

ARBITRATION COMMITTEE

In the Matter of the)	
Arbitration between:)	Pursuant to Article I,
)	Section 11 of the New York
TRANSPORTATION-COMMUNICATIONS)	Dock Conditions
INTERNATIONAL UNION,)	
)	
Organization,)	
)	
and)	
)	
CSX TRANSPORTATION, INC.)	
(Formerly CHESAPEAKE & OHIO)	
RAILWAY and SEABOARD COAST)	
LINE RAILROAD),)	
)	
)	OPINION AND AWARD
Carrier.)	
)	

Hearing Date: March 1, 1993
Hearing Location: Jacksonville, Florida
Date of Award: May 27, 1993

JOHN B. LaROCCO
ARBITRATOR
928 Second Street, Suite 300
Sacramento, California 95814-2278

MEMBERS OF THE BOARD

Employees' Member: C. H. Brockett
Carrier's Member: N. B. Grissom
Neutral Member: John B. LaRocco

STATEMENT OF THE CLAIM

1. Carrier violated the Agreement when it improperly deducted \$504.53 from the "New York Dock" protection given to Clerk J. P. Donehoo, ID No. 173904.
2. Because of the above violation, Carrier shall now be required to give Clerk J. P. Donehoo the \$504.53 which was improperly deducted from his "New York Dock" guarantee for the month of June, 1991.

OPINION OF THE COMMITTEE

I. INTRODUCTION

Under the auspices of Section 4 of the New York Dock Conditions, the Organization and the Carrier entered into a Memorandum Agreement, dated September 6, 1989, providing for the transfer of crew dispatching work from various points on the former Chesapeake and Ohio Railway (C&O) to the centralized Crew Management Center (CMC) at Jacksonville, Florida.¹ Employees affected by the transaction were afforded the protective benefits set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979), pursuant to the relevant enabling statute U.S.C. § 11343, 11347.

This Arbitration Committee is duly constituted by an Agreement dated October 19, 1992 in accord with Section 11 of the New York Dock Conditions. At the hearing held on March 1, 1993, the Committee heard extensive argument from both parties. In addition, the Organization objected to Carrier Exhibits Q, R, and S. The Committee, over the Organization's objection, entered those three exhibits into the record but gave the Organization the right to file a post-hearing brief which the Neutral Member of the Committee received on or about April 15, 1993. To permit the filing of the Organization's post-hearing brief, the parties waived the time limit, for issuing this decision, contained in Paragraph Ten of the October 19, 1992 Agreement.

¹ Inasmuch as all sections pertinent to this dispute appear in Article I of the New York Dock Conditions, the Committee will only cite the particular section number.

II. BACKGROUND AND SUMMARY OF THE FACTS

In the late 1980s, the Carrier consolidated its various crew calling offices into a single, centralized crew dispatching facility, the CMC, at Jacksonville. Pursuant to the September 6, 1989 Memorandum Agreement implementing a portion of the consolidation, Claimant transferred from Russell, Kentucky, a former C&O point, to the CMC at Jacksonville, a former Seaboard Coast Line (SCL) point.

Claimant began working a crew caller job at the CMC on December 13, 1989, and he commensurately transferred his seniority from C&O West Virginia District Six to SCL District No. 26. The Carrier calculated Claimant's New York Dock monthly guarantee at \$3,908.03 (now \$4,025.27). According to the Carrier, Claimant's test period average earnings were predicated on a substantial amount of overtime compensation.

Before Claimant's transfer to the CMC, the Carrier and the Organization entered into a March 17, 1988 Letter Agreement establishing a new and separate SCL seniority district (No. 26) for CMC employees. The Letter Agreement provided that, absent a later agreement to extend the arrangement, SCL District 26 would be dovetailed into SCL District No. 7 on April 1, 1991. Therefore, Claimant could not exercise his seniority to a position outside the CMC until after the expiration of the three year period specified in the March 17, 1988 Letter Agreement.

On May 1, 1991, Claimant voluntarily bid on and was awarded a Moncrief General Clerk position on SCL District 7 with a daily rate of \$106.57, which was lower than the daily rate of his former CMC crew dispatching position. The parties stipulated that, after Claimant departed the CMC, Schedule Rule 18 prevented the Carrier from calling him for available overtime

service in the CMC. Subsequent to May 1, 1991, Claimant held sufficient seniority to bid on and be awarded vacant CMC crew dispatching positions.²

For June, 1991 (and the ensuing months), the Carrier offset Claimant's New York Dock monthly displacement allowance with not only the rate of the higher rated CMC position available to Claimant but also overtime compensation Claimant ostensibly would have earned had he remained in the CMC.³ The Organization does not contest the propriety of the Carrier offsetting the higher rated position against Claimant's guarantee but challenges the Carrier's right to deduct CMC overtime compensation from his displacement allowance. The Carrier asserts that it only deducts (from Claimant's guarantee) overtime compensation earned by a CMC employee junior to Claimant.

Resolution of this dispute is governed by Section 5(b) of the New York Dock Conditions which reads:

If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

While Claimant readily accepts the fact that he is treated as occupying the higher rated CMC position, the Carrier improperly offset not only the difference in pay rates between Claimant's former CMC position and his Moncrief Yard position but also overtime compensation

² The Carrier claims that there are currently fifteen guaranteed extra board jobs available to Claimant in the CMC.

³ Purportedly, Claimant would have been called for overtime service which, if he worked, would have given him earnings of \$504.53 during June, 1991.

earned by incumbents on several different positions in the CMC. Certainly, the Carrier can hold overtime opportunities Claimant declined at Moncrief Yard against his displacement allowance but it cannot deduct CMC overtime opportunities because Claimant did not stand to be called for overtime service in the CMC. It was impossible for him to protect overtime in the CMC. Thus, the overtime compensation was not available to Claimant in the normal exercise of his seniority.

Alternatively, even if the Carrier could properly offset overtime compensation against Claimant's New York Dock protective guarantee, the overtime must be regular or recurring rather than casual. CMC overtime work is not regularly assigned to any particular CMC position but the work is instead assigned to and performed by employees in accord with Schedule Rule 18. Therefore, the Carrier cannot speculatively hold CMC casual overtime against Claimant's guarantee because such overtime does not adhere to any particular CMC position.

Finally, the Organization submits that the Carrier's interpretation of Section 5(b) of the New York Dock Conditions is absurd. Under the Carrier's theory, it could deduct overtime compensation from Claimant's ~~guarantee~~ even if he occupied a position with a pay rate greater than the rate of an available CMC vacancy even though the amount of overtime is speculative and fluctuates from month to month. The Organization suspects that the Carrier is not only trying to reduce its liability for protective benefits but it also is attempting to bar employees from freely exercising their seniority beyond the CMC facility. In other words, the Carrier wants to restrict employees from leaving the CMC.

B. The Carrier's Position

Claimant voluntarily exercised his seniority to a Moncrief Yard clerical position and he knew that his voluntary seniority move (out of the CMC) greatly reduced his opportunities to

perform overtime work. Since the Organization has not challenged the Carrier's right to hold a CMC position against Claimant's monthly New York Dock guarantee, the Carrier is impliedly able to offset both the basic rate of pay of the CMC position and any additional compensation Claimant would have earned had he stayed in the CMC. Claimant, by his own actions, made himself ineligible for overtime compensation in the CMC. Section 5(b) of the New York Dock Conditions refers to "compensation" as well as "rate of pay" which contemplates an offset for earnings, such as overtime compensation, over and above the basic pay of the position.

Claimant did not fully utilize his seniority. Thus, the Carrier can treat him as occupying a higher rated CMC job and hold all earnings of the position against his guarantee. Since Claimant's test period average earnings contained a substantial amount of overtime, it is logical that overtime compensation Claimant could have earned can be used to offset his guarantee during his protective period. Last, Section 5(b) of the New York Dock Conditions does not draw any distinction between regular overtime and the so-called, casual overtime.

IV. DISCUSSION

When an employee protected by the New York Dock Conditions voluntarily takes a position rated lower than a position which he would be entitled to occupy through a normal exercise of his seniority, the Carrier may properly offset the earnings of the higher rated position against the protected employee's displacement allowance. Brotherhood of Railway and Airline Clerks v. Chesapeake and Ohio Railway/Seaboard Coast Line Railroad, NYD § 11 Arb. (Lieberman; 1981). Section 5(b) of the New York Dock Conditions expressly states that the offset includes the "...rate of pay and compensation..." which exceeds "...those of..." the position which the employee voluntarily elects to retain. [Emphasis added.] The express language of Section 5(b) demonstrates that the offset against a protected employee's displacement

allowance includes not only straight time earnings determined by the basic rate of pay but also other compensation. If the offset consisted solely of straight time earnings, the words "and compensation" would not appear after "rate of pay" in Section 5(b). Indeed, a protected employee's test period average earnings and test period average hours are calculated based on earnings, including overtime pay, in excess of straight time hourly wages and so, it is consistent to offset the employee's displacement allowance with overtime earnings.

Therefore, the offset against Claimant's New York Dock guarantee is not restricted to the higher rate of pay of the CMC position but includes other forms of compensation which Claimant would have earned had he exercised his seniority to a CMC position.

Whether or not Claimant is eligible to be called for CMC overtime is irrelevant because he placed himself in a position where he was ineligible to work either straight time or overtime in the CMC when, if he fully exercised his seniority, he would be in a higher rated position and eligible for the overtime compensation which the higher rated position carries. The Organization acknowledges that the straight time compensation can offset Claimant's displacement allowance. Since Section 5(b) does not distinguish between straight time earnings and other types of compensation, overtime compensation should be treated no differently from straight time compensation.

However, the additional compensation beyond the straight time rate of pay must be compensation which is attached to the particular position that Claimant would have occupied if Claimant exercised his seniority to a CMC position. The Carrier cannot simply offset any and all CMC overtime against Claimant's displacement allowance because Section 5(b) refers to a "...position which carries..." compensation greater than Claimant's Moncrief Yard position.

[Emphasis added.] To deduct overtime compensation from Claimant's displacement allowance, the Carrier must show that the overtime opportunity accrued to the position being held against Claimant's guarantee and that Claimant would have been called for the overtime service per Schedule Rule 18. Stated differently, the Carrier must show that the overtime was worked by the desk or position that Claimant would have occupied in the CMC if he had exercised his seniority to the highest rated position available to him. This Committee remands this case to the property to ascertain if the Carrier correctly computed the overtime Claimant could have worked if he occupied the highest rated CMC position to which his seniority entitles him.⁴ We also note that the Carrier may not count duplicative overtime, that is, overtime Claimant declines at Moncrief Yard and CMC overtime scheduled for the same day.

Our decision is harmonious with the purpose of the New York Dock Protective Conditions. New York Dock protective benefits are designed to insulate an employee from being placed in a worse position with respect to his compensation and working conditions. Thus, an employee cannot willingly and knowingly exercise his seniority to a position which produces lower aggregate earnings than a higher rated position to which he could exercise his seniority.

In conclusion, assuming that the Carrier properly held a CMC position available to Claimant in the exercise of his seniority against him and the position carried substantial overtime opportunities, Claimant is not entitled to any additional displacement allowance for June, 1991.

⁴ The record is vague concerning exactly how the Carrier calculated the overtime compensation it deducted from Claimant's displacement allowance.

The Committee notes that, subsequent to June, 1991, Claimant exercised his seniority to a Train Director position subject to the Hours of Service Law. According to the Organization, the Train Director position carries a pay rate of eight dollars more per day than any position available in the CMC. The Carrier, the Organization charges, continues to hold the CMC position against Claimant because it generates more total earnings, when overtime compensation is included, than the higher rated Train Director position.

The Carrier contends that Claimant has again restricted his ability to occupy a position producing the maximum compensation since he has taken a position on which he can earn very little overtime due to the work limitations imposed by the Hours of Service Law.

This Committee cannot pass on the propriety of the Carrier continuing to hold CMC overtime earnings against Claimant after he assumed the Train Director position inasmuch as the Statement of the Claim and the October 19, 1992 Arbitration Agreement limits this Committee's authority to passing judgment on the appropriateness of the Carrier's action in June, 1991 when Claimant occupied the Moncrief Yard Clerk position. Thus, nothing in this Opinion shall be construed to mean that Carrier acted either properly or improperly when it offset CMC overtime against Claimant's guarantee after he took the Train Director position.⁵

AWARD AND ORDER

The Committee renders the following Award and Order:

1. The claim is denied provided the Carrier properly calculated the overtime compensation it deducted from Claimant's guarantee in accord with our Opinion; and,

⁵ The result may or may not be the same. However, two salient facts are different. First, the Train Director is a higher rated position than available positions in the CMC. Second, the Hours of Service Law may influence the calculation of "compensation" within the meaning of Section 5(b). This Committee finds not only that these questions are beyond its jurisdiction but also the parties have not had an opportunity to fully research and brief these peculiar facts.

2. The claim is remanded to the property to determine if the Carrier properly calculated the overtime compensation offset in accord with this Opinion; and,
3. The Committee retains jurisdiction should the parties disagree over whether any specific overtime should be offset from Claimant's guarantee; and,
4. If the Carrier deducted overtime compensation from Claimant's guarantee which is not consistent with our Opinion, the Carrier shall make Claimant whole; and,
5. The parties shall comply with this Award within sixty days of the date stated below.

Dated: May 27, 1993

C. H. Brockett

C. H. Brockett
Employees' Member

N. B. Gussom

N. B. Gussom
Carrier's Member

John B. LaRocco

John B. LaRocco
Neutral Member