ARBITRATION PURSUANT TO ARTICLE I, SECTION 11 OF THE NEW YORK DOCK CONDITIONS

In the matter of ICC Finance Docket No. 32549 between

Burlington Northern Santa Fe Railway Company

-and-

Transportation-Communications International Union

DECISION

Before the Arbitration Committee

J. C. Campbell, Organization Member
Dan Kozak, Carrier Member
Joseph A. Sickles, Neutral Member

BACKGROUND INFORMATION

The Interstate Commerce Commission (ICC), the predecessor agency of the Surface Transportation Board (STB), approved a merger and consolidation of the Burlington Northern Railroad Co. (BN) and the Atchison, Topeka and Santa Fe Railway Co. (SF) on August 16, 1995 (ICC Finance Docket No. 32549). The ICC imposed the *New York Dock* labor protective conditions for affected employees. On December 19, 1995, the Burlington Northern Santa Fe Railway Company (BNSF or the Carrier) and the Transportation-Communications International Union (TCU or the Organization) reached an implementing agreement under the *New York Dock* requirements.

Subsequently, the Carrier notified the Organization on January 10, 1997, of its plans to relocate certain clerical work. The Carrier planned to move the field support work that was performed in SF Seniority District 709 in Topeka, Kansas, to a BN district in Fort Worth, Texas, 114

clerical positions were affected. At the same time, the customer service work that was being performed in Fort Worth would move to SF Seniority District 709 in Topeka. This swap was accomplished on March 22, 1997. All of the customer service positions in Topeka were rebulletined.

Meanwhile, the Carrier also notified the Organization in December 1996 and January 1997 of its plans to move most of the accounting work being done in SF Seniority District 101 in Topeka to the BN in St. Paul, Minnesota. A total of 87 clerical accounting positions in Topeka (out of 101) were abolished in February and March 1997. The affected employees were placed in other SF positions in Topeka.

Many of the employees in SF Seniority Districts 709 and 101 were displaced or dismissed as a result of the two transactions and are receiving *New York Dock* protective benefits. However, the Carrier denied benefits to 24 employees from Seniority District 709 and 2 employees from Seniority District 101. When the parties were unable to reach agreement on the eligibility of these 26 employees for *New York Dock* protective benefits, the Organization invoked arbitration under Section 11 of the *New York Dock* conditions by letter of July 10, 1998.

A hearing was held on January 28, 1999, at the offices of the National Mediation Board in Washington, DC. The parties exchanged prehearing submissions on January 14, 1999, including numerous prior arbitration awards. Both parties were afforded full opportunity to present their arguments before the three-person arbitration committee.

ORGANIZATION'S STATEMENT OF THE ISSUE

> "Are T.G. Bingham, et al., displaced employees pursuant to *New York Dock*? Shall Carrier now be required to determine the claimants' test period averages as of the date they were affected by a transaction and allow their claims for *New York Dock*?"

CARRIER'S STATEMENT OF THE ISSUE

"Are claimants entitled to a "displacement allowance" under the *New York Dock* conditions, Article 1, Section 5, even though each claimant displaced to a position with the same daily rate of pay as their former position, working conditions remained unchanged, and the quantum of work in the department, as measured by actual available overtime, increased subsequent to the transaction?"

STATEMENT OF FACTS

The relevant provisions of the *New York Dock* conditions state:

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

> If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

The parties agree that the swap of field support work and customer service work in Seniority District 709 and the transfer of accounting work out of Seniority District 101 were transactions under *New York Dock*. All 26 claimants in this dispute were placed in jobs at the identical wage grades they held before the subject transactions. Prior to the transactions, the 26 claimants had worked various amounts of overtime; subsequent to the transactions, they also worked various amounts of overtime.

The Carrier states, without refute from the Organization, that the amount of overtime actually worked in the two seniority districts increased substantially in the year after the transactions. In Seniority District 709, overtime hours increased 24.9 percent from 1996 to 1997. In Seniority District 101, overtime increased 32.8 percent from 1996 to 1997.

The 26 claimants concluded that their incomes declined in at least some of the months following the transactions. The TCU requested that the Carrier compute the test period averages (TPAs)—average monthly compensation and average monthly time paid for—for the 26 claimants. The Carrier refused to compute the TPAs, insisting that the 26 employees were not adversely affected by the transactions.

POSITIONS OF THE PARTIES

Carrier's Position

The BNSF asserts that the claimants are not displaced employees under the *New York Dock* conditions because they were not placed in a "worse position" as a result of the transactions. Although the 26 claimants were affected by transactions, they were not adversely affected, the BNSF insists. All 26 claimants were placed in jobs at the same wage grade, and with the increase in overtime in their departments, they all maintained the same or greater potential for earnings:

> A reduction in earnings for a month or so cannot automatically be assumed to be the result of a transaction, especially since the quantum of work in the affected offices, as measured by available overtime hours, actually increased in each of the seniority districts after the transaction. . . . An occasional diminution in earnings in a particular month after the transaction does not make an individual a 'displaced' employee.

The Carrier continues that a comparison of the average monthly compensation during the test period:

> . . . to an isolated month of compensation following the transaction is not [the] proper criterion to determine whether an employee has been placed in a worse position regarding compensation as a result of a transaction.

The Carrier says that the claimants' reduced earnings were due to factors unrelated to the transactions. It notes that if the claimants did not work as much overtime after the transactions—despite the increased availability of overtime work— it was simply because many of them had not bothered to qualify for the overtime work on other positions that was available to them. According to the BNSF, qualifying would have been a simple matter, as it was the same type of work the claimants did on their regular jobs, but involved different commodities. Prior to the transactions, the claimants had taken the initiative to qualify for overtime work on other positions, and they are obligated to do so in their post-transaction positions in order to work the same number of hours they did before the transactions.[1]

The BNSF further contends that it has no obligation to compute TPAs for employees who are not adversely affected by a transaction. The BNSF claims that the

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[1]The Carrier also briefly notes that some employees, on occasion, have refused overtime for which they were qualified.

Organization has requested TPAs as a back-door approach to demonstrate that the claimants were in a "worse position." The Carrier cites several arbitration awards that have held that the TPA is a formula intended to calculate the **amount** of *New York Dock* protective benefits owed, not **if** such benefits are due. The Organization has the burden of first proving that the claimants were adversely affected by the transactions; and, the Carrier maintains, it has failed to do so in this case.

Organization's Position

According to the TCU, the Carrier initially denied *New York Dock* benefits to the claimants based solely on the grounds that they had been assigned to positions at the same wage grade and, therefore, were not placed in a "worse position" with respect to their compensation. The Carrier is mistakenly interpreting the term "compensation" as used in Section 5(a) of the *New York Dock* conditions to mean "rate of pay." The Organization submitted numerous arbitration decisions supporting its argument that "compensation" under *New York Dock* means total earnings, including overtime, allowances, bonuses, and other elements of pay.[2]

Using their pay stubs for the 12 months prior to the transactions and the months following the transactions, the claimants concluded that they had suffered a loss of earnings as a result of the transactions. The loss of earnings was due to post-transaction overtime, an element of "compensation" under *New York Dock*. Once there is a transaction and employees have identified facts which they believe demonstrate an adverse effect of the transaction, the burden shifts to the employer to prove that something **other than the transaction** was the cause, the Organization argues.

Moreover, it is not necessary that an employee's reduction in earnings occur **immediately** after a transaction in order to be related to that transaction, the Organization adds.

Late in the stages of handling on the property, according to the TCU, the Carrier seized upon the issue of overtime to bolster its argument that the claimants were not in a "worse position" as a result of the transaction, but rather as a result of their failure to work overtime. If the Carrier feels that individual employees are not fulfilling their obligations to make themselves available for sufficient overtime service to satisfy their average time paid for in the test period:

> . . . then the Carrier needs to decline their monthly claims on that basis, pay the displacement allowance which the Carrier calculates to

[2]The Carrier also submitted numerous arbitration decisions that equate "compensation" with "rate of pay." It is apparent that arbitral authority is split on this issue.

be correct, and let the displaced employee appeal the Carrier's declination if desired.

The TCU argues:

> It is not appropriate for the Carrier to paint all of the displaced employees with the same broad brush, as it has done in this dispute.

The relocation of the clerical functions involved in this case was anticipated by the Carrier in its merger application to the ICC, the TCU notes. The transfers of functions between the BN and SF seniority districts would have been prohibited by the collective bargaining agreements were it not for the ICC-approved merger, and labor protective conditions were imposed as a quid pro quo. There can be no dispute that there was a "transaction" as defined by *New York Dock*, and the employees have identified facts (reduced earnings, as determined from their pay stubs) that demonstrate that they are in a "worse position." Therefore, the Organization asserts, the Carrier is obligated to compute the TPAs for the 26 claimants.

DISCUSSION

The initial issue that must be addressed—because it is central to the other issues raised—is the interpretation of the word "compensation" as it is used in Sections 1 and 5 of the *New York Dock* conditions. Both parties have cited numerous arbitration awards on this issue, and the cited awards are contradictory. The decisions submitted by the Carrier hold that an employee moved, following a transaction, to a new position at the same rate of pay is in no worse position with regard to his compensation—essentially equating "rate of pay" or "hourly rate" with "compensation." The decisions submitted by the Organization give a more expansive definition to the term "compensation," specifically stating that it includes overtime pay.

We are inclined to adopt the more expansive definition. Clearly if the ICC had intended "hourly pay" or "rate of pay" to be the criterion for assessing an adverse impact on employees affected by a transaction, they would have used one of those phrases in drafting the *New York Dock*

conditions. By using "compensation," the ICC must have had in mind elements in addition to straight hourly wages. The word "compensation" is broad enough to include shift differentials, allowances, overtime, and other elements of pay, in addition to the contractually provided hourly rate. Exceptions to the inclusion of *all* elements of compensation are very narrow.[3]

It is interesting to note that the broader definition of "compensation" could conceivably mean that an employee moved to a lower-rated job with a lower hourly rate of pay following a transaction may not be entitled to protective benefits under *New York Dock*. Such an employee could receive allowances or a shift differential or sufficient overtime work to more than make up the deficit in hourly wages. Using the Carrier's definition, this employee would be in a "worse position" because his **rate of pay** would be lower. Using our definition, this employee would not be entitled to a displacement allowance.

With overtime payments included in their pre- and post-transaction "average monthly compensation," and with the evidence from their pay stubs that their earnings declined in close proximity to the transactions, the claimants have established at least a rebuttable presumption that they are displaced employees entitled to *New York Dock* protective benefits. At that point, the Carrier was obligated to compute the TPAs for compensation and hours paid, as requested by the Organization. It strikes us as common sense to apply the principle Referee Bernstein articulated years ago in Docket No. 62 under the *Washington Job Protection Agreement*: "In the normal and usual case, applying the formula of Section 6(c) [which corresponds to Section 5 of *New York Dock*] will

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[3]Neutral John B. LaRocco (*TCU and Missouri Pacific/Union Pacific*, March 1, 1998) has indicated that one of the very narrow exceptions to compensation to be included in the TPA is extraordinary overtime worked in anticipation of an imminent transaction. He added that the Carrier would have a "heavy burden" of proving that the overtime was linked directly to a transaction and was not part of regular, recurring, or casual overtime.

show whether an employee is 'in a worse position with respect to compensation.'" The critical language is unchanged from the *Washington Job Protection Agreement.*

The Carrier has argued that the claimants' reduction in monthly earnings is unrelated to the transaction. The BNSF says the claimants' failure to qualify for the available overtime work and alleged refusals of overtime are responsible for the earnings deficits. The Carrier places strong emphasis on the fact that the amount of overtime actually worked in the affected seniority districts increased substantially after the transaction, and the employees had ample opportunity to earn compensation equal to their TPAs.

The overtime figures cited by the Carrier (and unrefuted by the Organization) do suggest that overtime certainly did not diminish in the affected seniority districts. However, the figures alone do not show if this overtime was suitable for the 26 claimants' wage grades or if individual claimants had sufficient seniority to be awarded the overtime. As the Organization suggests, a case-by-case investigation for each claimant would be necessary to determine if they failed to meet their obligations to make themselves available for service.

Even if a closer inspection reveals that there was sufficient overtime suitable for the claimants' wage grades and seniority, there is the issue of the claimants' failure to qualify for the particular overtime work available. The BNSF points out that the claimants had, on their own initiative, qualified for overtime work on other positions prior to the transaction, and argues that they had an obligation to do so once again after the transaction. We do not agree. In the absence of the transaction, the employees would have already been qualified for enough overtime to maintain their customary earnings. It was the transaction that put them in the "worse position" of no longer being qualified for an equivalent amount of overtime.

We also reject the Carrier's argument that fluctuations in earnings are normal and, therefore, an occasional drop in earnings does not mean an employee is "displaced." We find that the *New York Dock* conditions require a **monthly** determination for the duration of the protective period as to whether an individual employee is in a "worse position" with respect to compensation, i.e., if his monthly earnings are less than his monthly average compensation in the test period.

Therefore, the Carrier must compute the TPAs for each claimant. This amount must include all overtime worked during the test period[4] and during the protective period. In any month that a claimant's compensation falls below his TPA, the Carrier must pay a displacement allowance. The only exception that would allow a denial of the displacement allowance is if a claimant refuses to work overtime for which he is qualified and consequently does not work enough hours in the month to match his TPA for hours paid.

As a means to minimize the amount of protective benefits it must pay, the Carrier is entitled to require employees to qualify for the available overtime work—on the Carrier's time. In the absence of such a requirement, however, the Carrier may not shift the burden onto the claimants if they do not work their TPA hours because there is insufficient overtime for which they are already qualified.

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[4]The Carrier objects specifically to including the overtime earned by Claimant Usnick when he worked during his vacation period, insisting that this was an extraordinary payment. In the absence of evidence that this overtime was due directly to an imminent transaction, we find that this payment must be included in his TPA.

AWARD

The Carrier shall compute the TPAs for each claimant. The claimants are presumed to be displaced employees in any month in which their compensation falls below their TPA for compensation, assuming the claimants have made themselves available for service for their TPA hours. The Carrier shall pay a displacement allowance in each such month, unless the Carrier can prove that the monthly decline in earnings was due to factors other than the transaction.

This award shall be complied with 30 days after its effective date.

Joseph A. Sickles
Neutral Member

J. C. Campbell
Organization Member

Dan Kozak
Carrier Member

Date: May 1, 1999