ARBITRATION PROCEEDING

Pursuant To

Article 1, Section 11 of
NEW YORK DOCK CONDITIONS

Parties to the Dispute	TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION vs. CSX TRANSPORTATION, INC. (former Chesapeake and Ohio Railway)

ARBITRATION COMMITTEE

R.E. Dennis - Neutral Member
C.H. Brockett - Labor Member
R.P. Beyers - Carrier Member

Questions submitted to the Committee by the Labor Organization:

Question No. 1

Did Carrier violate the New York Dock Labor Protective Conditions when it used the provisions of the 5-Party Agreement to return dismissed clerical employees to positions for which they do not stand for recall in accordance with the working agreement?

Question No. 2

Did Carrier violate proper procedures under the New York Dock Labor Protective Conditions when it offered brakemen positions to dismissed clerical employees without first ascertaining if they were physically and mentally qualified for such positions?

Question No. 3

Did Carrier violate the New York Dock Labor Protective Conditions when it disqualified Claimants from brakemen positions offered as comparable employment that they had already accepted and refused to allow New York Dock benefits?

Claimants

Patricia Lee
Carol Lowe
Debbie Lusco
Robin Riley
Dixie Ross
Cheryl White

Questions submitted to the Committee by the Carrier:

Question No. 1

Were Clerical employees P.A. Lee, D.C. Ross, C.D. White, D.J. Lusco, R.C. Riley and C.A. Lowe obligated under the New York Dock to accept a clerical vacancy at Jacksonville, Florida to which their seniority entitled them under the 5-Party Agreement or forfeit their protective status?

Question No. 2

Part "A" - Is the position of brakeman "comparable employment" under Section 6 of the New York Dock labor conditions for clerical employees?

Part "B" - If the answer to Part "A" of this Question No. 2 is in the affirmative did clerical employees P.A. Lee, D.C. Ross, C.D. White, D.J. Lusco, R.C. Riley and C.A. Lowe also forfeit their New York Dock protective benefits when they failed to accept comparable employment as a brakemen at Baltimore, Maryland and/or because their actions were tantamount to a rejection of such comparable employment?

OPINION OF THE COMMITTEE

BACKGROUND OF THE CASE

Claimants Lee, Ross, White, Lusco, Riley, and Lowe are "dismissed employees," as defined in New York Dock protection conditions. Claimants were clerical employees and held seniority on the Chesapeake and Ohio Railroad Seniority Roster No. 3 in Baltimore, Maryland. From the time the employees were placed in dismissed status under New York Dock (five in September 1991 and one in October 1991) up to February 1993, they were utilized by Carrier in Baltimore on an as-needed basis.

On February 4, 1993, Carrier notified Claimants that they were required to exercise their seniority to assume vacant clerical positions in Jacksonville, Florida, on Seacoast Line Seniority District No. 7 or lose their New York Dock protection. On February 16, 1993, Carrier sent a second letter to Claimants, indicating that there were Trainmen positions available in Baltimore. Claimants were required to accept jobs in Jacksonville or apply for jobs as Trainmen in Baltimore or forfeit their New York Dock benefits. Claimants' New York Dock protective benefits were terminated on March 10, 1993.

At issue in this dispute is whether Carrier had the right under New York Dock to adopt this position.

CONTRACT LANGUAGE AND NEW YORK DOCK PROVISIONS PERTINENT TO THIS ARBITRATION

New York Dock
Article I, Section 6(d)

> (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.

Five Party Agreement
Between
CSX Transportation, Inc.
Formerly Seaboard Coastline, B&O, L&N, and
C&O Railway Lines
and
TCU
Effective 1/1/91

In order to give Clerical employees working for CSX Transportation, Inc. (Formerly Seaboard Coastline Railroad (SCL), formerly Baltimore and Ohio Railroad (B&O), formerly Chesapeake and Ohio Railway (C&O) and formerly Louisville and Nashville Railroad (L&N) an opportunity to fill new positions and vacancies not filled by Clerical employees on the road on which advertised, it is agreed:

1. That new positions and vacancies not filled by Clerical employees on the road on which originally advertised may be advertised for twenty (20) days to all regularly assigned and furloughed Clerical employees on the roads signatory to this Agreement not included in the original advertisement.

2. That all applications will be considered in seniority order, based upon relative seniority among each other on any of the involved roads, and will only be considered valid if a furloughed protected employee is available at the applicant's location to fill the potential vacancy caused by the applicant.

3. That successful applicants will be notified and assignment made in line with the provisions of the appropriate General Agreement Rule.

4. That when a regularly assigned employee, including a guaranteed extra board employee, is

assigned to a position pursuant to this Memorandum Agreement, his position will be advertised and filled in accordance with the General Agreement Rules on the road on which the vacancy exists.

5. That employees transferring from one road to another under the provisions of this Memorandum Agreement by bidding in the positions of the vacancies in accordance with Sections 1, 2 and 3 of this Memorandum Agreement will have their former seniority transferred onto the new road. Such employees must report for duty within ten calendar days from date assigned or forfeit their right to the position.

6. That employees transferring from one road to another under the provisions of this Memorandum Agreement will forfeit all seniority on any former seniority district effective with the date he establishes seniority on his new seniority district.

7. That for the purposes of annual vacations, sick leave, pass privileges, protection under the applicable protective Agreements, etc., the service of the employee on his home road will be considered the same as having been performed continuously on the road to which transferred. Employees transferring under the provisions of this Memorandum Agreement having accumulated sick days in excess of the cap, if any, in existence on the road to which transferred, will be required to sell back such excess days the following January.

8. That employees transferring from one road to another under the provisions of this Memorandum Agreement will be covered by the General Agreement of the road to which transferred effective the date of transfer.

9. That employees who are transferred to a position on another road under the terms of this Agreement, will be granted a "transfer allowance" of ten thousand dollars ($10,000.00). In

addition thereto, said employees will be reimbursed for the expense of moving their household and other personal effects to the new location, provided they are incurred within one year after assignment and claimed within ninety (90) days after such expenses are incurred. If a transferred employee accumulates two (2) additional years of seniority on the road to which transferred and is still on the road to which transferred, seniority permitting, after two (2) years, he will qualify for a "supplemental transfer allowance" of five thousand dollars ($5,000.00).

10. That this Agreement may be revised or cancelled on thirty (30) days' written notice, either party, individually, to the other, and in the event of notice to cancel, this Agreement shall be considered null and void without further action of the part of anyone. Regardless of such cancellation, the provisions of this Memorandum Agreement will continue to apply to those employees who transferred to and established seniority on another road under the provisions of this Memorandum Agreement prior to the cancellation date.

POSITIONS OF THE PARTIES
ON QUESTION NO. 1

Carrier

Position of Carrier on Question No. I:

Were clerical employees P.A. Lee, D.C. Ross, C.D. White, D.J. Lusco, R.C. Riley and C.A. Lowe obligated under the New York Dock to accept a clerical vacancy at Jacksonville, Florida to which their seniority entitled them under the 5-Party Agreement or forfeit their protective status?

Carrier contends that Claimants, as dismissed employees, had an obligation under Article I, Section 6(d), of New York Dock provisions to accept vacant clerical positions in Jacksonville, Florida, to which their seniority entitled them under the 5-Party Agreement or forfeit their protective status.

In support of its position, Carrier presented a number of arguments, chief among them were the following:

(1) Article I, Section 6(d), of New York Dock states that a dismissed employee is obligated to accept a vacant position to which he or she is entitled by seniority anywhere it is available on the railroad. The 5-Party Agreement made jobs available to Claimants in Jacksonville, Florida. Claimants were properly notified of these available positions. When they refused to apply for them, they forfeited their right to protective benefits.

(2) The Organization's argument that the 5-Party Agreement does not obligate C&O employees to accept available positions on other roads covered by the Agreement is correct. The Organization, however, is incorrect in its analysis of how the 5-Party Agreement applies to employees receiving a dismissal allowance under New York Dock. New York Dock places an obligation on such employees to return

to service when there is a position available to them.. There have been and are at the present time Clerk jobs available in Jacksonville at the Crew Management Center. The six listed Claimants are obligated to take those available positions or lose their protective status.

(3) There have been numerous arbitration awards on the same or similar issues in the past that support Carrier's position. They include (a) OSL III Arbitration Committee, BMWE vs C&NW, R.R. Kasher, Arbitrator, September 27, 1992; (b) NYD Arbitration Committee RYA vs C&O & SCL, I.M. Lieberman, Arbitrator, March 6, 1981; (c) SBA 570 Awards, No. 135, 360, and 237; and (d) New York Dock, CSX vs. BRC, M.F. Scheinman, Esq., Arbitrator, July 12, 1993.

When one reviews the above cited awards, it becomes clear that an employee must exercise his or her seniority to the fullest extent in order to retain protective status, even if a change of residence is required.

Given the argument as presented, Question No. 1 should be answered in the affirmative.

The Organization

Position of the Organization on Question No. I:

> Did Carrier violate the New York Dock Labor Protective Conditions when it used the provisions of the 5-Party Agreement to return dismissed clerical employees to positions for which they do not stand for recall in accordance with the working agreement?

The Organization contends that Carrier violated Claimants' New York Dock Protective Conditions when it terminated Claimants' benefits for failing to apply for vacant positions under the terms of the 5-Party Agreement. In support of its position, the Organization presented numerous arguments. The chief arguments briefly stated are listed below:

(1) The 5-Party Agreement on which the Carrier bases its action is not a part of the Clerical Agreement under which Claimants receive New York Dock protection. It is a separate agreement that was entered into to assist Clerical employees who chose to move from their present positions to available positions on other roads (when people from those roads were not available to fill the position), if they elected to relocate. There is no obligation under current clerical agreements or the 5-Party Agreement for employees to request a transfer to another road.

(2) The pertinent language of New York Dock requires a protected employee to exercise his or her seniority rights under existing agreements, rules, and practices. New York Dock cannot be construed to mean that a protected employee must voluntarily seek out a position off his or her seniority district or be forced to take a position off his or her seniority district.

(3) The 5-Party Agreement was signed by both parties concerned because it was a benefit to all. It gave Carrier an opportunity to advertize for skilled people across seniority districts and road limits and it gave employees an opportunity to obtain jobs at other locations, if they so chose. It was never intended by either party that people protected under New York Dock would be required to seek positions under the 5-Party Agreement in order to preserve their protective benefits.

(4) Carrier and the Organization do not have an agreement that allows for the transfer of NYD protected employees to locations where they have no seniority. New York Dock does not require that Claimants seek employment in Jacksonville and Carrier has no contract authority to force the moves.

(5) Carrier has never taken the position in the past that it now adopts in this instance. The past practice on the C&O has been that NYD dismissed employees were only obligated to displace to positions available in the normal exercise of seniority. That is what Claimants in this case have done.

(6) The Organization has also presented numerous arbitration awards supporting its position. It specifically refers to Case No. 1, Award No. 1, TCU & UP, J.B. LaRocco, Neutral Member, June 26, 1990.

The Organization argues, for the reasons stated above, that the Committee should answer question Number 1 in the affirmative.

Findings of the Committee
on Question No. 1

While the questions presented by Carrier and by the Organization read differently, the essence of their respective inquiries are the same. The question to be answered by this Committee is simply whether Claimants are required under New York Dock provisions to accept jobs in the Jacksonville Crew Management Center or forfeit their protective benefits.

After a review of the extensive material presented on the issue by the parties, it is the opinion of the Arbitration Panel that Carrier has attempted to extend the reach of New York Dock requirements beyond the confines of the working Agreement covering Claimants in Seniority District 3 in Baltimore. Claimants, as dismissed employees, exercised their seniority under the working Agreement, as required by Article 1, Section 5, of New York Dock. There is no language in New York Dock in the working Agreement or in the 5-Party Agreement that requires more.

Arbitrator LaRocco in a New York Dock case involving TCU and the Union Pacific in June 1990 (cited above by the Organization) clearly set forth the arbitrable principle controlling in this case: "This Committee is powerless to add items triggering a cessation of an employee's New York Dock protective status not found in the New York Dock Conditions. Once an employee elected New York Dock coverage, the protective period for the employee could only cease upon the occurrence of one of the events listed in Sections 5(c) or 6(d) of New York Dock conditions." Those comments apply equally as well to this case. This Committee has also carefully reviewed the arbitration Awards submitted by Carrier in support of its position on this issue. We do not

find them to be on point with the instant case. We consequently view them as having no precedent in this instance. This Committee cannot conclude that the terms of the 5-Party Agreement can be construed to be a part of the working Agreement or that they can be imposed on Claimants. Claimants have no obligation to elect any benefits under the 5-Party Agreement. They can if they choose to do so, but are not required to.

If the parties had intended that New York Dock protected people could be forced to positions available under the 5-Party Agreement, they would have most certainly so stated in the Agreement. The 5-Party Agreement is a voluntary Agreement that can be cancelled by either side on thirty-days' notice. No section of the working Agreement can be cancelled in such a manner. Claimants have no real seniority rights under the 5-Party Agreement and this Committee cannot construe this dispute as if they had.

AWARD

The answer to the Carrier's Question No. 1 is no.

The answer to the Organization's Question No. 1 is yes.

POSITIONS OF THE PARTIES ON QUESTION NO. 2

The Carrier

Position of the Carrier on Question No. 2, "A" and "B":

QUESTION NO. 2

> Part "A" - Is the position of brakeman "comparable employment" under Section 6 of the New York Dock labor conditions for clerical employees?
>
> Part "B" - If the answer to Part "A" of this Question No. 2 is in the affirmative did clerical employees P.A. Lee, D.C. Ross, C.D. White, D.J. Lusco, R.C. Riley and C.A. Lowe also forfeit their New York Dock protective benefits when they failed to accept comparable employment as a brakemen at Baltimore, Maryland and/or because their actions were tantamount to a rejection of such comparable employment?

In regard to Question No. 2, part "A", Carrier contends that the position of Brakeman is "comparable employment" under Section 6 of the New York Dock labor conditions for clerical employees. It also contends that those Claimants who failed to accept Brakemen positions in Baltimore and those that accepted with conditions rejected such comparable employment. Consequentially, it is appropriate that their New York Dock benefits be forfeited. In support of its

position, it presented a number of arguments. Carrier pointed for its major support on this issue to arbitrable authority. It cited numerous arbitration awards that have concluded that train service work can be construed as comparable employment (that is, clerical service workers could perform train service). Carrier consequently requests that this Committee answer its Question No. 2, "A", in the affirmative.

Position of Carrier on its Question No. 2, "B":

Carrier contends that it properly offered Claimants train service jobs in Baltimore. Because of their refusal to accept the jobs and in some cases even appear for testing as ordered, they rejected comparable employment and forfeited their protective benefits. Carrier further argues that, in the final analysis, Claimants in this case did not want to accept any employment offered to them. They wanted to stay home and receive their salaries for not working. Carrier requests that the Committee answer its Question No. 2, "B", in the affirmative.

The Organization

Position of the Organization on its Questions No. 2 and 3:

Question No. 2

Did Carrier violate proper procedures under the New York Dock Labor Protective Conditions when it offered brakemen positions to dismissed clerical employees without first ascertaining if they were physically and mentally qualified for such positions?

Question No. 3

Did Carrier violate the New York Dock Labor Protective Conditions when it disqualified Claimants from brakemen positions offered as comparable employment that they had already accepted and refused to allow New York Dock benefits?

Claimants

Patricia Lee
Carol Lowe
Debbie Lusco
Robin Riley
Dixie Ross
Cheryl White

The Organization does not categorically reject the notion that a Brakeman's position could be considered a comparable position by many classes of employees covered by TCU Agreements. It does, however, reject the notion that a Brakeman position would be a comparable position, as defined

under New York Dock, for any of the six named Claimants. If one reviews the physical, mental, and skill levels of the six Claimants, it is clear that not one of them would ever be hired by Carrier as a Brakeman. The offer of Brakeman positions to these Claimants was not a good faith offer, but a play to force these employees to make a decision that would cost them their protective benefits. The Organization asks the Committee to answer Question 2 and 3 in the affirmative.

FINDINGS OF THE COMMITTEE
ON CARRIER'S QUESTIONS NO. 2 "A" and "B"
and
THE ORGANIZATION'S QUESTIONS 2 and 3

As was the case in Question No. 1, the parties have each presented separate questions to the Committee in regard to the comparable employment issue. What they reduce to, however, is whether the offer of a Brakeman position to any or all of the Claimants could be construed as a comparable position that they are required to accept or forfeit their New York Dock protection.

There is no question that, under certain conditions, a Brakeman's position can legitimately be considered a comparable position for a Clerk. That point has been made in numerous arbitration awards on the subject. Both parties have presented awards that essentially make this point. Practically, however, one should not be allowed to obtain a position that he or she can not properly cover and employees should not be forced into positions that they are not capable of performing.

Claimants in this instance were by no stretch of the imagination candidates for Brakemen positions. There is no evidence whatsoever in the record to support the notion that any of the Claimants could have performed the duties of a Brakeman. There is, however, considerable evidence to the contrary.

The methods used by Claimants to resist the Brakemen positions offer to them and then, on advice of Counsel, to accept the positions under protest could have been anticipated by anyone familiar with the situation. The Committee does not find Claimants' actions in this instance to be a refusal to accept Brakemen positions, but rather an appropriate response on their part, given the uncertainty that existed.

This Committee is of the opinion that if any of the six Claimants were forced into a Brakeman's position given the knowledge of railroading they appear to possess and their physical and mental make-up, an unimaginable amount of mischief could result. This Committee can not, based on the record before it, believe that a responsible Carrier would make any of these Claimants Brakemen. This Committee is compelled to answer in the following manner:

Carrier's Question No. 2, "A", is answered in the affirmative on a general basis, but answered in the negative in regard to the six named Claimants.

Carrier's Question No. 2, "B", is answered in the negative.

The Organization's Question No. 2 is answered in the affirmative.

The Organization's Question No. 3 is answered in the affirmative.

R.E. Dennis, Neutral Member

C.H. Brockett, Employee Member

R.P. Beyers, Carrier Member

August 2, 1993