CONRAIL-IAM&AW
NY DOCK (MGA)
(Custer, et al)

ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 11
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31875

In the Matter of an Arbitration between CONSOLIDATED RAIL CORPORATION and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	FINDINGS & AWARD

QUESTIONS AT ISSUE:

1. With respect to each Claimant, namely, J. Custer, R. Slunski, R. Endsley, S. Thorpe, D. Evanoski and T. Yuratovich, which, if any, meet the definition of a "displaced employee" under the New York Dock conditions?

2. With respect to each, if any, Claimant where the answer to Question No. 1 is affirmative:

   a) What is the date of the beginning of the employee's protective period?

   b) What is the correct calculation of the average monthly compensation (TPA) for use in determining displacement allowances?

BACKGROUND:

This arbitration arises pursuant to Section 11 of the New York Dock employee protective conditions, as imposed by the Interstate Commerce Commission (the ICC) when it approved the merger of the Monongahela Railway Company (the MGA) into the Consolidated Rail Corporation (Conrail or the Carrier), and follows an Award and Arbitrated Implementing Agreement that issued under date of June 21, 1993 in implementation of the ICC authorized transaction.

The Claimants are employees of the former MGA who are represented by the International Association of Machinists and Aerospace Workers (the Employees or Organization). Three of the Claimants had worked in the Locomotive Shop of the MGA as Maintenance of Equipment (ME) machinists, and three had worked in the Maintenance of Way and Signal Department of the MGA as Maintenance of Way (MW) machinists, together with one other employee (Kautzman), who was likewise represented by the Organization. All of these former MGA employees became employees of Conrail upon the consummation of the ICC-authorized merger.

On June 25, 1993, the Carrier addressed the following letter to the Organization:

> "You are hereby notified that the MGA New York Dock Arbitrated Implementing Agreement dated June 21, 1993 between the International Association of Machinists and Aerospace Workers, and Consolidated Rail Corporation and Monongahela Railway Company will become effective July 2, 1993.
>
> On July 2, 1993, the employees of the former Monongahela Railway Company will be covered by the applicable Collective Bargaining Agreement between your Organization and Conrail. On that date and thereafter the coordination of work will take place in accordance with the above-cited arbitrated implementing agreement and the conditions imposed by the Interstate Commerce Commission in I.C.C. Finance Docket 31875."

On the date that the aforementioned Implementing Agreement was made fully effective (July 2, 1993) requests were submitted to the Carrier for each of the Claimants to be recognized and certified as a "displaced employee" as that term is defined in the NY Dock Conditions. The basis of the claims and the reason for the denial of the claims will hereinafter be summarized in the position of each of the parties.

A "displaced employee" is defined in Section 1 of the NY Dock Conditions to mean "an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions."

A displaced employee, pursuant to the NY Dock Conditions, is entitled to a "protective period," or period of time (six years) during which that employee is to be provided certain protective benefits, including a "monthly displacement allowance" equal to the difference between the monthly compensation received by the displaced employee in the position in which such employee is retained and the average monthly compensation received by the displaced employee in the position from which such employee was displaced. The monthly displacement allowance is determined by

dividing separately by 12 the total compensation received by the employee and the total time for which that employee was paid during the 12 months in which the employee performed compensated service immediately preceding the date of that employee's displacement as a result of the transaction, and is commonly referred to as the "test period average."

The Awarded Implementing Agreement did not mandate, as requested by the Organization, that each employee who was in active service on the MGA on the date the merger transaction was implemented be certified as a protected employee or that they be given a test period average. However, the Carrier did subsequently agree, at the request of the Organization, to provide test period average earnings for the employees represented by the Organization who held positions on the former MGA for the 12-month period from July 1992 through June 1993, namely, the six Claimants in this dispute. It was stipulated in the letter of agreement, however, "that providing this test period average earnings data does not, in and of itself, establish that the employee has been adversely affected or is entitled to a displacement, dismissal or separation allowance."

As indicated above prior to the merger, there were three ME machinists positions on the former MGA. These positions were at South Brownsville, PA, and all three positions worked the first trick, Monday through Friday, with rest days of Saturday and Sunday.

Effective the close of business on September 28, 1993, the Carrier abolished all three of the aforementioned positions at South Brownsville, PA that were being held by Claimants Custer, Slunski and Endsley. At the same time, the Carrier advertised three ME positions at Brownsville, PA, one on the first trick, and two on the second trick. The three named Claimant each bid for and were awarded the positions at Brownsville, PA, which is located about two miles distant from South Brownsville, PA.

Thereafter, on December 22, 1993, the Carrier abolished the three ME machinists positions at Brownsville, PA that were being held by the three above mentioned Claimants and readvertised the three positions to reflect a change of headquarters to Waynesburg, PA, a location about 26 miles from South Brownsville, PA. The three ME machinists positions and Claimants Custer, Slunski and Endsley have remained at this location since that time.

The foregoing notwithstanding that effective August 24, 1994 the three positions were abolished and readvertised with one first trick position (Claimant Endsley) and one second trick position (Claimant Custer), and a third trick position being vacant account Claimant Slunski, at that time. and for some months later, being off work as disabled/sick as a result of an injury.

Insofar as concerns Claimants Thorpe, Evanoski and Yuratovich, who were working as MW machinists, together with non-claimant MW Machinist Kautzman, there was no change in their positions until November of 1993. At that time (November of 1993), a reduction was made in the MW machinist force. As a result of job abolishments, Claimant Evanoski and non-claimant Kautzman were essentially forced to other positions available to them in an exercise of their dove-tailed seniority on the Conrail Seniority District No. 12A Roster at the Conway locomotive facility. The positions for the two remaining Claimants (Thorpe and Yuratovich) did not change and they have remained headquartered at South Brownsville, PA.

Machinists Kautzman claimed certification as an adversely affected employee for NY Dock benefits effective November 15, 1993, and his claim was subsequently granted by the Carrier. At the time the Carrier agreed to honor Machinist Kautzman's claim (March 22, 1994), the Carrier offered to treat Claimant Evanoski in the same manner as Machinist Kautzman. The Carrier offer was rejected, and the claim for Claimant Evanoski continued to be pursued, it being alleged, in principal, that he was entitled to certification and the payment of a displacement allowance as a displaced employee from the earlier claim date of July of 1993 as opposed to the above mentioned date of November of 1993.

In this latter regard, the Board would note that although the Carrier does not dispute the fact that Claimant Evanoski was adversely affected by the transaction, and that it had made an offer to treat Claimant Evanoski in the same manner as MW Machinist Kautzman, the Carrier says that it later withdrew the offer in a finding that no claim had been specifically filed for November of 1993. The Organization disputes the contention that no claim was filed for November of 1993.

In any event, the Organization continued to pursue the contention that the six Claimants be certified or recognized as displaced employees effective July of 1993, and when conferences on the property failed to resolve the dispute(s) here at issue, the parties determined that they would place such matter to this arbitration board in the form of the Questions at Issue as set forth above.

POSITION OF THE EMPLOYEES:

It is the position of the Organization that the Claimants are entitled to the employee protective benefits prescribed by the NY Dock Conditions because each of them was placed in a worse position with respect to compensation and/or rules governing working conditions as result of the transaction or merger. Moreover, it argues that what is done in placing one employee in an adverse situation places all in an adverse situation.

The Organization maintains that because of what it calls, "the complexity of the different transactions/coordinations of the consolidation" that the Claimants should be certified as "displaced employees" as of July 2, 1993, the date that the Carrier implemented the Arbitrated Implementing Agreement.

Among other things, the Organization contends that the Claimants were placed in a worse position because the Carrier changed their conditions of employment and did not make available to them the same amount of hours of service and rates of pay which they previously worked prior to the transaction.

The Organization says that each of the Claimants has made a prima facie case that they each have been placed in a worse position with respect to compensation when earnings dropped below the test period average following the transaction to less than the "average monthly time paid for," or they were placed in a worse position in respect to rules governing their working conditions. The Organization thus says the burden shifted to the Carrier to prove otherwise, and that, in this regard, the Carrier has failed to do so.

The Organization also says that because of the many variables (new schedule rules, differences in size of the work force, differences in volume of work and, what it calls, "a host of other factors") the drop in average compensation and being placed in worse position is inferentially caused by the transaction.

The Organization says that while it recognizes that in order to be a "displaced employee" that an individual must establish that they have been placed in a "worse position" as a result of a transaction, that the whole of the consolidation of the MGA and Conrail was a "transaction," but that is not to say, the Organization asserts, that no action taken pursuant to the ICC authorization, such as job abolishments or the combination of seniority rosters is not also to be considered as a transaction. The Organization thus says it is the Carrier's merger related transactions/coordinations disturbed the work place tranquillity, and that absent these transactions/coordinations there would have been no change in working conditions.

In this same connection, the Organization says that operational changes, the transfer of equipment, and the restructuring of work not only adversely affected the Claimants, but likewise had an adverse impact on all machinists on the Conrail seniority roster into which the Claimants had their seniority dove-tailed, i.e., the Conrail Seniority District No. 12A Roster.

The Organization thus asks that all six Claimants be held to be displaced employees under the NY Dock Conditions.

POSITION OF THE CARRIER:

It is the position of the Carrier that the Claimants do not meet the definition of a displaced employee as that term is defined by the NY Dock Conditions and has been recognized in awards of past boards of arbitration.

The Carrier says that the Claimants have suffered no diminution of their compensation and that their work rules and work opportunities have, if anything, improved as a result of the transaction or merger.

Further, the Carrier submits the under the scheme of NY Dock arbitration, employees have the initial burden of showing that they have been adversely affected by a transaction and that it is only then that the Carrier has the burden of showing that any adverse affect was due to a cause other than a transaction. In this respect, the Carrier asserts that there has been no showing of record that the Claimants in the dispute at issue have been placed in a worse position.

Rather than having been adversely affected, the Carrier submits that no positions were abolished at the time of the transaction (July 2, 1993) and that all the Claimants received an increase in their daily rate of pay. Moreover, the Carrier submits that the earnings of all the Claimants but Claimant Evanoski have increased since the transaction. In this latter regard, the Carrier offers statistical data showing that the Claimants (except Claimant Evanoski) experienced improved earnings for the 12 months after the date of the claimed adverse affect (July of 1993) that range from 7% to 30% over the 12 months which had preceded the transaction. Thus, the Carrier offers that the Claimants, except for Claimant Evanoski, essentially stayed on the same or like jobs, they were paid at least the same, if not a higher rate of pay, and their overall earnings were more after the transaction was implemented.

The Carrier also urges that the Organization is essentially seeking to reargue the case which led to the Arbitrated Implementing Agreement, and more especially, blanket certification for all employees as a result of the transaction. In this respect, the Carrier argues that it is not that the transaction took place, and had some affect on an employee, but whether an employee was placed in a worse position with respect to their compensation and rules governing their working conditions that defines an employee as a displaced employee under the NY Dock Conditions. In the instant case, the Carrier maintains that the record shows that the Claimants (except as concerns Claimant Evanoski) were not in fact adversely affected as a result of the transaction. It therefore asks that the Questions at Issue be answered in the negative.

FINDINGS AND OPINION OF THE BOARD:

Clearly, the NY Dock Conditions prescribe, and it has long been recognized in awards of arbitration boards in the disposition of employee protective disputes, that an employee is not adversely affected by a transaction if that employee is enabled to obtain a position where compensation is equal to or greater than compensation prior to the transaction and that employee has not been placed in a worse position with respect to rules governing their working conditions.

That a position occupied by an employee at the time of the transaction is abolished does not, in and of itself, establish that such an employee is thereby entitled to be recognized as a displaced or adversely affected employee. It is only after an employee affected by a transaction exercises seniority as a result of the abolishment of a position that it may be determined if that employee has in fact been placed in a worse position, or, principally, a position unlike that which the employee would have stood for absent the transaction.

The NY Dock Conditions prescribe that a displacement allowance shall be paid "so long after a displaced employee's displacement as he is unable, in the normal exercise of seniority rights under existing agreements, rules and practices, to obtain a position, which does not require a change in his place of residence, producing compensation equal to or exceeding the compensation he received in the position from which he was displaced..." Here, except as concerns Claimant Evanoski, there is no probative showing that the Claimants, in the normal exercise of their seniority rights under the existing agreements, rules and practices, were not able to obtain positions producing compensation equal to or exceeding the compensation they had received as former MGA employees without a change in their place of residence.

The Board would also note that it finds it difficult to comprehend how it may be properly argued on the one hand that the Claimants lost work opportunities and, on the other hand, claim that these same individuals worked too much.

Even if was to be found, arguendo, that the earnings of certain of the Claimants fluctuated over several months following the transaction, this fact alone does not establish that such a happenstance was directly attributable to the transaction. In this respect, the Board would note, and adopt as here applicable, the findings of Arbitrator Herbert L. Marx, Jr. as set forth in an arbitration between Conrail and the BMWE, wherein it was stated in part as follows:

> "It my be argued that New York Dock benefits are applicable in any month where compensation does not reach

> the test period average, and so comparisons of annual earnings are not relevant. The Arbitration Committee understands and accepts this, insofar as it is applicable to employees who have been clearly determined to be 'displaced employees' in a 'worse position.' But this monthly test does not apply in considering whether employees are determined to be in a 'worse position' so as to qualify them for New York Dock in the first place."

In regard to the question of whether the Claimants were placed in a worse position with respect to the rules governing their working conditions. As stated in the Findings of the Arbitrated Implementing Agreement, the parties were found to have been in basic agreement that the then current Conrail-IAM&AW Schedule of Rules Agreement be the surviving agreement when the MGA was merged into Conrail. The Board in that dispute stated in its Findings that "both parties have wisely chosen to be in general agreement that the Conrail-IAM&AW Schedule of Rules Agreement be applicable when the former MGA employees are merged into Conrail, albeit, as indicated above, the IAM&AW would like to amend that Agreement to preserve certain MGA rules."

In the circumstances, this Board finds no basis for the Organization to here be heard to say that the Claimants had been placed in a worse position because of a change in rules governing working conditions. This, notwithstanding that, except for repeated argument about those same former rules of the MGA which were found not proper to be carried over, the Organization has not identified any rule or working condition that would support the contention that the Claimants have in fact been placed in a worse position.

It being evident in study of the record that the Claimants, except for Claimant Evanoski, have failed to establish a valid basis to be recognized as entitled to the protective benefit status prescribed by the NY Dock Conditions for a displaced employee, this Board has no alternative but to deny each of their individual claims. Accordingly, insofar as concerns Claimants Custer, Slunski, Endsley, Thorpe and Yuratovich, Question at Issue No. 1 is answered in the negative.

In regard to Claimant Evanoski, the Board finds that he was in fact adversely affected and meets the definition of a displaced employee under the NY Dock Conditions. And, as concerns the question of whether a claim had been specifically filed for the month of November of 1993, we find the record sufficient to support the conclusion that even assuming, arguendo, a claim had not been filed for November of 1993 that the record in this case, as demonstrated by the Carrier's past willingness to treat Claimant Evanoski in the same manner as MW Machinist Kautzman, supports a finding that if a claim for November had not in fact been filed,

the Carrier was on notice from the prior filing of claims commencing with the month of July 1993 and the handling of the claim, that the claim was of a continuing nature. The beginning of the protective period for Claimant Evanoski shall be the date that he was displaced following the abolishment of his position in November of 1993. The calculation of Claimant Evanoski's test period earnings for use in determining any displacement allowance to which he may be entitled is to be the 12-month period which preceded the date he was displaced in November of 1993.

AWARD:

The Questions at Issue are answered as set forth in the above Findings. That is, in the negative insofar as concerns Claimants Custer, Slunski, Endsley, Thorpe and Yuratovich; and, in the positive for Claimant Evanoski.

Robert E. Peterson, Chairman
and Neutral Member

Jeffrey H. Burton
Carrier Member

Raymond J. McMullen
Employee Member

Philadelphia, PA
April 17, 1995

Employee's Dissent attached Hereto

Dissent of the Employee Member to the
Findings and Award Rendered by Chairman and
Neutral Member R. E. Peterson of the

ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31875

In the Matter of an Arbitration between

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

and

CONSOLIDATED RAIL CORPORATION

Re: New York Dock Disputes
Merger MGA - Conrail
Claims of Custer, et. al.
Date of Findings & Award - April 8, 1995

The Employee Member of this Board, based on the record, most vigorously dissents to the Award rendered by the Arbitrator in the instant dispute. This dissent is due to the failure of the Arbitrator to properly interpret the provisions of New York Dock as intended by the Interstate Commerce Commission (ICC) in behalf of employees adversely affected by an ICC approved transaction.

In essence, this Board either did not understand the facts of the dispute that led to its award or it chose to ignore the record of the dispute which clearly reflects that the Claimants were adversely affected as a direct result of the transaction/coordination. Subsequent to the effective date of the coordination, four of the Claimants' respective earnings consistently dropped below their test period averages, yet this Board has failed to acknowledge that adverse effect and afford each of them the New York Dock "displacement" benefits to which entitled.

The New York Dock clearly was intended to protect an employee involved in a transaction from being "placed in a worse position with respect to his compensation" than the employee earned during his 12 month test period average.

The Marx Award this Board has relied on as the basis of its decision is clearly not on point in the instant case. The Marx Award clearly established that a fluctuation in an employee's earnings not associated with a transaction does not entitle one to a displacement allowance. However, in the instant case, the record clearly reflects that four of the Claimants suffered a real loss of earnings as a direct result of the coordination, thus being adversely affected, they were entitled to an appropriate displacement allowance for any period in which their earnings were less than their test period average.

Furthermore, in obvious disregard for the facts of the record of this case, the Arbitrator in the instant dispute stated in his Findings and Opinion that "... the Organization has not identified any rule or working condition that would support the contention that the Claimants have in fact been placed in a worse position." (I bid, p. 8) The Arbitrator's conclusion is without merit. The Employees' submission, clearly established that each Claimant was adversely affected as a result of the transaction/coordination. The Organization, in its Submission, referred this Board to no less than 15 awards supporting the Employees' claim.

In conclusion, the provisions of New York Dock and the award rendered in the instant case are in direct conflict one with the other as there can be no doubt that the Carrier's merger related transactions/coordinations definitely caused each of the Claimants to be adversely affected as such adverse effects are defined in New York Dock. It is quite obvious that in this particular case, the record has been ignored with the subsequent result that adversely affected employees have been deprived of their New York Dock entitlements.

Consequently, this award is palpably erroneous, has no probative value and should be recognized as such.

Raymond J. McMullen
General Chairman, IAMAW District 19