In the Matter of Arbitration, between:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
System Council No. 6

and

CSX TRANSPORTATION, INC.

Decision of Arbitration Committee
pursuant to Article I, Section 11
of the
New York Conditions (350 I.C.C. 60 (1979))
Imposed by the Interstate Commerce Commission
in
Finance Docket No. 28905 (Sub No. 1)

John C. Fletcher, Chairman & Neutral Member

C. A. Meredith, Employee Member
IBEW, System Council No. 6

R. D. Hiel, Carrier Member
CSX Transportation, Inc.

October 3, 1990

INTRODUCTION:

On January 26, 1987, Carrier served notice on the Organization, pursuant to the provisions of the September 25, 1964, National Agreement of its intent to transfer certain mechanical work from its Louisville, Kentucky shops to Corbin, Kentucky. Five months later, to the day, an Implementing Agreement was reached, which provided that New York Dock Conditions, (New York Dock Railway Control - Brooklyn Eastern

District Terminal, 360 I.C.C. 60 (1979)), would be applicable t the transaction.

Mr. C. T. McKeehan, the herein Claimant, retained seniority in the Electrician's Craft at Louisville, Kentucky. However, at the time of the transaction he was working as a non-agreement Supervisor at Carrier's Evansville, Indiana Locomotive Shop. In late 1987, Carrier downsized its non-agreement Supervisory work force. McKeehan, because of his relatively low ranking in this group, was released from his Supervisory position. On November 12, 1987, he exercised his Electrician's Craft seniority.

McKeehan was allowed to place himself at Corbin. He was advised that his Test Period Average, for protective pay purposes, would be computed in the following manner:

> In order to compute what your protected rate would have been if you had been an electrician at South Louisville at the time of the transfer of work to Corbin, we have requested the Test Period Averages computed at the time of the coordination for the contract employees immediately above and below you on the seniority roster. As soon as that information is available, we will take an average of those two Test Period Averages and that amount will be used as your guarantee rate. This will not be equivalent to your supervisory rate of pay.

The Organization filed a protest to this method of computation of McKeehan's Test Period. It asked that his Test Period be determined as provided in the second paragraph of Section 5(a) of the Conditions.

It is the parties disagreement on the method of establishing Mr. McKeehan's Test Period Average which is the dispute before this Arbitration.

QUESTION AT ISSUE:

The Organization fashions the Question at Issue in this matter to be:

> (1) Is Electrician C. T. McKeehan entitled to a Test Period Average under New York Dock derived from his earnings received in the twelve (12) months in which he performed services immediately preceding the date of his displacement?
>
> (2) As an employee protected under New York Dock, what is the amount of the Test Period Average for Electrician C. T. McKeehan?

While Carrier fashions it slightly different:

> Was the Test Period Average of Corbin, Kentucky, Electrician C. T. McKeehan properly arrived at by the Carrier's method of computation?

There are no procedural or jurisdictional impediments to an award on these questions.

THE POSITION OF THE PARTIES:

The Position of the Organization:

The Organization contends that the only proper method of computing Mr. McKeehan's Test Period Average is to literally follow the method set forth in Section 5 (a) of the Conditions. In doing so, it argues, Carrier must consider Claimant's earnings received in the twelve months in which he performed Carrier service immediately preceding the Date of his displacement, which must include his earnings as a non-agreement supervisor.

The Organization argues that Carrier's suggested method of establishing Claimant's Test Period Average, averaging the earnings of the individuals above and below McKeehan and averaging these results to determine his TPA is arbitrary and without basis under the Implementing Agreement or the Conditions.

In support of its position the Organization relies upc a number of Awards of various tribunals, but mainly it bottoms its case on New York Dock Arbitration, TCIU v. UP, Stallworth, Arbitrator, (February 28, 1989), which concluded 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 asks that this Arbitration establish Claimant's TPA at $3,475.00 per month, (his average monthly compensation as a supervisor), plus increases.

The Position of the Carrier:

Carrier contends that Claimant, (as a promoted employee returning to the Craft subsequent to the Coordination), derives entitlement to protective benefits from language within the Implementing Agreement which only conveys:

> ... whatever rights (he) may have had if (he) had been present at the time of the coordination.

The contemplates treating McKeehan as an Electrician and not as a non-agreement Supervisor when developing his TPA.

It argues that the way it developed McKeehan's TPA was consistent with prior arbitration Awards on the subject. Carrier cites a number of decisions on the subject, with particular emphasis on Award 433, SBA 605, Eischen, Referee, (May 21, 1984), stating:

> It is unreasonable to the point of absurdity to conclude that the official position worked, irrespective of compensation, should establish the protected rate which is the quid pro quo for continued (resumed) employability under the BRAC Agreement.

Carrier disputes that the award of Arbitrator Stallworth, relied on by IBEW, is appropriate because if it is followed non-agreement Supervisory employees returning to their

Craft would receive more than:

> ... whatever rights they may have had if they had been present at the time of the coordination.

It contends that the averaging method used in determining Claimant's TPA was equitable and proper in the circumstances present in this case.

DISCUSSION:

This case involves the correct method to be used in establishing Test Period Averages of an Electrician who performed no service within his Craft in the twelve month period immediately preceding his return to his Craft and subsequent inclusion within coverage of New York Dock protection. The issue is whether his TPA should be based on compensation earned in a non-agreement Supervisory position or if it should be based on an average derived from the earnings of the two individuals immediately above and below him on the seniority roster. (Carrier indicates that it has been unable to develop any earning data on Mckeehan as an Electrician because of the length of time he has been away from Craft and the unavailability of payroll records back that far.)

It is our opinion that Mr. McKeehan's TPA must be developed in the manner prescribed in Section 5 (a) of the Conditions. Support for any other method of development, no matter how equitable it may appear to some, simply cannot be found in the language of the Implementing Agreement or in the provisions of the Conditions. Moreover, as will be discussed in more detail below, prior arbitration authority supports the contentions of the Organization on this point and not those advanced by Carrier.

The language contained in Section 5(a) has been in place since 1979. And even before that similar, if not identical, language appeared in Section 6 of the May 1936, Washington Job Protection Agreement, which, by all accounts, was the precedent establishing forerunner for the I.C.C.'s earlier, Oklahoma, New Orleans and Southern-Central of Georgia, Employee

Protective Conditions, required to be imposed in abandonment and merger transactions by Section 5 (2) (f) of the Interstate Commerce Act. From time to time negotiators in drafting employe protective and implementing agreements have altered the formula established by WJPA Section 6 and/or sections of I.C.C. employee protective conditions, to suit their situations, but this was not done in the transaction under review here.

The fact that the parties to the Implementing Agreement did not, intentionally or unintentionally, see fit to alter, what others have termed "the straightforward language of Section 5(a)", as it concerns the establishment of Test Period Averages, must be given great weight and precludes subsequent alteration, on our part thru the Arbitration process, on the basis that one party now considers that a literal application of a TPA under the formula provided would be lacking in equity.

This Carrier and this Organization spent five months, from the date notice was given to the date the Implementing Agreement was signed, with the Louisville - Corbin transaction in an active negotiating status. While it is understood that in that period full time negotiations did not occur, it is clear that considerable thought, nevertheless, went into the process of drafting a suitable Implementing Agreement. The resulting product of these efforts is thoroughly detailed and contains no less than 23 side letters covering almost every imaginable subject and/or contingency. It is notable that while the negotiators saw fit to modify some provisions of New York Dock, the TPA development formula provided in Section 5 (a) was left unchanged.

IBEW Letter No. 13 to the Implementing Agreement clearly provides that non-agreement Supervisors who lose their jobs involuntarily may exercise seniority rights back into their Craft and be entitled to whatever rights they would have enjoyed if they had been present at the time the coordination occurred. When this provision was included within the Agreement it should have been apparent to all involved in the negotiations that such employees were receiving rates of pay greater than employees working exclusively within the Craft. The parties were, we are certain, also aware of the language of Section 5 (a) of NYD Conditions on development of TPA's.

However, they did not see fit to provide new and different language altering the TPA development formula in such circumstances. It would be an affront to the Arbitration process to do so for them now. Especially since we are not being asked to interpret intent of the parties or obviously ambiguous language, but, instead, are being asked to sidestep "straight forward language" because it is perceived as lacking equity.

Carrier contends that its development of Mckeehan's TPA is consistent with prior arbitration Awards on the subject. It stress adherence to the result of SBA 605, Award No. 433. We do not find Award No. 433 faulty or inappropriate in the circumstances present there. However, we have difficulty in accepting it as precedent in our case because of two critical factors.

First it should be observed that compensation guarantees in the February 7, 1965, Agreement are bifurcated. Regularly assigned employees are protected with regard to their normal rate of compensation as it existed on October 1, 1964, (plus increases). Other than regularly assigned employees are protected with a monthly displacement allowance, developed somewhat similarly to those under Section 5 (a) of NYD. However, the parties to the February 7, 1965, Agreement, the controlling instrument involved in Award No. 433, adopted several interpretative Questions and Answers which clearly expressed their intention to exclude certain non-Craft employment which may have occurred earlier. One question, for example was:

> Question No. 9: Can employment in more than one craft be counted in determining protected status?
>
> Answer to Question No. 9: Ordinarily no: however, in cases such as promotion of a telegrapher to train dispatcher, promotion of a clerk to yardmaster, etc., where the seniority in the craft from which promoted is retained, employment in the higher classificaiton will be counted.

If service in another craft would not ordinarily be credited under the February 7, 1965, Agreement, it would also seem that the earnings received in that craft would not be used

in development of TPA's. But in those instances where such other craft service was to be counted, the parties to the February 7, 1965, Agreement developed a computation procedure which met this contingency. Their solution is found in the Answer to Question No 1, reading in part:

> To the extent that an employe whose guarantee is governed by Section 2 of Article IV has compensated service in such other craft, such service will also be included in determining the base period average earnings and hours paid for. However, his base period average monthly earnings shall be computed by taking his average hourly earnings in the base period in the craft in which he is protected (adjusted to include subsequent general wage increases), multiplying by the total number of hours paid for in the base period in both crafts and dividing by 12.

It is not our purpose here to interpret the February 7, 1965 Agreement, but, it seems that the Answer to Question No. 1 established a formula where the hours worked in the other Craft are added to the hours worked in the protected employees Craft and both are used with the average hourly earnings from the Craft in which protected to develop a TPA. No such similar agreed to interpretation exists with respect to Section 5 (a) of New York Dock or the June 26, 1987, Implementing Agreement, perhaps because the Conditions and the Implementing Agreement do not specifically exclude Carrier earnings from sources outside an employees Craft, which appears to be the case, for the most part, under the February 7, 1965 Agreement.

Each of the other awards from SBA 605, submitted by Carrier as support for its contentions, have been carefully reviewed. They are determined not to be controlling because of the special interpretations placed on the February 7, 1965, Agreement, and there are no similar understandings in place for NYD and the Implementing Agreement, with regard to Section 5 (a), which we are aware of.

Carrier also has supplied Award 1, SBA 860, Seidenberg Referee, (November 20, 1976), dealing with a dispute over base period compensation and time paid for under the 1966 Penn-Centra Merger Protective Agreement. It is from the novel remedy generated in this Award that Carrier developed its peer averagin concept which it seeks to apply to Mckeehan's situation. Award 1, SBA 860 cannot stand as precedent here because language of th UTU Merger Protective Agreement, under review there, detailed which service would count and provided special considerations on periods while absent on leave for union business as well as time working as an official, supervisory or in a fully excepted position.

For example the UTU Penn-Central Merger Agreement developed train service employees test periods from:

> ... the individual's average monthly compensation for the last twelve months in which he performed service in train service, ...

A similar provisions is not present in the language of the Conditions being reviewed here.

Carrier has stressed that by using language reading:

> "... shall be entitled to whatever rights they may have had if they had been present at the time of the coordination."

in the Agreement and Side Letter 13, it is manifest that it was the parties intention to treat returning non-agreement Supervisors as if they had worked in the Craft in the 12 months preceding the coordination that they would only be protected at the level of compensation they would have received it they had worked in the Craft during that time.

Even if this argument were accepted in total as presented, which it is not, TPA's would still have to be developed in accordance with the procedures provided in the Conditions, which the parties did not modify. This procedure requires examination of the earnings and hours in the preceding 12 months and taking the "total compensation" received and divide

this number by the "total time paid for." This formula does not provide an exclusion of earnings received in higher rated service and it does not provide for an exclusion of earnings received in lower classes of service. The formula is arbitrary - providing for no exceptions of any type, and while some may argue that it is not equitable to protect a demoted Supervisor at his higher rate others may argue that a recently promoted Journeyman Mechanic is not treated equitably when lower rated helper or apprentice service would be counted. But, regardless of which perspective of equity and fairness is considered, the formula is there, and that is what must be followed, unless the parties saw fit to alter its language. A situation not present here.

However, if a general statement indicating that returning Supervisors are to be entitled to whatever rights they may have had if they had been present at the time of the transaction, was intended to provide a different formula for developing TPA's it would have been quite simple to include this formula within the text of the Agreement. This of course was not done. This omission forces a conclusion that returning Supervisors are entitled to have their TPA's computed as provided by the language of Section 5(a) as if they had been present at the time of the coordination. This computation includes "compensation earned" in the preceding 12 months.

Many of Carrier's arguments here are similar to those considered and rejected in New York Dock Arbitration TCIU v. UP. Stallworth, Arbitrator, (February 28, 1989). In that case the contentions of the parties were stated to be:

> The Carrier contends that for purposes of calculating a Claimant's test period earnings, the Claimants may not include compensation earned in non-agreement positions. The Organization argues, however, that the New Dock Conditions require the benefits to be based upon the total compensation during the preceding year including non-agreement earnings.
>
> The decision of the Arbitrator held:
>
> The Committee concludes that the literal language of these sections [Article 1, Sections 5(a) & 6(a)] should be applied, and that all of 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.

It is our view that this is a correct interpretation of the New York Dock Conditions. As such it will be applied to the matter under review here.

One additional point. TCIU v. UP, (supra), also stated that:

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

Carrier argues that in our case a "compelling reason" to use a different method of computing Claimant's TPA is that by protecting his non-contract rate of pay he would be receiving far more than whatever rights he may have had if he had been present at the time of the coordination.

This contention is found to be unpersuasive because, among other things, it operates from an assumption that it is "rate of pay" which is the factor being protected. "Rate of Pay" is not the element of protection; "compensation" is the term that is used and that is the element on which protection must be based.

Additionally, notwithstanding Carrier's contentions when this matter was being reviewed on the property and notwithstanding its arguments before this Arbitration, we have no persuasive showing that at the time the Implementing Agreement was under consideration and in negotiations the parties ever intended that Section 5 (a) ever be applied other than literally as written. Accordingly, Carrier has not shown a compelling reason why the straightforward language of Section 5(a) should not be applied to the development of Mckeehan's TPA.

Finally, it should be observed that Carrier insists that the Award in TCIU v. UP is in error. However, it does not cite a single other authority in which unaltered NYD Conditions are scrutinized and a different result is reached. As discussed above, each authority submitted by Carrier involved language which could fairly be interpreted to support the conclusion reached. These decisions, though, cannot be viewed as controlling in this matter because of the existence of significant language differences between the Agreements studied in those case and the Conditions under review here.

On the totality of the entire record we are compelled to make an Award in favor of the Organization.

A W A R D

The Question at Issue posed by Carrier is answered, No.

Question 1, posed by the Organization is answered:

Electrician C. T. McKeehan is entitled to have his Test Period Average under New York Dock Conditions include all earnings received in the twelve month period in which he performed service immediately preceding the date of his displacement, including earnings he received while working as a non-agreement Supervisor.

Question 2, posed by the Organization is answered:

Electrician C. T. McKeehan shall have his Test Period Average determined by dividing separately by 12 the total compensation received 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.

John C. FLETCHER, Arbitrator
Chairman and Neutral Member

C. A. Meredith, General Chairman
Employee Member

R. D. Hiel, Manager Labor Relations
Carrier Member

I dissent

Dated at Mt. Prospect, IL., this 3rd Day of October, 1990.