BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED
UNDER ARTICLE I, SECTION 11 OF THE
NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

PARTIES TO DISPUTE	TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION AND CSX TRANSPORTATION, INC.	DECISION

ORGANIZATION'S QUESTIONS AT ISSUE:

1. Did the Carrier violate Article 1, Section 5, of the New York Dock conditions when it failed to furnish Clerk R. W. Harris a test-period average as a result of a transaction which resulted in his being affected on January 13, 1993?

2. If the answer to the above is in the affirmative, shall Carrier be required to furnish Clerk Harris a test-period average commencing twelve months prior to January 13, 1993, and compensate him any displacement allowances to which he may be entitled commencing January 13, 1993, and each subsequent month for the duration of the New York Dock protection?

CARRIER'S QUESTION AT ISSUE:

Did Carrier violate Article 1, Section 5, of the New York Dock when it declined to furnish clerical employee R. W. Harris a second New York Dock test-period average when he was displaced again by the same transaction?

HISTORY OF DISPUTE:

On October 25, 1990 CSX Transportation, Inc. (Carrier or CSXT) pursuant to the authority granted by the Interstate Commerce Commission (ICC) in Finance Docket 28905 (Sub-No. 1) and related proceedings served notice under Article I, Section 4(a) of the

labor protective conditions set forth in New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)(NYD or New York Dock Conditions) upon the Transportation Communications International Union (TCU or Organization) of its intent to establish on or about April 1, 1991 a Centralized Customer Service Center (CCSC) at Jacksonville, Florida in connection with which:

> . . . the Carrier will transfer, consolidate, coordinate and/or otherwise mechanize various yard, agency and customer service functions performed by employees at (or under the jurisdiction of) the Transportation Service Centers (TSCs) shown on the Attachment to this notification, and in the Centralized Waybilling Center at Jacksonville, ...

The notice stated that the Carrier's actions would commence on or about April 1, 1991 and continue thereafter on a progressive basis. The notice also suggested that the parties meet ". . . for the purpose of arriving at the appropriate arrangements providing for the selection of forces from all employees involved on a basis accepted as appropriate for application in this particular case."

After several meetings the parties entered into a Memorandum Agreement on January 29, 1991 (Implementing Agreement) in satisfaction of their obligations under Article I, Section 4(a) of the New York Dock Conditions. The agreement provides for advance notice showing the positions to be abolished and reestablished at each location involved and the new positions to be established in the CCSC at Jacksonville.

By notice dated May 1, 1992 the Carrier announced plans to transfer certain clerical employees from Nashville, Tennessee to

the CCSC in Jacksonville, Florida. All positions at Nashville were scheduled for abolishment. All such positions were assigned specific dates for abolishment except three the abolishment of which required authority from the Tennessee Public Service Commission. Position 154 Assistant Agent was one of the three.

The abolishments which were the subject of the Carrier's May 1 notice became effective July 11, 1992, and all employees affected by such abolishments were certified for protection under the New York Dock Conditions as provided in Section 5 of the Implementing Agreement. Claimant, whose clerical position at Nashville was among those abolished was certified for protection.

Eventually the Carrier received the requisite authority from the Tennessee Public Service Commission to abolish the three positions at Nashville slated for abolishment in the Carrier's May 1, 1992 notice pending receipt of such authority. The positions were abolished on August 25, 1992.

By letter of September 4, 1992 Claimant was notified that he was entitled to protective conditions as a result of the transaction and further that he would be required to elect between New York Dock protection and other protection available to him under applicable agreements. The letter set forth a test period average under the New York Dock Conditions of $3,530 per month and 221.62 hours of service per month. On September 11, 1992 Claimant elected New York Dock protection, and he received a displacement allowance under Section 5(a) of the Conditions.

Subsequently, the Carrier reestablished clerical positions at Nashville and, as provided in the Implementing Agreement, Claimant placed himself upon one of those positions. Thereafter, Claimant bid on or was bumped to a succession of positions.

On January 13, 1993 Claimant was displaced from Position 0174-111. Claimant was in a chain of displacements resulting from the August 25, 1992 abolishment of Position 154 Assistant Agent at Nashville. Claimant then displaced to a guaranteed extra board position.

By letter of January 25, 1993 Claimant requested a revised statement from the Carrier as to his options under applicable protective agreements for the selection of protective benefits. The letter also asked the Carrier to refigure his New York Dock test period average. The Carrier responded by letter of January 27, 1993 denying Claimant's request on the ground that he already had made his election under the applicable transaction and was not entitled to further options.

The Organization appealed the Carrier's denial. The Carrier denied the appeal. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remained unresolved.

By letter of April 25, 1994 the Organization notified the Carrier that it was invoking the arbitration procedures of Article I, Section 11 of the New York Dock Conditions. By letter of April 29, 1994 the Carrier agreed to the establishment of an

Arbitration Committee as provided in Article I, Section 11(a). The parties selected the undersigned as Neutral Member of the Committee. The Committee held a hearing in this case on August 16, 1994 in Jacksonville, Florida where all parties were given the opportunity to present evidence and to engage in oral argument. Additionally, each party filed a written submission with the Committee. The period of time within which the Committee is to render its decision as provided in Section 11(c) was extended by the parties.

FINDINGS:

The Questions at Issue in this case require this Committee to determine whether an employee displaced by a transaction and receiving a displacement allowance under Article I, Section 5(a) of the New York Dock Conditions who is subsequently displaced again by the same transaction is entitled to a second election of benefits as provided in Article I, Section 3 of the New York Dock Conditions and a recomputation of his or her test period average (TPA) under Section 5(a). This appears to be a novel question.

The Organization maintains that nothing in the New York Dock Conditions or the Implementing Agreement restricts an adversely affected employee to a single election and TPA computation where, as here, the employee is adversely affected, i.e., displaced, a second time by the same transaction. The Organization emphasizes that the Implementing Agreement contemplates implementation of the

transaction in several stages which is precisely what happened to Claimant in the instant case when he was displaced on July 11, 1992 and again on January 13, 1993. The Organization argues that the second phase of the implementation of the transaction entitled Claimant to the same election of benefits and TPA computation he received after implementation of the first phase of the transaction.

The Organization argues further that in view of the multistaged implementation of the transaction contemplated by the Implementing Agreement, should the Carrier's position in this case prevail it could deny protective benefits to employees affected years later by consolidation of TSC operations at other locations into the CCSC at Jacksonville. Pointing to the fact that the three employees at Nashville holding the positions abolished on August 25, 1993 were afforded the election of benefits and TPA computation sought here by Claimant, the Organization maintains that Claimant is a victim of discriminatory treatment.

The Organization contends that should this Committee sustain the Carrrier's position in this case it would be rewriting the Implementing Agreement and the New York Dock Conditions as well as rendering them null and void. The Organization argues that the Carrier's action in this case also violates the New York Dock Conditions and the Implementing Agreement by failing to extend protection to Claimant for a full six years following January 13, 1993. The Organization urges that had Claimant become a dismissed

employee on or after January 13, 1993 the Carrier's position might deprive him of any benefits under NYD.

The Carrier maintains that the Organization's position in this case would lead to absurd and nonsensical results. The Carrier points out that when jobs are abolished at large terminals as a result of a transaction it is not unusual for junior employees to be displaced several times over a period of several months. The Carrier points out that inasmuch as it is the junior employees who experience the largest number of displacements, they would receive longer protective periods than senior employees.

The Carrier vigorously asserts that there is no language in NYD or the Implementing Agreement providing for more than one protective period per transaction. Had the framers of the language of NYD or the Implementing Agreement intended a contrary result, urges the Carrier, they would have so stated. The Carrier emphasizes that in the instant case Claimant's initial displacement occurred on July 11, 1992 following which Claimant was given an election of benefits and his TPA. The Carrier argues that no further election or computation of TPA is contemplated by the Implementing Agreement or the New York Dock Conditions.

In support of its position the Carrier has cited Award No. 3, Case No. 3, Oct. 4, 1993, of an Arbitration Committee established under Article I, Section 11 of the New York Dock Conditions involving the Carrier and the American Train Dispatchers Association (ATDA), with the undersigned as the Neutral Member. In

that case the Claimant's position was abolished shortly after November 23, 1988 as a result of the Carrier transferring dispatching work from throughout the system to Jacksonville, Florida. On December 6, 1988 the Claimant exercised his seniority to a position which at that time produced slightly less compensation than the abolished position but effective December 15, 1988 produced more compensation than the abolished position. On June 6, 1989 that position was abolished, and the Claimant transferred to another position producing a lower rate of pay. The Committee rejected the Organization's argument that the Claimant's protective period began on June 6, 1989 and held that it began on December 6, 1988.

We believe the ATDA case is analogous to the one now before us, and we find it highly persuasive. Applying the logic of that decision to the instant case, Claimant's protective period under the New York Dock Conditions began in July 1992 and not in January 1993. It follows that Claimant is not entitled to a recomputation of his TPA or to another election of benefits effective January 1993.

Award No. 66 of Public Law Board No. 3160, Sept. 20, 1982 (Dolnick, Neutral), cited by the Arbitration Committee in the ATDA case and by the Carrier in the instant case, also is instructive. On facts similar to those of the instant case that Board found that "[T]he employees 'test period' is determined by his initial eligibility for displacement allowance." That Board also rejected

the Organization's position, similar to the one taken by the Organization in this case, on the ground that it would result in ". . . more than one, if not several, 'test periods' from which the rate of displacement allowance is calculated." The logic of the award is compelling. In light of the rulings in Award No. 3 of the ATDA Arbitration Committee and Award No. 66 of PLB 3160 this Committee finds the Organization's arguments in this case unpersuasive. Additionally, the arbitral authorities relied upon by the Organization are inapposite.

The Organization cites the decision of the Section 13 Committee interpreting the Washington Job Protection Agreement in Docket No. 132 (Bernstein, Referee). However, a close reading of that decision reveals that it was predicated upon the fact that the Claimant was adversely by two separate transactions. Both parties in the instant case recognize that Claimant was affected by a single transaction, albeit in two phases. Similarly, in Award No. 4 of the ATDA Arbitration Committee Oct. 4, 1993, with the undersigned as Neutral Member, also cited by the Organization, the Claimant was affected by a second transaction which was the subject of a separate notice and implementing agreement.

In the final analysis we must conclude that the Carrier has the stronger position in this case.

AWARD

All Questions at Issue are answered in the negative.

William E. Fredenberger, Jr.
Chairman and Neutral Member

N. B. Grissom
Carrier Member

C. H. Brockett
Employee Member
"Written dissent to follow"

DATED: ~~12/05/94~~
December 7, 1994

DISSENT TO AWARD OF THE
SECTION 11 NEW YORK DOCK ARBITRATION COMMITTEE

With the merger of the C&O, B&O, L&N and SCL Railroad into CSX Transportation, pursuant to ICC approval and imposition of the New York Dock Protective Conditions, literally scores of "transactions" under Fiance Docket No. 28905 have taken place over the ensuing years. Through notice and negotiated Agreements under Article I, Section 4 of the NYD conditions this Organization and the Carrier have facilitated such coordinations and reorganizations under Implementing Agreement provisions. And, for the most part, disputes have been at a minimum.

As is the nature with every coordination and reorganization, some of the involved transactions have been limited in scope while others have been complex and far reaching. The matter considered by this Section 11 Committee, and the subject of the Arbitration Award, was of the latter. In view of the nature of the involved transaction: its scope, progressive method of implementation, and the very terms of the Implementing Agreement, the Committee has erred in its interpretative Award.

The decision of the Section 11 Committee found the Organization's referenced decisions of the Section 13 Committee under WJPA (Docket No. 132) and Award No. 4 of the ATDA Arbitration Committee of October 4, 1993, to be distinguishable from the matter under consideration in one aspect. That aspect, which the Committee considered controlling, was whether or not the Employe is affected by two separate and distinct transactions under two separate Implementing Agreements.

The Carrier's coordination and reorganization of the numerous Terminal Service Centers on line-of-road of the SCL, LN, B&O and (under a separate Implementing Agreement) the C&O railroads into one Centralized Customer Service Center was a project that involved two (2) distinct and separate Implementing Agreements and was progressively implemented over the course of three (3) years. Under the Committee's decision an Employe could be displaced in the very first upheaval and movement of a Terminal Service Center and, after a period of up to three (3) years, could again be "affected" by a latter coordination, but not extended another election of benefits. The fact that the Implementing Agreement provided for numerous TSC locations on the SCL, LN and B&O to be consolidated in different and distinct phases under which the Claimant was again displaced does not serve to extinguish or negate the conditions of the ICC approved merger and imposed protection.

Under the Committee's Award an Employe could be affected numerous times by progressive movements of work and employes under an Implementing Agreement and never again be offered an election of

benefits when subsequently affected by that transaction. The Committee seems to have based its decision on the usual windfall argument the Carrier recites in all matters concerning Employe protections and reduced its interpretation to a matter of equity. Therein, the Committee has lost sight of the clear language of New York Dock and the basic question of whether or not the individual was displaced or dismissed by that secondary movement. Once that basic question is answered in the affirmative the election of New York Dock should not be a matter of dispute or condition.

Although the Neutral Member of the Committee has found support in his prior decision in Award No. 3 of the ATDA Arbitration Committee, he has failed to distinguish that decision from Award No. 4 of ATDA v. CSX Section 11 Arbitration Committee. In Award No. 4 the Committee found that:

> "We believe that on the record before us the Organization has the superior argument that Claimant was affected within the meaning of Section 6(a) of the August 15, 1989 Implementing Agreement by Phase II of the transaction.[1] While it is true that Dispatcher Stalcup exercised his seniority pursuant to Article 5(c) of the applicable schedule agreement, the Carrier's October 19, 1989 notice clearly indicating that such action was anticipated to be at a result of the implementation of Phase II. If Phase II had not been implemented the dispatching duties from Columbus, Ohio would not have been placed on the AQ desk in the Corbin Division at Jacksonville and Dispatcher Stalcup would not have exercised his seniority to another position. Accordingly, Claimant was entitled to a new protective period beginning with his displacement on February 1, 1990.

The clear logic and parallel found in the decision in Award No. 4 to the issue at bar is inescapable. The Organization finds that decision to be on-all-fours with Claimant Harris' case and the current decision of this Committee, involving the same Carrier, merely establishes a conflicting decision.

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[1] Obviously Phase II was part of one transaction under which the New York Dock Protective Conditions were imposed. The fact that two Implementing Agreements were penned does not, in and of itself, grant entitlement to protection, the clear terms of the NYD conditions do that. In that Award the Neutral Member recognized that an Employe could be affected twice under the same transaction, but in this recent decision has added additional requirements on the Claimant. Requirements not to be found in NYD or the Implementing Agreement, suffice the Neutral would have Implementing Agreements prepared for each different and distinct location and seniority district to fulfill his requirements.

Further, the Committee had only to look to the subject Implementing Agreement (TCU Exhibit A to Employes' Submission) to ascertain Claimant Harris' entitlement to an election of benefits and the similarity of this dispute to that found in Award No. 4. The pertinent Sections read:

> "Section 4 (c) Within 30 days following each progressive implementation provided for in this agreement and resultant transfer of employes to the CSC in Jacksonville, the Carrier shall arrange to issue, a revised roster for SCL Seniority District No. 18 - Customer Service Center, and post such revised roster so as to be accessible to employes affected, with copy to the General Chairman. (underline added)
>
> "Section 5 (a) The employe protective benefits and conditions in so-called 'New York Dock' will be applied to this transaction.
>
> (b) Each employe entitled to the protective benefits and conditions referred to in Section 5(a) above and who is also otherwise eligible for protective benefits and conditions under other protective agreements or arrangements shall, within thirty (30) days from the date of entitlement be notified of his monetary protective entitlements under this agreement..."

Here it is evident that with each ensuing implementation an employe would become affected both in relative seniority standing and the position he held. Although we do not profess that the dovetailing of seniority would trigger the extension of benefits, the fact is that such an arrangement provides, by it very nature, circumstances whereby the individual may be affected at later stages as a direct result of the transaction.

Analogous to this particular situation is the Award of Public Law Board No. 3540, Case No. 43 (Scheinman, CSX v. TCU) in which entitlement to an election of New York Dock benefits was decided. In that case the Carrier argued that subsequent employe displacement was operative under the working agreement and that the prior transaction was not the cause of that affect. The Committee noted there can be future instances wherein the employe can become affected and that affect did not have to occur only in the first instance of implementation. The Committee held:

> "The Board is convinced that Claimant's displacement was not the result of a routine exercise of seniority. Rather, we are convinced that Claimant's bumping into a lower rated position was the result of a series of re-arrangements which developed out of the merged conditions and the original coordination.

"It is significant that Mr. Chapman's exercise of seniority occurred shortly after he was transferred as part of the coordination process. In addition, it appears to this Board that Carrier's issuance of Bulletin No. 39 was reasonably related to the need to make changes in the work week which were not apparent at the time of the original coordination. The term of a coordination includes that period after a coordination, and it involves those consequent, and sometimes unforeseen, changes which may be required. Thus, there existed a substantial link between the initial coordination and Claimant's displacement into a lower rated position.

"Moreover, Carrier has failed to prove that it was not the merger and coordination which caused Claimant Butler's displacement. The burden of proof in this case is on Carrier, as indicated in the Award of the Secretary of Labor of April 28, 1971. In that Award, Secretary of Labor Hodgson stated:

> 'The Railpax conditions simply require an employe to identify the transaction and the facts upon which he relies in his claim that he was affected by a transaction. The burden is then on the railroad to prove that factors other than "a" transaction affected the employe.'

"Given the factors, it is clear that Carrier violated the Agreement as alleged." (Award appended)

Numerous awards under New York Dock arbitration have held that an employe has certain obligations that project into his future relationship with a Carrier after initially being affected by a transaction. Those requirements recognize that an affected employe may find himself at some future date again affected by consequential circumstance. It is a contradiction in terms to accept the totality of the transaction giving rise to protection and to simultaneously dismiss the possibility of subsequent and relative instances that same transaction may have upon the employe. The bottom line put forth in this Committee's decision is that once affected there can be no other cause and effect that would entitle the employe to a subsequent protective period--once affected no further entitlement is required is this Committee's contribution to New York Dock application.

It is the Organization's position that the event that affected Claimant Harris was distanced in time and space from the initial event that provided him with an election of benefits. Pending approval of the Tennessee Public Service Commission the subsequent displacement of the Claimant may never have come to pass, nonetheless, it did. With the Committee's decision the Carrier is

free to dismiss future events inextricably tied to a transaction by evasion of imposed protection. Those events become no more than tiresome annoyances and whether or not they come to pass their eventuality does not operate to prompt the quid pro quo of ICC merger imposed protection. In the Committee's decision a senior employe affected would be given an election of benefits, however, the chain of entitlement would end when junior employes with pre-existing protection under a prior phase were again affected and these employes would then be left without the mandated protection imposed.

It is for all of the aforesaid reasons that the decision of this Section 11 Committee is palpably erroneous and not rested in the facts, logic, and terms of the New York Dock protective conditions.

Respectfully,

Carl Brooks

Employe Member

12/12/94

CARRIER MEMBER'S RESPONSE
TO
LABOR MEMBER'S DISSENT

NYD § 11, ARBITRATION AWARD (12/7/94)
(REFEREE FREDENBERGER)

The Majority Opinion of the *New York Dock* Section 11 Committee is set forth in such an articulate and persuasive manner that it does not need this Response to bolster its sound reasoning. There is nothing in the Labor Member's Dissent that even begins to supplant the correctness of the Award which is on point with many other fine Awards, such as Aw. No. 3, *ATDA v. CSXT. NYD § 11 Arb.* (10/4/93 and Aw. No. 66, of PLB 3160, *UTU v. BN* (9/20/82.

The Organization's Dissent persists in clinging to the same erroneous arguments and theories that were presented in their brief and during oral presentation of the dispute. The Dissent is nothing more than a rehash of those contentions, with scant improvement upon the original.

There was no oversight here by the Majority, simply a divergence with, and a rejection of, the Organization's position.

The Awards cited in the Organization's Dissent are inapposite. The Organization has attempted to read into those Awards facts and rationale which does not exist. Neither of the Awards cited by the Organization deal with the same issue involved in the instant matter--whether claimant was entitled to a second test period average because he was affected again by the same transaction. Here, this Committee correctly found that Claimant was not entitled to a recomputation of his TPA or to another election of benefits.

In sum, contrary to the assertion of the Organization, not only does the Majority Decision carry precedential value, it will likewise make similar disputes on this property res judicata.

Neil B. Grisson
Carrier Member

January 3, 1995
Date