (Russell Smith, 1949); Brewers Board of Trade, Inc., 38 LA 679, 680 (Burton Turkus, 1962). It is not necessary that the subsequent arbitrator endorse all of the reasoning expressed in the earlier opinion. What is important is that the earlier award contains a holding which is not erroneous. Lehigh Portland Cement Co., 46 LA 133, 137 (Clair Duff, 1965). In such circumstances, arbitrators generally conclude that it would be a disservice to the parties to subject them to the unsettling effects of conflicting and inconsistent interpretations of the same contract language in the same set of circumstances.

This Arbitration Committee has scrutinized the entire voluminous record, including hundreds of pages of antecedent decisions cited by the Parties and described above. Careful analysis reveals that most of these cases are distinguishable from the present case on the basis of fact, questions at issue, contract language and/or protective condition language. Of the many precedents cited, only two (2) directly address the interpretation and application of NYD § 5 (a) in circumstances like those presented by Mr. Wimsatt's situation.

One of these colorably authoritative precedents, upon which TCU chiefly relies, is the decision of Arbitrator Lamont E.

Stallworth and UP Railroad/TCU, ICC Fin. Doc. No. 30,000, Award No. 2, February 28, 1989) ("Stallworth Decision"). In the Stallworth Decision the Arbitration Committee was presented with the question: "What is the proper method for computing Test Period Averages when the test period includes both agreement and nonagreement earnings?". The Stallworth Decision considered and discussed the identical arguments raised by the Parties in the present case before answering that question as follows: "The proper method for computing test period averages is to include both agreement and nonagreement compensation earned during the test period". On the other hand, the other colorably authoritative precedent, upon which CSX chiefly relies, is the decision of Arbitrator Jacob Seidenberg in the CSX/IAMAW, ICC Fin. Doc. Nos. 28905 and 30093, October 3, 1990 ("Seidenberg Decision"). In the Seidenberg Decision the Arbitration Committee was faced with the following question: "Should the literal language of Article I, § 5 (a) of the New York Dock Conditions be applied in determining Claimant's Test Period Average earnings?". In the Seidenberg Decision the Arbitration Committee answered that question as follows: "The literal language of Article I, § 5 (a) of the New York Dock Conditions may not be applied in determining this Claimant's Test Period Average earnings." (Emphasis added) It is not surprising that each of the Parties to the present dispute takes comfort in their respective colorably authoritative precedent. They have presented this Arbitration Committee with the task of choosing which is

appropriate and controlling in the facts and circumstances presented by Mr. Wimsatt's situation.

A careful reading of the Stallworth Decision and the Seidenberg Decision, however, readily reveals that only the former stands as an authoritative interpretation and application of NYD § 5 (a) in circumstances identical to those presented by Mr. Wimsatt's situation. In short, a careful reading shows that the Seidenberg Decision is not authoritative precedent on the issue presented in the present case. In the Seidenberg Decision the Arbitration Committee did not even apply NYD § 5 (a) at all, because it held that the New York Dock Conditions did not apply in that case, as shown in the following excerpt from pages 14-15 of the Seidenberg Decision:

> The Committee finds that the New York Dock Conditions are not applicable to the Claimant because he was not disadvantaged or adversely affected as a result of a "transaction" as defined in New York Dock nor was he an "employee" within the meaning and purport of NY Dock. On the contrary, the Committee finds that whatever protection benefits the Claimant derived, he derived them from the provisions of the May 29, 1987 Implementing Agreement. While this Implementing Agreement may have granted a form or type of NY Dock protection, nevertheless it was not the New York Dock protection that was prescribed by the ICC in 1980 and 1982 when it approved the several mergers that culminated in the establishment of the CSX Transportation, Inc.

There are other significant factual differences between the case decided by the Seidenberg Decision and that with which this Arbitration Committee is now presented. But the above-quoted distinction makes it absolutely clear that the Seidenberg Decision is of no authoritative value whatsoever in deciding the

proper interpretation and application of NYD § 5. (a) in this matter now before us.

Unlike the Seidenberg Decision, in the present case there is no question and no dispute between the Parties that Claimant Wimsatt was entitled to New York Dock protection benefits. The only dispute is whether, in computing the TPA under NYD § 5 (a), nonagreement earnings as well as agreement earnings during the past twelve-month period must be counted. That is precisely the issue faced, considered fully and decided authoritatively by the Stallworth Decision. It is worth quoting extensively from the Opinion of the unanimous Arbitration Committee in the Stallworth Decision to demonstrate how it is "on all fours" with the facts, issue and circumstances now before us in Mr. Wimsatt's claim:

* * *

> THE OPINION
>
> This case involves the proper method of calculating test period earnings in order to determine the monthly allowances of employees affected by a New York Dock transaction. The issue is whether the allowances should be based upon compensation earned in both non-agreement and agreement positions.
>
> The Claimants in this case all held non-agreement positions during the year prior to the transaction giving rise to this dispute. Sometime during that year each Claimant moved to an agreement position. These initial moves are not the New York Dock transaction(s) at issue here. Rather, once the Claimants entered their agreement positions, they were subsequently displaced or dismissed by a merger-related transaction that the Parties agree entitled them to New York Dock benefits. The question then is whether the Claimants' monthly allowances authorized because of this transaction should be based in part on compensation earned in their agreement positions.

* * *

The Committee concludes that the literal language of these sections should be applied, and that all of a Claimant's earnings with the Carrier during the prior year, whether from agreement or non-agreement positions, are to be included in the test period earnings.

As the Organization points out, the language of these sections sets forth a formula for calculating monthly allowances based upon "total compensation" in the service of the Carrier "during the last twelve months ... immediately preceding the date of his displacement as a result of the transaction." The Committee concludes that the literal language of this section requires the Carrier to calculate benefits based upon all the jobs, agreement and non-agreement, held by an affected employee in the service of the Carrier for the year prior to the transaction.

The Committee is bound to apply the literal language of the New York Dock Conditions, unless the Carrier can show a compelling reason why this straightforward interpretation does not reflect the actual intent of the Parties. The Committee concludes that the Carrier has not met this burden.

* * *

The Committee concludes therefore that nothing in the language of the New York Dock Conditions suggests that the Parties intended to exclude wages earned from a job other than the job held at the timing of the transaction. Furthermore, nothing suggests that there was an intent to differentiate between compensation earned in agreement as opposed to non-agreement jobs.

The Carrier argues, however, that to permit calculations based upon an employee's non-agreement income would provide a "windfall" to the Claimants. As the Carrier also acknowledges, however, the unusual employee who was earning more as an agreement employee than in his former non-agreement job would suffer a hardship under the Organization's formula for calculating allowances.

The assumption behind the Carrier's position is that the New York Dock agreement demands that an employee should be in the same position -- no better and no worse -- after a transaction than if he had continued to work in his job. Allied Services Division/Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

vs. Western Railroad Association, (Dennis, Ref.). Although there is some logic to this argument, in fact the New York Dock Conditions state only that an employee should not be placed in a worse position as a result of a transaction.

Furthermore, even if the Carrier's interpretation were correct, the issue here may be cast as "what is a 'better or worse' position?" The Carrier urges that the Committee compare a Claimant's position on the day before the transaction with the day after. The Organization measures the Claimant's position on the basis of the year before the transaction date. The language of the Agreement supports the latter position.

* * *

In conclusion, the Committee determines that the literal language of the New York Dock Conditions applies, and the monthly allowances must be based upon all compensation received by the Claimants for service to the Carrier in the applicable year.

* * *

We find that the above quoted Arbitration Committee decision in "on all fours" in every material aspect with the facts, contract language, protective condition language and questions at issue which are presented in the present case concerning Mr. Wimsatt's § 5 (a) calculations. Significantly, it should be noted that the Stallworth Decision was a unanimous decision by that Arbitration Committee. Whether we would have reached the same result if faced *de novo* with the question at issue is not relevant. The Stallworth Decision is carefully reasoned, fully supported by the evidence, and contains no glaring or palpable error. We are not technically bound to follow the teachings of the Stallworth Decision, but the principles enunciated above favoring stable labor management relations and predictability in contract interpretation dictate that this Arbitration Committee

follow the same course in the present case as was followed in the Stallworth Decision. On the basis of all of the foregoing, we conclude that Carrier must apply NYD § 5 (a) literally in computing Claimant Wimsatt's TPA for the twelve months in which he performed agreement or non-agreement services immediately preceding the date of his displacement.

## AWARD OF THE ARBITRATION COMMITTEE

1) The Test Period Average of Clerk G. L. Wimsatt was not properly arrived at by the Carrier's method of computation.

2) Carrier violated § 5 (a) of the New York Dock Conditions in its computation of the Test Period Average of Clerk G. L. Wimsatt.

3) The remedy for the violation and the proper method of computing NYD § 5 (a) Test Period Averages, when the test period includes both agreement and non-agreement earnings, is to include both agreement and non-agreement compensation earned during the test period.

4) Carrier is directed to compute G. L. Wimsatt's Test Period Average in accordance with the directive of the Arbitration Committee set forth above.

5) Carrier shall implement this Award of the Arbitration Committee within thirty (30) days of its execution by a majority of the Committee.

Dana Edward Eischen, Chairman
Signed at Ithaca, New York on July 4, 1992

Carl Brockett
Union Member
Signed at Jacksonville, FL
on July 20, 1992

Cassandra D. Anderson
Company Member
Signed at Jacksonville, FL
on July 20, 1992