NEW YORK DOCK

PARTIES TO DISPUTE: CSX Transportation, Inc.
and
Brotherhood of Railway Carmen

ISSUES PRESENTED:

Is a "dismissed employee" obligated under New York Dock conditions to accept employment at another location in order to retain his protective status?

If the answer to Question No. 1 is in the affirmative, may a "dismissed employee" who is subsequently required to accept employment at another location elect a separation allowance in lieu of transferring?

OPINION OF BOARD:

The relevant facts of this case are not in dispute. Claimants J.C. Harrison and T.R. McKinnon were employed as Carmen by CSX Transportation, Inc.

On September 29, 1989, the Carrier served notice of the intent to sell, lease and grant trackage rights totalling 224.19 miles to the Wilmington Terminal Railroad. The implementing agreement covering this transaction was signed October 2, 1990. Effective the close of shift on November 20, 1990, Carman Harrison's position was abolished in Macon, Georgia.

On November 12, 1990, the Carrier served notice of the intent to sell, lease and grant trackage rights totalling 77.4 miles to Gulf & Ohio Railway, Inc. The implementing agreement covering this transaction was signed November 11, 1990. Effective the close of shift on February 14, 1991, Carman McKinnon's position was abolished in Albany, Georgia.

Claimants Harrison and McKinnon have received dismissal

allowances under the New York Dock since their positions were abolished.

During the negotiations which resulted in the signing of the aforementioned implementing agreements, a dispute arose as to whether Claimants could be required to relocate to positions in their craft which required a change in residence. Rather than delay the transactions, it was agreed that Carrier would not arbitrarily attempt to relocate Claimants until the issue could be resolved at arbitration.

By letter dated January 14, 1993, Carrier notified the Organization that it intended to arbitrate the right to relocate Claimants to vacancies that existed in Atlanta, Georgia.

The Organization argues that Carrier's actions violate Section (d) of New York Dock. Specifically, it maintains that a dismissed employee does not have to accept a comparable position which requires a change of residence. According to the Organization, Atlanta is ninety (90) miles from Macon and one hundred and fifty (150) miles from Albany. It submits that these distances would require a change in the Claimants' residences.

In addition, the Organization argues that Rule 23 (f) of the Agreement has nothing to do with eligibility for New York Dock protective benefits. It maintains that Rule 23 (f) only gives the furloughed employee the rights to transfer to another point if he or she makes application for a transfer under the 3100 form, nor are they required to do so. The Organization maintains that Claimants have not made application for a transfer. As such, it

contends, Rule 23 (f) does not apply, under these facts.

Further, the Organization submits that the vacancies in Atlanta are not permanent jobs. It argues that there are ninety eight (98) positions for one hundred and eight (108) employees. As such, the Organization insists that the vacancies cannot be perceived as permanent positions.

In all, the Organization submits that Claimants not be directed to relocate to Atlanta, Georgia. It further requests that the Carrier be directed to continue the payment of New York Dock protective benefits to Claimants.

As to Question No. 2, the Organization argues that Claimants are entitled to the choice of a separation allowance in lieu of transferring, if they are required to transfer. It insists that it would be inequitable and unfair to claim that such election period has now expired. This, the Organization asserts, was the reason for the parties' Agreement to delay transferring the Claimants, pending arbitration.

Carrier, on the other hand, argues that a "dismissed employee" is obligated, under Sections 1 (c) and 6 (d) of New York Dock to accept employment at another location in order to retain his protective status. Those Sections state as follows:

> 1. (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.
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> 6. (d) The dismissal allowance shall cease prior to the

expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

This language, Carrier submits, provides that a dismissal allowance shall cease in the event of an employee's failure to return to service after being notified in accordance with the Agreement. As such, Carrier insists that Claimants' refusal to accept the positions at Atlanta would terminate their dismissal allowances.

In addition, Carrier submits that Rules 23 (f) and 15 (f) of the Schedule Agreement are relevant in this dispute. Those Rules are as follows:

Rule 23 (f): **When furloughed men are needed at other points they will upon application be given preference to transfer, with privilege of returning to home station when forces are increased at home station, such transfer to be made without expense to the company, seniority to govern. Form to be used is attached hereto and identified as Appendix C.**

* * * *

Rule 15 (f): **Acceptance of work at other shop points or at the same point where more than one roster is maintained between the time of layoff and being called back into service at home seniority point, will not impair an employee's seniority standing. If an employee makes the transfer permanent he will be dated as a new man from the day he started to work at the new seniority point of employment.**

Carrier maintains that Rule 23 (f) provides that when furloughed employees are needed at other points, those making application will be given preferential rights, in seniority order,

to transfer to those locations. It submits that a need did exist at Atlanta for the Claimants. While Carrier acknowledges that Rule 23 (f) does not make it mandatory for an employee to submit an application for a position, New York Dock clearly places an obligation on an employee receiving a "dismissal allowance" to return to service when notified that there is a position available for him.

As such, Carrier contends that an employee failing to make application for a position available to him under Rule 23 (f) is not protecting his rights as a New York Dock covered employee. Under the facts of this case, it insists, Claimants have the obligation under New York Dock to take available work at another location.

Further, Carrier points out that in imposing New York Dock conditions, the ICC recognized that an employee may have to change his residence as a result of a transaction. Such is the reason for the moving expenses contained in Section 9 and the loss of home benefits found in Section 12 of the New York Dock.

The Carrier also disputes the Organization's contention that the Carmen positions at Atlanta were not permanent. It submits that ten (10) Carmen are out of service - one is retired on disability and others are not expected to return to service. As such, Carrier maintains that the positions in question were intended to be permanent.

Finally, Carrier urges that Question No. 2 must be decided in the negative. It asserts that Claimants, at the time of the

hearing, had been in dismissed status and receiving dismissal allowances for two (2) years or more - McKinnon for twenty four (24) months and Harrison for twenty seven (27) months. According to Carrier, "it would be grossly unfair...and contrary to clear provisions of New York Dock for them now to be given the option of electing separation allowances while there is work in their craft available for them" (Carrier's Brief at page 18).

Question No. 1 refers to a "dismissed employee's" obligation under New York Dock conditions to accept employment at another location in order to retain his protective status.

Section 1 (c) of Article I of New York Dock clearly places an obligation on an employee receiving a "dismissal allowance" to return to service when notified that a position is available. Failure to do so results in the expiration of the employee's dismissal allowance. On this there is no dispute.

However, at issue here are vacancies that have arisen in another location, in Atlanta, Georgia. This location would require a change in residence for Claimants.

The Organization submits that Claimants are not obligated to change their residences and accept the Carmen vacancies in Atlanta. Carrier, on the other hand, maintains that Claimants are obligated to accept these vacancies, even though a change in residence would be required.

After a review of the record evidence, this Board is convinced that Question No. 1 must be answered in the affirmative. This is so for several reasons.

First, the whole premise underlying the definition of "dismissed employee" under Section 1 (c) is that he or she, as a result of a transaction, is "deprived of employment". Here, both Claimants have seniority with which they can exercise to positions at Atlanta, Georgia. While it is true that Rule 23 (f) does not require an employee to make application for such vacancy, by failing to do so it is the employee's discretion and not the results of a transaction, that deprived the employee of railroad employment.

In this regard, our reasoning is consistent with the decision in OSL III Arb. Comm., BMWE v. C&NW, (Referee Kasher) dated September 27, 1982. We agree with that Board's reasoning that "we are hard-pressed to conclude that an employee who had seniority, which he/she is able to exercise, can be considered "deprived of employment".

Second, we agree that the ICC, in imposing New York Dock conditions, recognized that an employee might have to change residences due to a transaction. Section 9's moving expenses demonstrates such a contemplation. We note that both Claimants were notified that they were eligible for relocation benefits if they accepted employment at Atlanta.

Third, the Organization raised an argument that the Claimants need not relocate since the vacancies at Atlanta are not permanent. However, the Organization did not meet its burden of establishing that the vacancies at Atlanta were not permanent. In fact, the record evidence establishes just the contrary.

Moreover, even if the Organization was able to establish that the available positions were temporary - which is not the case here - the fact remains that this would not provide a basis for the Claimants refusing to make application for the positions while retaining protective benefits. New York Dock contains no limitation restricting seniority exercises to permanent vacancies. See, also Special Board of Adjustment No. 929 and Issue No. 3 of Special Arbitration Board, BRAC v. Chessie (August 29, 1984, Arbitrator Scheinman).

For all of the foregoing, we conclude that the answer to Question No. 1 is in the affirmative.

The second question presented is whether a dismissed employee who is required to accept employment at another location may elect separation in lieu of transferring.

Under Article I, Section 7 of New York Dock, a dismissed employee may elect, within seven (7) days of dismissal, whether to resign and accept a lump sum payment.

It is true that the Claimants have been receiving dismissal allowances for over two (2) years. Normally, to now provide them the option of electing a separation allowance would be grossly unfair.

However, the fact remains that there was great confusion as to whether the Claimants had to apply to Atlanta or forfeit their protective benefits. Without knowing the real choices they faced, it was impossible for them to make an informed judgment as contemplated by New York Dock. As a result of this Award, there

is no longer any confusion. Claimants, in order to retain protective benefits, must exercise their seniority to the fullest extent in order to retain protective benefits.

Also, the parties made an agreement regarding the circumstances surrounding this case, pending arbitration. That is, so as to not delay the transactions, Carrier agreed not to transfer the Claimants until this matter was resolved through arbitration of whether Claimants must accept employment at another location in order to retain their protective status. To now suggest that the Claimants' attempt to receive a separation allowance is untimely is completely inconsistent with the circumstances surrounding that "freeze agreement".

Accordingly, the answer to Question No. 2 is in the affirmative. Claimants may, within seven (7) days of notice of this Award, elect a separation allowance in lieu of transferring.

AWARD OF ARBITRATION COMMITTEE

1. Question No. 1 is answered in the affirmative.

2. Question No. 2 is answered in the affirmative.

I Dissent - see attached

Gerald Gray
Organization Member

Neil Grissom
Carrier Member

Martin F. Scheinman, Esq., Neutral Member

7-12-93