ARBITRATION COMMITTEE

In the Matter of Arbitration between American Train Dispatchers Association and CSX Transportation, Inc.	OPINION AND AWARD Pursuant to Art. I, Section 11, New York Dock Conditions.

Arbitration Committee:

Hugh G. Duffy, Chairman and Neutral Member
George J. Nixon, Jr., Organization Member
Brenton C. Massie, Carrier Member

Appearances:

For the Organization:

Gordon P. MacDougall, Esq., Counsel
H.E. Mullinax, Vice President
Vernon Skeans, General Chairman

For the Carrier:

James D. Tomola, Esq., Senior Counsel

I. APPOINTMENT OF ARBITRATION COMMITTEE

On August 6, 1991, Hugh G. Duffy was nominated by the National Mediation Board to serve as Chairman and neutral member of a New York Dock Article I, Section 11 Arbitration Committee to resolve a dispute involving the American Train Dispatchers Association (hereinafter "Organization") and CSX Transportation, Inc. (hereinafter "Carrier"). Mr. Brenton C. Massie was designated as the representative of the Carrier, and Mr. H.E. Mullinax was designated as the representative of the Organization. On May 27, 1992, because of the temporary unavailability of Mr. Mullinax, Mr. George J. Nixon, Jr. was designated as the representative of the Organization.

The parties submitted Pre-Hearing Briefs, and a hearing was held on June 19, 1992 in Baltimore, Maryland, during which exhibits were offered and made part of the record and oral argument was heard. The parties submitted Post-Hearing Briefs on July 27, 1992.

II. STATEMENT OF THE CASE

This case involves a dispute over the method for calculating displacement allowances under Article I, Section 5(a) of the New York Dock conditions.

The Carrier contends that the "average monthly compensation" computation under Section 5(a) must be adjusted to reflect any transaction-related overtime. The Organization contends that the literal terms of Section 5(a), i.e., "total compensation received", do not allow for such an exclusion.

The parties have agreed that this Arbitration Committee should resolve a specific dispute involving John P. Barr (hereinafter "Barr"), a displaced employee, in order to provide guidance to the parties in resolving a large number of similar disputes on the property.

III. BACKGROUND OF THE DISPUTE

Beginning in 1980, the Interstate Commission (hereinafter "ICC") approved several railroad consolidation applications filed by the Carrier or its predecessor carriers (CSX Corp.--Control--Chessie and Seaboard C.L.I., 363 I.C.C. 521(1980); Seaboard C.L.R. Co.--Merger Exemp.--Louisville & N.R. Co., Finance Docket No. 30053, 47 F.R. 50772(Nov. 9, 1982); Baltimore & Ohio Ry. Co. and C & O Ry. Co.--Merger Exemp, Finance Docket No. 31033, 52 F.R. 19412(May 22, 1987); and The Chesapeake & Ohio Ry. Co. and CSX Transportation, Inc.--Merger Exemp. Finance Docket No. 31106, 52 F.R. 35334 (Sept. 18, 1987).

Pursuant to Section 11347 of the Interstate Commerce Act (49

U.S.C. s. 11347), the ICC imposed its standard New York Dock labor protective conditions on the Chessie-Seaboard consolidation and subsequent merger exemptions (New York Dock Ry.--Control--Brooklyn Eastern District, 360 I.C.C. 60(1979), aff'd, 609 F. 2d 83(2d Cir. 1979).

A. THE JACKSONVILLE CONSOLIDATION

As part of its implementation of the consolidation authority conferred upon it by the ICC, the Carrier served notice on the Organization on September 1, 1987 that on or after May 2, 1988 it would transfer and consolidate train dispatching functions throughout its system into a single centralized train dispatching operation headquartered at Jacksonville, Florida. Pursuant to Article I, Section 4(a) of New York Dock, the Carrier and the Organization signed an Implementing Agreement for this consolidation on January 9, 1988.

Approximately 420 members of the Organization in 13 States were affected by the Jacksonville consolidation. In determining whether an individual employee was entitled to receive a "displacement allowance" under Article I, Section 5(a) of New York Dock, and for other purposes, the Carrier was required to compute the employee's "average monthly compensation".

Article I, Section 5(a) reads as follows:

Displacement Allowance.- (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 service 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 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 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. [Emphasis in Text]

The parties are in fundamental disagreement with respect to the computation of the "average monthly compensation" under Section 5(a). In its simplest terms, the Carrier contends that the compensation must be adjusted to exclude any extraordinary overtime earnings attributable to the Jacksonville transaction itself, while the Organization contends that the literal terms of Section 5(a), i.e., "total compensation received", do not allow for such an exclusion.

In attempting to resolve the fundamental dispute, the parties have agreed that this Arbitration Committee should resolve a specific dispute involving the calculations made for Barr, a displaced employee formerly employed as a Train Dispatcher at the

now-closed Evansville, Indiana train dispatching facility. The resolution of this specific claim will then provide guidance to the parties in resolving a large number of similar disputes on the property.

B. THE CLAIM OF JOHN P. BARR

The train dispatching facility at Evansville was closed on June 18, 1988 as part of the consolidation of operations into Jacksonville, and train dispatcher Barr reverted to the basic craft of Clerk pending recall to a Train Dispatcher position at Jacksonville, thus becoming a displaced employee entitled to New York Dock protection.

For a period of time before and after the Evansville closing, Barr was utilized to protect the vacancies of other dispatchers at Evansville who were either in training or being transferred to Jacksonville. He was also utilized to fill in at other train dispatching locations on the property for dispatchers who were in training or being transferred. This resulted in substantial amounts of overtime, as well as reimbursement for travel and living expenses incurred while away from his headquarters location.

As stated by Barr in a letter to a Carrier official dated February 2, 1989:

> Because so many dispatchers were out of the office, learning the new dispatching system, reviewing territory, etc., I worked 7 days a week from about March 1st until the office was closed on June 17, 1988.

On February 10, 1989 the Carrier advised Barr that his

displacement allowance "Test Period Average", or "TPA" (the term used to denote "average monthly compensation" under Section 5(a)) was $3,163.14 per month based on 174 average hours per month, and that his protective period commenced on June 18, 1988 and would run for the 6-year period ending June 17, 1994. Barr and the Organization disputed the Carrier's computation of his TPA. (The Organization correctly notes in its Post-Hearing Brief that it also disputes the date of commencement of Barr's protective period, and that this is an issue to be resolved separately between the parties; see Ex. TD-6E, ATDA Initial Submission).

The Carrier computed Barr's TPA in the following manner:

(1) During the 12-month period immediately prior to his displacement on June 18, 1988, Barr's average monthly earnings were $3,338.94 and average hours were 183.67 (for calculation purposes throughout, all hours are expressed in straight time; thus 8 hours of overtime would be expressed as 12 straight-time hours). This worked out to average hourly earnings of $18.18 per hour for the 12-month period. ($3,338.94 divided by 183.67 = $18.18).

(2) During the 8-month period immediately prior to the commencement of training for the consolidation, i.e., the period from June 1, 1987 to January 31, 1988, Barr's average earnings were $2,896.49 per month and average hours were 174. This resulted in a difference in average hours of 9.97 (183.67 - 174 = 9.67).

(3) The 9.67 difference in monthly hours was then multiplied by the previously calculated hourly rate of $18.18, yielding a figure of $175.80 (9.67 X $18.18 = $175.80).

(4) The $175.80 was then deducted from $3,338.94 in arriving at the TPA of $3,163.14.

The Organization contends that $3,338.94 is the correct amount for purposes of Section 5(a). The Carrier contends that $175.80 of the amount represents transaction-related overtime and should be excluded.

C. OTHER PROCEEDINGS

As the Barr claim and a number of other individual claims remained pending in an uncertain status on the property, the Organization filed a complaint with the ICC on October 31, 1989 alleging that the Carrier had not properly computed "average monthly compensation" amounts for employees affected by the Jacksonville transaction under the ICC's New York Dock conditions.

In a decision dated June 25, 1990 (Finance Docket No. 28905, Sub - No. 24), the ICC declined to take jurisdiction, stating that "We have been reluctant to intrude into the field of claims resolution, an area that has traditionally been deferred to arbitrators...", and concluded,"We agree with CSX that this dispute should be submitted to arbitration under Article I, Section 11 of New York Dock. Consistent with Lace Curtain, the Arbitrator can address this question in the first instance. The appellate remedy before us ensures consistency with New York Dock."

The ICC subsequently denied the Organization's petition to

reopen and reconsider in an order dated November 9, 1990.

In American Train Dispatchers Association v. Interstate Commerce Commission, 949 F. 2d 413 (D.C. Cir. 1991), the U.S. Court of Appeals denied the Organization's petition for review of the ICC's order, holding:

> We conclude that the Union seeks judicial review of a nonfinal order of the ICC, which we have no jurisdiction to grant. After an Arbitrator decides this dispute in the first instance, the Union may seek ICC review of the Arbitrator's decision...If the Union petitions for review of any final order that the agency may then issue, it may be heard at that time on the merits of its claim that the ICC improperly remitted it to arbitration. (414,415)

During the pendency of the proceedings before the U.S. Court of Appeals, the Organization by letter of April 3, 1991 notified the Carrier that it was referring "our dispute as to whether CSXT has correctly computed the 'average monthly compensation'" to an Arbitration Committee under Article I, Section 11 of New York Dock, and on June 18, 1991 requested the National Mediation Board to appoint a neutral member. Following appointment of the neutral member on August 6, 1991, the proceedings of this Arbitration Committee were held in abeyance until the judicial proceedings were completed.

IV. JURISDICTIONAL AND PROCEDURAL ISSUES

Numerous procedural and jurisdictional issues were raised by both parties in the Pre-Hearing Briefs, several of which were

resolved at an initial Executive Session of the Committee.

The most important procedural agreement reached was to allow the claim of Barr to be resolved by the Committee, thus clearing the way to use that claim as a vehicle for resolving the fundamental dispute between the parties.

Although the Carrier has insisted on several of its procedural and jurisdictional objections in its Post-Hearing Brief, most of these have become either moot or unnecessary to resolve in light of the procedural agreement reached.

This leaves the question of whether the Carrier is correct that the Organization is barred from pursuing this claim by the doctrine of Laches.

Although the claim has a lengthy history and the Carrier asserts that the Organization has been "forum-shopping" in this matter, the Committee would observe that the Organization has the right to attempt to advance the interests and secure the rights of its members through all legitimate avenues. It has vigorously pursued its legal and quasi-legal remedies at every stage of this dispute, and the consequent time delays cannot be said to fall within the ambit of the traditional doctrine of Laches.

We therefore find that there are no jurisdictional or procedural obstacles to moving forward to a resolution of this dispute.

V. POSITIONS OF THE PARTIES

A. THE ORGANIZATION'S POSITION

The Organization argues that Article I, Section 5(a) requires the Carrier to include total compensation and total time paid for in the 12-months period immediately preceding the date of an employee's displacement.

The Organization asserts that the Carrier used an 8-month test period which was well outside of the 12-month period immediately prior to the displacement of Barr and most other Train Dispatchers. It made no attempt to identify overtime specifically performed in connection with the instant transaction, but rather assumed that any overtime beyond that during the 8-month period was for the transaction. The use of the earlier 8-month period effectively deprived Barr of most of the overtime and premium earnings which accrued in the 12-months period prior to his displacement.

The terms of Article I, Section 5(a) are specific. Total compensation during the pre-displacement 12-month period is to be used. Such a rule may result in inequities; for example, an employee may be ill during part of the period, or there may be an economic recession. On the other hand, in anticipation of a coordination, a carrier may curtail hiring with the result of considerable overtime. But the rule is pragmatic and arbitrary, and avoids numerous disputes as to the fairness of an individual's average monthly compensation.

The virtue of such certainty and even-handedness was

recognized by Arbitration Board No. 284 (Arbitrator Francis Robertson; Brotherhood of Ry. & Airline Clerks/Western Md. Ry. Co., 9/9/64), and the Committee should be guided by that decision in the instant case.

Finally, the Organization argues, Train Dispatchers are required to perform overtime by virtue of the existing Agreement. There is no voluntary "windfall" for Train Dispatchers, unlike other rail carrier employees in other crafts. Accordingly, even if overtime work was to an extent performed because of the transaction, such was performed in the ordinary contract administration of Train Dispatcher duties.

B. THE CARRIER'S POSITION

The Carrier points out first that it has not relied on a "test period" other than the 12-month period preceding implementation of the transaction. The only reason that a period of time prior to the "test period" was reviewed was for the purpose of comparison to determine whether the actual "test period" contained extraordinary transaction-related service. The comparison period could have been any period of time so long as it was of sufficient length and did not incorporate any transaction-related activities.

In the specific claim in dispute here, the Carrier has shown that Barr's increased earnings were directly related to implementation of the transaction. Barr admitted this himself since he predicated his contentions on his extraordinary and

extended service as a Train Dispatcher associated with implementation of the transaction.

The issue of whether "average monthly compensation" must be adjusted to reflect transaction-related overtime and other extraordinary payments has been settled for years. The Committee has been furnished with numerous Awards by Arbitrators from a long line of precedent in support of its position.

These Awards reflect the common-sense rationale that earnings which would not have accrued to the employee, in the absence of the Carrier's implementation of the transaction, would constitute a "windfall" multiplied by the number of years in the employee's protective period.

The Carrier therefore asks the Committee to deny the claim of Barr and reaffirm the long-settled practice in the railroad industry that transaction-related overtime and other extraordinary payments must be excluded when computing "average monthly compensation" under New York Dock.

VI. DISCUSSION

A. HISTORY OF THE COMPUTATION PROVISION

We turn first to a review of the history of employee

protective arrangements in the railroad industry, and in particular the computation provision for displaced employees.

In the early 1930's the railroad industry, with a workforce then of approximately 1.6 million employees, began a long process of mergers, coordinations of facilities, abandonments, service discontinuances, and technological and organizational changes which, as the history of this dispute discloses, has not only continued into the present time but has to a degree accelerated with the introduction of technological leaps such as the Carrier's centralized computer-assisted train dispatching facility in Jacksonville. As a result of these and other factors, the workforce in the industry has gradually declined to a level well under 300,000.

On May 21, 1936 the initial framework for protective arrangements for employees adversely affected by these changes was put in place by means of a collective bargaining agreement between 85% of the nation's carriers and 20 of the 21 railroad labor organizations, subsequently referred to as the Washington Job Protection Agreement (hereinafter "WJPA"). The WJPA provided certain protections for employees who lost their jobs or were otherwise adversely affected in their employment as a result of a "coordination".

Among the protections provided was a displacement allowance for an employee who was retained in service but who, because of the coordination, was placed "in a worse position with respect to compensation and rules governing working conditions than he

occupied at the time of such coordination" (WJPA, Section 6(a)). The method for computing the displacement allowance is found in Section 6(c) of WJPA, and, as pertinent to our purposes, is essentially identical to the language found in Article I, Section 5(a) of the ICC's current New York Dock conditions.

Section 6(c) of WJPA reads in pertinent part as follows:

> (c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for...

Following the agreement reached on WJPA, the ICC held that it was empowered to prescribe "just and reasonable" conditions for the protection of employees in merger cases (233 I.C.C. 21). This authority was upheld by the Supreme Court in U.S. v. Lowden, 308 U.S. 225(1939).

The Transportation Act of 1940 (54 Stat. 906) added Section 5(2)(f) to the Interstate Commerce Act (now recodified and previously cited in this Opinion as 49 U.S.C. s.11347), mandating employee protection in rail mergers and consolidations requiring ICC approval. The protective arrangements could be devised by agreement of the parties to these transactions and frequently were; otherwise the ICC was required to prescribe them.

A review of the major protective provisions prescribed by the ICC and imposed on the parties over the years pursuant to this statutory authority demonstrates that, while various alterations

were made to the entire package of employee protective arrangements provided under WJPA, the specific provision concerning the computing of displacement allowances remained essentially unchanged (See, for example, the Oklahoma Conditions, 257 I.C.C. 177(1944); the New Orleans Conditions, 267 I.C.C. 763(1948), 282 I.C.C. 271(1952); the Southern Central of Georgia Conditions, 317 I.C.C. 557(1962), 317 I.C.C. 729(1963), and 331 I.C.C. 151(1967)).

Section 405(c) of the Rail Passenger Service Act of 1970 (45 U.S.C. s.565) mandated protective conditions for employees affected by the establishment of AMTRAK. These conditions were devised by the Secretary of Labor and imposed as Appendix C-1 on each AMTRAK train discontinuance contract with carriers; hence they were called the Appendix C-1 Conditions. While differing in some respects from previously-noted ICC-prescribed conditions, the specific provision we are concerned with was included essentially unchanged.

In 1976, in the legislation establishing Conrail, the Railroad Revitalization and Regulatory Reform Act of 1976 (90 Stat. 62), the Interstate Commerce Act was amended so as to in effect require the ICC to prescribe a new set of protective conditions which included the Appendix C-1 Conditions. This led directly to the ICC's adoption of the New York Dock conditions in 1979 and the previously-cited Article I, Section 5(a).

In a decision upholding the ICC's new conditions, New York Dock Ry. v. U.S., 609 F. 2d 83(2d Cir. 1979), the Court, after noting that WJPA "generally is conceded to be the blueprint for all subsequent job protection arrangements" (p.86), summarized the

ICC's action as follows:

> Briefly, the ICC, in formulating the "New York Dock conditions" selected the most favorable of the labor protective provisions contained in both the "New Orleans conditions" (as clarified in Southern Control II) and the Appendix C-1 conditions. (p.91)

Thus, in the journey from WJPA in 1936 to the proceedings before this Committee, the language found in Article I, Section 5(a) of New York Dock concerning the computation of displacement allowances has stayed essentially the same.

We turn then to a review of previous decisions of Arbitrators construing this language over the years.

B. DECISIONS BY ARBITRATORS

The term "total compensation", first appearing in Section 6(c) of WJPA, has inherent ambiguities, and has never been addressed during the many legislative and administrative developments previously discussed. Clarification of its meaning with respect to numerous issues has thus been left to Arbitrators on a case-by-case basis.

The Award of Arbitration Board No. 284 (Arbitrator Francis Robertson; Brotherhood of Ry. & Airline Clerks/Western Md. Ry. Co., 9/9/64) has been cited by the Organization in support of its contention that the term should be interpreted literally. That Award, which construed the ICC's Oklahoma Conditions, held as follows:

To determine what amount of compensation would be protected it is clear that the Commission adopted a pragmatic and arbitrary formula. A formula which it must be presumed to have recognized would result in inequities at times against the employee and at times against the Carrier. For example, during the twelve months immediately preceding displacement an affected employee might have experienced a long period of illness and the amount of his 'protected' compensation would be substantially affected by operation of the formula. On the other hand, perhaps in anticipation of an abandonment, the Carrier may have curtailed its hirings with the result that considerable amounts of overtime would be worked during the test period. We cannot believe that the Commission was blind to these factors.

While this Award is readily distinguishable on the facts from the present case, some other early Awards by Arbitrators did interpret the language literally, resulting in a number of contradictory Awards on the issue.

The WJPA Section 13 Disputes Committee, however, in Docket No. 62 and Docket No. 137, did not apply the literal interpretation, holding in Docket No. 137 that:

In computing test period averages, it is proper to exclude overtime earnings in excess of average overtime directly attributable to increased pre-coordination work opportunities caused by the impending coordination.

These cases were discussed by Arbitrator Irwin Lieberman in a 1982 Award construing an Implementing Agreement under WJPA (ATDA/Baltimore & Ohio RR Co., 5/6/82). Arbitrator Lieberman first distinguished the Award of Arbitration Board No. 284:

An examination of Arbitration Board No. 284's decision with respect to a related issue indicates significant differences in the factual background. In that case, in which the Board affirmed the Organization's position, it is clear that the Claimant worked on other assignments which flowed from his status prior to displacement. Thus, his earnings during the test period were attributable to his employment status in the primary job prior to his displacement. There is no indication that the earnings which were excluded were as a direct result of the abandonment of the operation itself. Thus, the circumstances involved in that case are distinct and different from those involved herein and do not

provide an applicable precedent for the resolution of this dispute.

He then continued:

The Board notes that in the Section 13 Committee's Docket No. 137, the same principle was upheld as indicated in Docket No. 62. The Board in Docket No. 137 reaffirmed the principles it had enunciated in the earlier decision. The Board stated in the second case that it was sound to test adverse affect in part by comparing test period average earnings with post coordination actual earnings and to treat a deficit as presumptively the result of a coordination. The Board went on in that case to point out that the Agreement, with respect to the coordination, was designed to protect employees against reduction of their normal earnings...[Original Emphasis]

While recognizing the Organization's argument with respect to the literal and clear meaning of the words involved in the Agreement, the Board must note that this same language has been interpreted consistently following the two Section 13 Awards referred to heretofore. The Board is not persuaded that the Section 13 Committee reasoning should be overturned.

Thus, the Board must conclude that there is no basis for perpetuating the abnormal and truly windfall overtime earnings which the three Claimants accrued during the six month period immediately preceding the coordination for a five year period. Such a perpetuation of windfall earnings would be contrary to the intent of the Washington Job Protection Agreement philosophy and the entire purpose for protection of earnings as this Board views it.

In a more recent case directly construing the New York Dock conditions (Transportation Communications Union/Missouri Pacific RR, 3/1/88), Arbitrator John LaRocco held as follows:

While test period average earnings cannot be computed solely with straight time earnings, the term "total compensation" in protective arrangements like the New York Dock Conditions has evolved over the years into a meaning slightly at variance with the literal language. As the Section 13 Disputes Committee ruled, excessive overtime earnings directly attributable to the imminent coordination are outside the ambit of total compensation. The exception is narrow. The Carrier bears the heavy burden of proving that the overtime was extraordinary and linked directly to the impending implementation of the transaction. Regular overtime, recurring overtime or casual overtime attached to any assignment is properly included within the test period average earnings.

Arbitrator LaRocco went on to explain the rationale for the exclusion:

The narrow exception, which excludes only one type of overtime, is designed to prevent employees from profiting from the transaction. Excessive overtime earnings arising directly from the transaction would not have otherwise accrued to the employee if the Carrier did not implement the transaction. In such instances, the employee would obtain a windfall multiplied by the number of years in his protective period. Whether any overtime which an employee earns during this test period should be included or excluded from the Section 5(a) formula must be decided on a case by case basis using the guidelines discussed above.

The Committee also notes recent decisions in accord construing a National Agreement between the parties (LaRocco; ATDA/Burlington Northern RR Co., 1/9/87), and the Appendix C-1 Conditions (LaRocco; Transportation Communications Union/Burlington Northern RR Co., 12/17/90).

The Organization cited only one recent Award which departed from this line of authority, a case involving the Appendix C-1 Conditions (Arbitrator John Willits; International Brotherhood of Electrical Workers/Burlington Northern RR Co., 10/10/91). Arbitrator Willits found the language in question to be "straight forward language" which "must be given great weight and precludes subsequent alteration through the Arbitration process." He concluded:

> In spite of existence of some contradictory awards which exclude certain overtime from the term "total compensation", this Committee is guided by the principle enunciated in Eg., United Paperworkers International Union v. Misco, Inc. 484 U.S. 29, 38 (1987), in which it was held that an arbitrator cannot "ignore the plain language of the contract'.
>
> On the totality of the entire record, we are compelled to make an Award in favor of the Organization. The Committee is bound to apply the literal language, with no exceptions, of Appendix C-1, Article 5(a) of the National Rail Passenger Service Act of 1970 (P.L. 91-518, as amended by Section 7-A, 1972 - P.L. 92-316. [SIC]

This Award, which essentially dismisses out of hand all previous arbitral decisions on the subject, appears to be an

aberration and the Committee gives it little weight.

It can thus fairly be stated that the preponderance of decisions by Arbitrators requires that transaction-related overtime should be excluded from the computation.

VII. FINDINGS AND CONCLUSIONS

After a review of the extensive record developed in this case, including the proceedings before the ICC and the U.S. Court of Appeals, and having reviewed the history of the computation provision and decisions by Arbitrators construing it, the Committee finds that the Carrier correctly adjusted Barr's "average monthly compensation" to exclude extraordinary overtime earnings attributable to the Jacksonville transaction, and that the claim of Barr must therefore be denied.

While we have carefully considered the Organization's contention that a literal reading of Article I, Section 5(a) would result in certainty, even-handedness, and the avoidance of numerous disputes, we are persuaded that the underlying rationale followed by most Arbitrators who have ruled on this issue is a sound one, i.e., that the purpose of employee protective provisions is to protect an employee's normal earnings, but not to present an opportunity to obtain a windfall for the entire protective period.

In the specific case of Barr, he admitted that he worked seven

days per week for several months as a direct result of other dispatchers being in training or having been transferred to Jacksonville, making his earnings for that period unrepresentative of his normal earnings. Had the Jacksonville transaction not occurred, he may have earned regular, recurring or casual overtime but, as demonstrated by a review of the comparison period properly used by the Carrier, not this amount of extraordinary overtime.

Having examined the long history which led to the adoption of the New York Dock conditions, we are persuaded that to reflect this extraordinary overtime in a displacement allowance for a 6-year protective period would be fundamentally inconsistent with the basic protective purposes of the Conditions. Whether he volunteered or was required to perform this overtime work has no bearing on the question of properly determining what his normal earnings were for protective purposes.

The Committee thus concludes that there is no reason to depart from the great weight of arbitral authority on the issue presented, and the claim must accordingly be denied.

AWARD

The claim is denied.

George J. Nixon, Jr.
Organization Member
See attached dissent.

Brenton C. Massie
Carrier Member

Hugh G. Duffy
Chairman and Neutral Member

Dated: August 31, 1992