ARBITRATION COMMITTEE

In the Matter of Arbitration Between Transportation - Communications International Union And Kansas City Southern Railway Company	OPINION AND AWARD Pursuant to Article I, Section 11 of New York Dock Conditions ICC Finance Docket No. 32167 Case 1

Hearing Date: September 30, 1998
Place of Hearing: Kansas City, Missouri

Members of the Committee:

Carrier Member: John Morse
Organization Member: Phillip T. Trittel
Neutral Member: Eckehard Muessig

BACKGROUND

In November 1992, an application with the Interstate Commerce Commission ("ICC") was filed by the Kansas City Southern ("KCS") railroad for control of MidSouth Rail Corporation ("MSRC"). The acquisition was approved in June 1993 (Finance Docket #32167) and under the terms of the acquisition, New York Protective Conditions ("New York Dock") were imposed.

The triggering event for this dispute arose on December 31, 1993 when the Claimant's position of Chief Clerk Car Accounting at the MSRC Jackson, Mississippi facility was abolished. There is no dispute that the Claimant was an affected employee under the terms of the acquisition and that he is eligible for a protective allowance under New York Dock. The claim arose because the parties disagreed on the process used to calculate the Claimant's monthly Test Period Average ("TPA") wages and the resultant amount of compensation to be paid to him.

The Organization, in its submission to the Arbitration Committee, stated the "Question at Issue" as follows:

> 1. Did the Carrier violate Section 5 (a) of New York Dock Protective Conditions when it applied a three year average to calculate the Claimant's Test Period Average (TPA), instead of using the clear and unambiguous language dictated by New York Dock Protective Conditions, and if so, should the Carrier now correctly calculate the Claimant's TPA, and make him whole for any loss?
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> 2. Did the Carrier further violate New York Dock Protective Conditions when it failed to include in the Claimant's TPA the total compensation earned during the twelve month period prior to the date the Claimant was affected?

The Carrier in its submission provided the Claimant's Statement of Claim which reads as follows:

> Claim on behalf of Mr. A. D. Johnston for the difference between $3,807.15 and that of $4,629.66 per month beginning with the month of January, 1994.

Thus, simply stated, the question is whether the Carrier properly applied Section 5(a) of New York Dock to the facts and circumstances of this case.

NYD Provisions Mainly Applicable

ARTICLE I

1. Definitions - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means 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.

* * * *

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rule and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

* * * *

POSITION OF THE PARTIES

The following is believed to be an accurate abstract of the parties' substantive positions in this dispute. The absence of a detailed recitation of each and every argument or contention advanced by the parties in the grievance does not mean that these were not fully considered by the Board.

THE ORGANIZATION'S POSITION

At the outset, the Organization points out that it does not dispute the Carrier's right to adjust an employee's TPA, if the employee earned abnormal, extraordinary, or unusual amounts of overtime in anticipation of the transaction. However, in the case at hand, the Organization insists that the Claimant's extra hour of work were totally unrelated to the transaction. Therefore, the Carrier should not have disregarded them.

In advancing this position, the Organization mainly relies upon the data provided by the Claimant as well as the written statements of three individuals, who the Organization claims had first hand knowledge of the work the Claimant performed.

Specifically, the Organization relies upon a letter, dated April 7, 1994, from the former Director Car Accounting, William D. Smith ("Smith") who was the Claimant's immediate supervisor during the test period. In pertinent part, Smith stated that some of the overtime performed by the Claimant during the test period came about because a position had been abolished some years earlier. Smith also stated that the work of the abolished position was assigned to the Claimant. On average, he stated this accounted for 21.75 overtime hours per month.

Another reason the Claimant worked overtime, Smith noted in his letter, came about because during 1992, the Association of American Railroads approved a new method of reporting car hires by user roads to the car owners. The revised reporting system was made effective January 1, 1993. Smith stated that this change required the Claimant to work considerable overtime when he worked with a contract programer to assure compliance with industry standards. Additionally, Smith stated that the Claimant worked overtime to assure that an outside audit firm, Recoveries Unlimited, accurately reported car recoveries on contract movements involving private line cars moving under reduced or no mileage allowance provisions. Smith concluded that the Claimant worked overtime a minimum of thirty-five to forty hours per month.

Another statement was provided by Mr. Clyde Mitchell, former Assistant Vice President MSRC in a "To Whom It May Concern" letter, dated December 20, 1995. The letter read as follows:

> "In 1992 and 1993, Mr. Donald Johnston worked under my direction to assist in converting the Car Accounting programs on MidSouth Corp. from monthly reporting to cycle reporting. During this same period he was required to audit mileage contracts to recover mileage payments paid to private line companies in error.
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> Both of the above projects required Mr. Johnston to work overtime on a routine and regular basis. I recall that he usually worked overtime every day and often times on weekends.
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> The overtime that he performed while under my direction was due to computer enhancements and mileage recoveries and was not related to the impending merger with KCS."

Additionally, Mr. Lynn Outlaw ("Outlaw") wrote to Mr. M. L. Scroggins ("Scroggins"), the General Chairman of the Organization on December 20, 1995. Outlaw, the owner of Generic Software (a firm under contract with MSRC in 1992 and 1993 to change the car hire accounting system) stated that the Claimant assisted in this effort and that he "worked a lot of overtime on a regular basis."

Last, the Organization noted that the parties to this dispute signed the Implementing Agreement on September 30, 1993. However, the Organization points out the Carrier, at the time when the parties negotiated the Agreement, did not raise the TPA issue and did not indicate that it would use a three (3) year period to calculate the TPA, rather than a one year period as contemplated by NYD. If there was "rampant overtime" at the time when the parties signed the Agreement on September 30, it should have been addressed at that time.

In summary, the Organization contends that the Carrier violated Section 5(a) of NYD when it applied a three year average to calculate the Claimant's TPA.

THE CARRIER'S POSITION

The Carrier contends that this claim should be denied because the Organization and the Carrier agreed that this claim should be held in abeyance, pending the results of claims over the same issue that were filed by the Brotherhood of Railway Carmen ("BRC"). The BRC withdrew its claim on August 23, 1996. Accordingly, the Carrier submits that the claim now before the Board should be governed by the BRC withdrawal. The Carrier also contends that the claim should be barred by the doctrine of laches.

Without prejudice to its procedural position, the Carrier further contends that the claim lacks merit and should be denied. In support of its substantive position, the Carrier, relying on a number of arbitral holdings, submits that unusual earnings in anticipation of a merger are to be ignored when calculating the TPA. It notes that this principle is well-established and, indeed, has not been dispute by the Organization.

The Carrier contends that the dramatic increase in the Claimant's overtime for 1991 to 1993 has been conceded by the Organization. Moreover, the Carrier maintains the Organization accepted the three year formula in computing guarantees of other employees, it, therefore, should not object in this case. Likewise, the Organization did not, in any substantive fashion, rebut significant statements in the letter of August 18, 1994 to the Organization from M. H. I. Salmons ("Salmons"), Vice-President Human Resources. That letter in pertinent part read as follows:

> Also, as you know, Carrier made nine (9) Implementing Agreements covering various craft employees and the test period earnings for both the TCU and Carmen Crafts were calculated on the same basis. Out of all the employees coming under the protective conditions referred to as the New York Dock only two employees (including the instant claim) have alleged that the calculation of their test period earnings was incorrect. (Emphasis added)
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> ....

> During the period of January, 1993 and December, 1993 the time required to complete the duties of Claimant's position greatly increased as a direct result of the MidSouth Rail Corporation becoming a part of the Kansas City Southern system.
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> As you are aware, MidSouth Rail Corporation began converting to Kansas City Southern systems during the late Spring of 1993 and this conversion to Kansas City Southern systems had a direct impact on the amount of overtime being made at Jackson. Additionally, there were at least two (2) clerical positions at Jackson which were not filled during 1993. Because of extra work required for the conversion to Kansas City Southern's systems and the fact that the Carrier chose not to hire new employees, in the fact of the anticipated transfer of work from Jackson to Kansas City, overtime was rampant among clerks at Jackson during the middle and latter parts of 1993, and such additional overtime could be considered nothing less than extraordinary.

Last, the Carrier observes that the Claimant did not submit any timely accounting data, records or statements. Because of this, the Carrier could not investigate this matter while it was still fresh.

The Carrier also makes a point that it did not hire more people because of the impending sale. The Carrier argues that it is not sufficient to show that the Claimant's work was related to the sale of MidSouth. The key point was that manpower declined, not that work increased. Thus, the controlling factor is whether the aggregate workload at the Claimant's office increased or remained the same during the time the workforce decreased in anticipation of the sale.

FINDINGS AND OPINION

This has been a difficult case for the parties as well as the Board members. The Board has a situation that was not well handled by either party during its early stages. A record has been formulated over a lengthy period that is not as precise or as orderly as would be desired. Nonetheless, it is sufficient to render a holding.

Turning first to the Carrier's procedural arguments, we find that, given the circumstances of this case, it should not be settled on procedural grounds.

The Carrier's contentions that the issue here has been settled in view of the BRC's withdrawal of its claim is not reasonably drawn given the record. While the Organization could have withdrawn its claim following the BRC withdrawal, there was no requirement for it to do so. Moreover, our holding on this element of the dispute is given further substance in light of the Carrier's failure to challenge the Organization's position when, on July 18, 1996, it advised the Carrier that, because the BRC claim had "not been processed," it nevertheless would reinstate its claim. Moreover, the Carrier's assertion that the Organization's attempt, for the first time submit evidence in support of the claim in its letter of March 29, 1996, created a delay such that it was put to a disadvantage also is not supported by the record. Indeed, while certain detailed evidence on which the Organization has relied was not presented until after March 1996, this failure was the Carrier's doing. A fair reading of the record supports this conclusion.

Specifically, the claim was filed under date of April 8, 1994. The Claimant attached a letter from his former Supervisor, W. D. Smith ("Smith") dated April 7, 1994 addressed to the Carrier's Assistant Vice President of Labor Relations at that time. Smith's letter provided details as to the work that the Claimant performed from June 1, 1992 to the end of January 1994. Subsequently, there was more correspondence that included two denials of the Carrier. Neither of these two denials addressed the substance of the claim in Smith's letter of April 7, 1994. Instead, the denials were based on the Carrier's right to make adjustment upon "unusual overtime made in anticipation" of a transaction.

It was not until the letter of August 18, 1994 that Salmons again asserted the Carrier's right to make adjustments to the test period. Also, it was not until this letter that the question of the work itself was addressed, albeit not in the substance of the claim at a time when the evidence could easily have been gathered by the Carrier.

Accordingly, for all of the above, we find the Carrier's defense that, because of the delay in processing the claim, it did not have an opportunity to gather data to refute the Claimant's claim, lacks substance.

Subsequent letters of denial by the Carrier provided no evidence to effectively refute the claim or support its use of a three year TPA. It also has not shown that the overtime worked by the Claimant during the twelve month period required by New York Dock, prior to the date that he was affected, was as a result of the merger.

AWARD

The claim is sustained.

John Morse
Carrier Member

Eckehard Muessig
Neutral Member

Phillip T. Trittel
Organization Member

Dated: 11-30-98