Revised 10/00 dbk

AWD001
Referee: Quinn
Fin. Docket: 28250
Carrier(s): NYDR/BEDT
Union(s): BLE
Award Date: 12-15-80
NYD Articles: Art. I, § 1(a)

Carriers had no rail connection, only engaged in car-float and ferry operations. Upon ICC approval to merge, they advised of their intent to consolidate seniority rosters. Organization argued that this was not a transaction account no merger of facilities (coordination) was occurring. Referee ruled that "*...as a result of the merging or dovetailing of seniority rosters since the intended consolidation requires a rearrangement of forces, which may cause the displacement of BLE employees*", there were adversely affected employees (potentially). Therefore, the consolidation of the rosters was a transaction.

AWD002
Referee: Lieberman
Fin. Docket: 28905
Carrier(s): CO/SCL
Union(s): TCU
Award Date: 2-28-81
NYD Articles: Art. I, § 5; Art. 1, § 5(b); Art. 1, § 9

In combining forces from the two merged railroads at one location, TCU argued that the affected employees had the right not to consider positions on other than their home railroad as positions available to them. Further, if they exercised their seniority and moved rather than considering the position at the same location on the other line, they were required to move. Referee held that "*the implementing agreement provided an option which an employee must consider, even though on a foreign carrier*"; hence, if an employee had a position available to him at the location he would not be entitled to displacement allowance or moving expenses if he declined said position.

AWD003
Referee: Lieberman
Fin. Docket: 28905
Carrier(s): SCL
Union(s): RYA
Award Date: 3-6-81
NYD Articles: Art. I, § 5(a); Art. II, § 1

Organization argued that if an employee was dismissed in the craft within which the implementing agreement was signed, he did not have to exercise seniority he had in another craft. Organization argued that to require him to do so was tantamount to writing a new rule which was not in the basic schedule agreement. Referee stated that the language of Article 1, Section 5(a) "*...does not restrict the exercise of seniority to a particular agreement and specifically also includes practices which in this instance clearly indicate return to the original craft*."

AWD004
Referee: Roukis
Fin. Docket: 28905
Carrier(s): CO/LN
Union(s): RYA
Award Date: 4-10-81
NYD Articles: Art. I, § 5(a)

Organization argued that a Yardmaster was not required to exercise his seniority to another craft wherein he held seniority if he was dismissed as a Yardmaster. Further, the Organization argued that the NY Dock intended that the Carrier should establish a guaranteed extra board for dismissed employees. Referee held that 5(a) of the NY Dock "*requires that a displaced person follow the normal exercise of his seniority under existing agreements as a condition to obtaining displacement allowances..*" He also stated "*..the language of 5(a) does not envisage a higher level of protection than that contained in existing agreement rules and practices and the establishment of a guaranteed extra board would expand such protection*."

AWD005
Referee: Zumas
Fin. Docket: 27773
Carrier(s): MP
Union(s): ATDA
Award Date: 7-31-81
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Many years earlier, the MP acquired the stock of the TP RR and over the years consolidated certain of the properties. In 1967, several of the Dispatcher's territories were "swapped" pursuant to the provisions of the WJPA. After approval of the merger in 1976, the Organization argued that the consolidations and transfer of functions was a result of the merger transaction and the Carrier should provide the coverage under ICC. Referee held that the proposed consolidation was "*the result of economic measures and technological improvements that merely by chance happened to occur after the merger and not the direct result of the merger or in any way connected to the merger*". The Carrier was successful in convincing the referee that the change would have taken place anyway. The referee referred to the award in Case #2. He also stated: "*It is equally clear, however, that the Commission has viewed the imposition of protective benefits as requiring a <u>proximate nexus</u> between the actual merger and the Carrier action at issue*."

AWD006
Referee: Seidenberg
Fin. Docket:
Carrier(s): CR/DTRC
Union(s): RYA
Award Date: 8-13-81
NYD Articles: Art. I, § 1; Art. I, § 4; Art. I, § 2

Organization argued that the employees of the applicant Carrier are not affected, that they are not required to take part in interest arbitration, that they are not bound by the arbitrator's decision. In refuting the Organization's position, the referee stated: "*The Conrail Yardmasters must participate in, and be bound by, the award of the arbitration proceedings involved...*" The referee, in devising the implementing agreement, placed all of the DTRC YM's under the coverage of the Conrail Schedule, and in doing so changed their vacation and sick leave entitlement. He also made provisions for separation allowance in the implementing agreement.

AWD007
Referee: Peterson
Fin. Docket: 29489
Carrier(s): CR
Union(s): UTU
Award Date: 8-24-81
NYD Articles: Art. I, § 4

The parties to the dispute engaged in successful negotiations and came up with an acceptable agreement; however, the UTU Constitution provided that a local agreement could not be signed without the concurrence of the Local Chairman who, in this instance, refused to sign. The arbitrator adopted the negotiated agreement between the parties, stating: "*The purpose of collective representation is to entrust individual rights with accredited representatives so as to avoid the pitfalls of bargaining on an individual basis*."

AWD008
Referee: Edwards
Fin. Docket: 29455
Carrier(s): NW/IT
Union(s): UTU
Award Date: 12-29-81
NYD Articles: Art. I, § 2; Art. I, § 4

Carrier wanted to dovetail employees on two railroads represented by one union and place them all under one schedule agreement. Regarding the placing of all employees under the coverage of one schedule, the referee said: "*What the Carriers are asking here goes much too far. It involves the entire destruction of part of one negotiated working agreement...No good cause or necessity has been shown for arbitrarily applying and imposing the Wabash agreement upon a group of employees who had no hand or participation in negotiating the Wabash agreement*." The referee remanded the case to the parties and retained jurisdiction for a supplemental award.

AWD009
Referee: Sickles
Fin. Docket: 29455
Carrier(s): NW/IT
Union(s): RYA
Award Date: 12-30-81
NYD Articles: Art. I, § 2; Art. I, § 4

Carrier wanted to place all of the employees on one Carrier under the coverage of the working agreement and representation of the other Carrier. In rejecting this plan, the referee stated: "*Art I Sec 4 of the NY Dock (II) Conditions does not provide an avenue for interest arbitration of all benefits and working conditions to the extent suggested by Carrier... the Commission did not authorize changes in the working agreement...*"(regarding his authority to fashion an agreement) he stated: "*...I have been asked here to eliminate an entire collective bargaining agreement without any actual evidence regarding the practical operation of that agreement. Within the framework of the limited time available to us, such a step could hardly be a true extension of 'collective bargaining' and a valid exercise of interest arbitration*". The referee also criticized the referee's decision in Case #6 wherein he eliminated the working agreement of the Detroit Terminal employees.

AWD010
Referee: Zumas
Fin. Docket: 29455
Carrier(s): NW/IT
Union(s): BLE
Award Date: 2-1-82
NYD Articles: Art. I, § 2; Art. I, § 4

Carrier wanted to place employees represented by two different unions under one working agreement and one representation. Although referee went along with the Carrier's proposal to dovetail the seniority rosters, he flatly rejected eliminating the collective bargaining agreement. He stated: "*An Arbitrator's authority under Article I, Section 4 of New York Dock, where the parties are unable to reach agreement, is limited to the determination of employee protective conditions contained in Appendix III, and to provide a basis for the selection of work forces of the employees involved. Art. I, Sec 4 does not give an arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are preserved under Section 2*."

AWD011
Referee: Peterson
Fin. Docket: 29430
Carrier(s): NW/SOU
Union(s): RYA
Award Date: 5-24-82
NYD Articles: Art. I, § 2; Art. I, § 4; Art. IV

Carrier (NW/SOU) had several locations where it wanted to consolidate yardmaster functions. At some locations, there were yardmasters working that were not represented by the RYA. Referee held that the Carrier's proposal for selection of forces was adequate and appropriate, with a fair distribution of work between agreement and non-agreement employees. The referee stated: "*It is also apparent in reviewing the history and intent of the New York Dock that, contrary to RYA contentions, consideration cannot be given to a supposed superiority of right for represented employees of the same job class or craft..employees who are not represented by a labor organization 'shall be afforded substantially the same levels of protection as afforded to members of labor organizations*."

AWD012
Referee: Dolnick
Fin. Docket: 28583
Carrier(s): BN
Union(s): UTU
Award Date: 7-27-82
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claimant was a trainman that had been laid off and filed for displacement allowance. Organization cited the number of trains that had been discontinued through his home terminal as evidence that the transaction had caused him to become displaced. Referee disagreed, stated: "*The mere fact that the Claimant has, since the merger, suffered a loss of earnings or was furloughed is not enough to entitle him to displacement allowance... Changes in volume of Carrier's business, which results in an employee's loss of earnings or furlough is not a transaction within the meaning and intent of the Merger Protective Agreement*."

AWD013
Referee: Sickles
Fin. Docket: 29455
Carrier(s): MP
Union(s): BRC
Award Date: 7-30-82
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Referee referred to Case #5 MP vs. ATDA, wherein he traced the history of MP acquiring the stock of TP, etc. Referee stated "*...if...there is a lack of a causal nexus between the merger and the action, the New York Dock II provisions simply would not apply. Rather the individual provisions which the Carrier sought to impose would be the appropriate protection to be afforded to the employees*."

AWD014
Referee: Fredenberger
Fin. Docket: 29690
Carrier(s): SOU
Union(s): BRC
Award Date: 10-5-82
NYD Articles: Art. I, § 2; Art. I, § 4; Appendix III; Art. 1, § 10

Carrier attempted to convince the referee that it was within his authority to place employees represented by Kentucky & Indiana Terminal Railroad under the SOU Agreement; both groups were represented by the Brotherhood of Railway Carmen. The referee referred to the awards by Edwards, Zumas and Sickles on the Illinois Terminal: "*In summary this neutral finds the IT trilogy applicable to the issue in this case and highly persuasive. No clear, superior, contrary authority has been cited. Accordingly, this neutral concludes no jurisdiction exists to apply the Southern agreement with the Organization as requested by Carrier*." With regard to the Carrier's premature offer of the New York Dock II Conditions prior to the ICC's approval, the referee said "*...the Commission specifically rejected the argument ruling that the arbitration procedures of Article I, Section 4 of the New York Dock Conditions could be invoked prior to the time the Commission granted authority for a transaction and in anticipation of the imposition of protective conditions*."

AWD015
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): BO/LN
Union(s): BRC
Award Date: 1-12-83
NYD Articles: Art. I, § 6; Art. I, § 4

In combining carmen forces, Carrier wanted to transfer the work and positions of two carmen. Organization claimed that Article I Section 6 prohibited moving their jobs. The referee stated: "*...the Carrier's may require the two Glenwood carmen who ultimately lose their positions at Glenwood to transfer to the two new positions at the South Louisville Shops. Put another way, as urged by Carrier, these two employees may not refuse to transfer to Louisville and still come within the definition of dismissed employees set forth in Article I, Section 1(C)*." In presenting his arbitrated implementing agreement, the referee included a provision that the Carrier could take credit for any RRUI benefits to which an affected employee was entitled to but failed to claim.

AWD016
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): BO/LN
Union(s): IAMAW
Award Date: 1-19-83
NYD Articles: Art. I, § 1; Art. I, § 6; Art. I, § 4

While involving another union, IAMAW, the facts and circumstances and Carriers involved are the same as Case #15. Identical arguments presented by both sides. However, in this dispute, the Carrier attempted to place the transferring employees under the coverage of the collective bargaining agreement at the transferred-to location. Referee, in reiterating that he did not have the authority to change work rules, etc., stated: "*...such neutral has no authority to modify a collective bargaining agreement where the parties have not agreed to confer that authority upon him*" (reference was made to Case # 11, and this referee's decision in Case #15 -above- wherein the transferring employees were placed under the same agreement; they were distinguished from this dispute account the parties in the dispute involving the BRC agreed to the placing of employees under the same agreement.)

AWD017
Referee: Zumas
Fin. Docket: 28250
Carrier(s): NYDR
Union(s): TCU
Award Date: 4-22-83
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Transaction combining forces was effectuated and sometime later Carrier abolished positions. The Referee held that the abolishments were brought about by a decline in business and were unrelated to the earlier transaction. In placing the burden on the Employees to prove that the transaction, and not the decline in business, caused the abolishment, Referee stated: "*The Carrier has made a convincing case, however, that a number of external factors led to a drastic drop in business between those dates*." On the positive side, he stated: "*...the Organization is correct that the coverage of the protective benefits extends past the date of the transaction*."

AWD018
Referee: Zumas
Fin. Docket: 30053
Carrier(s): SCL/LN
Union(s): TCU
Award Date: 6-10-83
NYD Articles: Art. I, § 2; Art. I, § 3

Carrier attempted to convince the referee that only after an employee becomes adversely affected does he have the right to elect between the NY Dock or other protective Agreements. This interpretation was too narrow for the referee and would have meant that only those at the end of a chain of displacements would have the option to elect between protective agreements. Referee stated: "*...the implementing agreement must recognize the employees' rights to elect whatever benefits may exist*."

AWD019
Referee: LaRocco
Fin. Docket: 28905
Carrier(s): SCL/LN/CO
Union(s): TCU
Award Date: 6-30-83
NYD Articles: Art. I, § 2; Art. I, § 3; Art. I, § 4

The referee declined Carrier's position that only those at the end of a chain of displacements had rights to elect between protective agreements. Referee stated: "*Thus, to the extent employees are entitled to any property agreement, those benefits cannot be vitiated or indefinitely delayed merely because the Carriers are engaging in a New York Dock transaction*." As regards Sec. 4, the referee looked to prior handling between the parties and stated that "*Art. I Sec. 4 does not contemplate an expansive selection of forces where there is no evidence forces have been rearranged in the surviving office*." Referee denied TCU's position that all employees at the affected location should have rights to exercise seniority even though their assignments were not directly affected by the transaction.

AWD020
Referee: Dolnick
Fin. Docket: 28905
Carrier(s): NW/ACY
Union(s): ATDA
Award Date: 7-20-83
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Sometime prior to receiving ICC approval to merge, the NW purchased all of the stock of the ACY. At the same time, a Master Merger Agreement was entered into by the parties. Later, after ICC approval, the NW began to merger facilities but argued that the NY Dock did not apply because the "*control*" of the ACY predated the merger by many years. The referee disagreed, stated that "*control does not exist when a stockholder owns all ... (stock)*". However, he also held that the transaction at issue was planned for many years prior to the merger authorization and, therefore, it was not a transaction under the terms of the NY Dock.

AWD021
Referee: Peterson
Fin. Docket: Staggers Act
Carrier(s): SFTB
Union(s): TCU
Award Date: 8-31-83
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claim progressed account rate bureau abolished positions and TCU claimed that as a result of the Staggers Act of 1980 and the narrowing of the antitrust immunity by the ICC as a result of that act positions were lost. The referee held that the abolishments were the result of a decline in business and the employees had not shown that they were adversely affected by Staggers. The referee stated that if the burden had been proven, there was no question that the provisions of the New York Dock would have applied.

AWD022
Referee: Seidenberg
Fin. Docket: 30095
Carrier(s): BO/NSS
Union(s): BMWE
Award Date: 8-31-83
NYD Articles: Art. I, § 2; Art. I, § 4

Carrier wanted referee to place all of the employees represented by one labor union under the agreement of the absorbing Carrier into another representative. Referee stated: "*Because we find that the Trilogy and Southern-KIT and BO-LN cases are directly in point with the core issue in the instant case, and the other cases cited by the Carrier are not, we are not inclined to depart from the awards in point, and therefore, must conclude that we lack the authority to set aside the collective bargaining agreement in affect ... even though it may impede the speedy integration of the NSS and the BO*." In determining that the arbitrated implementing agreement must maintain separate seniority rosters, the referee stated: "*We find that it is also more appropriate to maintain separate roster and seniority districts for NSS employees rather than integrate them ... because of the nature of seniority, difference in compensation and to preserve employment rights*."

AWD023
Referee: Fredenberger
Fin. Docket: 30095
Carrier(s): BO/NSS
Union(s): UTU/BLE
Award Date: 9-15-83
NYD Articles: Art. I, § 2; Art. I, § 4

In the same circumstances as Case #22 involving BO/NSS and BMWE/Steelworkers, the Carrier wanted to transfer five BLE employees from NSS into the UTU (BO) and place them under the UTU agreement. In quoting from Seidenberg's agreement (above), the referee stated that there was no compelling agreement to do so. The Carrier also argued that the Referee should not consider any proposals from the Organization that were not introduced during negotiations on the property. The referee stated: "*in the final analysis any damage to the negotiating process perceived by the Carrier is outweighed by the necessity for the Neutral Referee to have the fullest possible access to the parties' positions on issues with respect to which the Neutral is fulfilling his duties under Article I Sec. 4... The Carrier's position in the instant case effectively would confine the Neutral's consideration to the Carrier's proposal.*" As regards the final distribution of the involved switching work, the Referee devised a percentage distribution of the work to the remaining crafts based upon the switching work performed prior to the merger. In rejecting the Carrier's notion that it should not be required to accept as employees those furloughed employees on the NSS or those whose jobs would not be reestablished on the BO, the referee said that they, too, were affected by the merger and must be brought over as employees and given an opportunity to perform the work of their former employer.

AWD024
Referee: Brown
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): UTU
Award Date: 3-16-84
NYD Articles: Art. I, § 4

The parties to the dispute engaged in successful negotiations and came up with an acceptable agreement; however, the UTU Constitution provided that a local agreement could not be signed without the concurrence of the Local Chairman involved, who, in this instance, refused to sign. The arbitrator adopted the negotiated agreement the parties agreed to, and stated: "*The implementing agreement under consideration herein was drawn by skilled and experienced negotiators. All involved interested parties represented by competent advocates. Such review convinces the arbitrator that the agreement implementing the consolidation of terminals in Omaha and Council Bluffs provides an appropriate basis for the selection and assignment of forces...*"

AWD025
Referee: Fredenberger
Fin. Docket: 30000
Carrier(s): UP/WP
Union(s): ATDA
Award Date: 5-27-84
NYD Articles: Art. I, § 4

Carrier served notice to transfer certain dispatcher work from one location to another; there was no intended loss of positions. Organization argued that since there were no affected employees, the notice was improper and the NY Dock did not apply. Referee said NY Dock applied, that ICC had stated: "*...in the event employees might be impacted in the future, as a result of this consolidation, they will be afforded the protection we have imposed here*."

AWD026
Referee: Roukis
Fin. Docket: Staggers Act
Carrier(s): WRA
Union(s): TCU
Award Date: 6-4-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claim progressed account rate bureau abolished positions and TCU claimed that as a result of the Staggers Act of 1980 and the narrowing of the antitrust immunity by the ICC as a result of that act positions were lost. The referee held that the abolishments were the result of a decline in business and the employees had not shown that they were adversely affected by Staggers. The referee stated that if the burden had been proven, there was no question that the provisions of the New York Dock would have applied.

AWD027
Referee: LaRocco
Fin. Docket: 29430
Carrier(s): NW/SOU
Union(s): TCU
Award Date: 7-17-84
NYD Articles: Art. I, § 4

Carrier served notice to reorganize accounting departments and consolidate accounting functions. TCU argued that it was a violation of a scope rule to move accounting work from the coverage of an agreement which was performed by schedule employees and place it under the coverage of another agreement to be performed by PAD employees. The referee ruled that it was not a scope violation, that the purpose of the merger was to consolidate the work just as the Carrier was attempting to do. However, the Carrier wanted the arbitrator to establish the new, transferred positions as PAD. The referee ruled that he had no authority to do so, that "*To write an implementing agreement calling for exempt or partially exempt positions would subordinate elements of existing labor contracts and disrupt collective bargaining under the Railway Labor Act without any compelling justification*."

AWD028
Referee: Zumas
Fin. Docket: 28905
Carrier(s): SCL
Union(s): TCU
Award Date: 9-26-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Transaction combining forces was effectuated and some time later Carrier abolished positions. The Referee held that the abolishments were brought about by a decline in business and were unrelated to the earlier transaction. In placing the burden on the Employees to prove that the transaction and not the decline in business caused the abolishments, he stated: "*There is no evidence in the record to sustain the proposition that the Claimants were adversely affected by the coordination of the clerical work or by any other event... However, a reading of the record shows that, at most, Carrier contends that if Claimants were affected at all they were affected by a decline in business and not by the coordination*."

AWD029
Referee: Cassle
Fin. Docket: 28490
Carrier(s): BAP
Union(s): UTU
Award Date: 9-26-84
NYD Articles: Art. I, § 1; Art. I, § 4

In a unique situation, the BAP, which operated trackage only within the state of Montana and was a subsidiary of the Anaconda Copper Company, was taken over by the Atlantic Richfield Company (ARCO). When ARCO made application to the ICC, it made the pronouncement that no employees would be affected by the take over, indeed, that they would prosper and benefit from the take over. In later years (1978-1982) the copper industry was depressed and many employees laid off. The Carrier claimed that the lay-offs were as a result of decline in business and there was no applicability of NY Dock. The referee, though, referred to the pronouncements of ARCO and concluded that since ARCO said that no employees would be affected, and it was on this basis that the ICC gave permission for the merger, that the Carrier had made a contract to guarantee employment, or lacking that, protective benefits, to all of the

employees of the BAP. He distinguished the instant situation from most mergers because when two carriers merge, it is expected that there will be job abolishments and consolidations of work functions and locations. In referring to the public policy that mergers of railroads would leave the employees affected thereby untouched with regard to employment compensation, he concluded that ARCO was required to pay claims under the NY Dock. (The ICC subsequently overruled this decision.)

AWD030
Referee: Peterson
Fin. Docket: 29430
Carrier(s): SOU
Union(s): TCU
Award Date: 10-23-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Transaction combining forces was effectuated and some time later Carrier abolished positions. The Referee held that the abolishments were brought about by a decline in business and were unrelated to the earlier transaction. In placing the burden on the Employees to prove that the transaction, not the decline in business, caused the abolishment, the Referee stated: "*Thus, while it might be held that there was some minor diversion of traffic from Monroe as a result of the coordination, it was not of sufficient nature to hold that a causal nexus existed between job abolishment and the consolidation of the rail carriers. In this respect, we think it noteworthy that heretofore the weight of most arbitral authority has been to the effect that a remote or tangential affect cannot qualify an individual as having been adversely effected by a transaction*."

AWD031
Referee: Brown
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): UTU
Award Date: 1-85
NYD Articles: Art. I, § 2; Art. I, § 4

The question was framed as to whether or not in applying the NY Dock Conditions it was permissible to transfer work from one working agreement to another (no mention was made of whether or not it was contemplated to transfer employees from one agreement to another). In deciding that the board was an extension of the ICC's mandate and was meant to implement the merger, subject to the limitations of the NY Dock, the referee stated: "*...indeed, without such authority vested in some board or agency it is not reasonable to expect that matters such as those before us could ever be resolved, since it is clearly in the interest of one or more partisans to maintain the status quo in one or more details. We therefore conclude and find that this committee has jurisdiction to transfer work from the MP to the UP if such is deemed, giving effect to the ICC decisions in the several dockets herein involved. We further find that should the circumstances reflect that placing the transferred work under the UP collective bargaining agreements would be the most appropriate means for giving effect to such decisions, this committee has the jurisdiction to do so.*" (It was stated that the intent of the NY Dock was to cover situations just such as this, and to provide protective benefits for the employees that would lose work because of such transfer from one Carrier to another.)

AWD032
Referee: LaRocco
Fin. Docket: 28905
Carrier(s): CO/SCL
Union(s): BRS
Award Date: 1-3-85
NYD Articles: Art. I, § 4

Carrier was going to reorganize some signal maintainer's territory. Org. protested account the notice did not designate precisely each crossing guard, etc. Also, Carrier wanted to take credit for (deduct from any dismissal allowance) RRUI benefits entitled to but not claimed. Referee stated that the notice was adequate and that Carrier could deduct RUI benefits "*to which entitled*."

AWD033
Referee: LaRocco
Fin. Docket: 28905
Carrier(s): CO/SCL
Union(s): BRS
Award Date: 1-3-85
NYD Articles: Art. I, § 4

(Same as Award No. 32 above)
AWD034
Referee: Phipps
Fin. Docket: 30000
Carrier(s): UP/MP/WP
Union(s): UTU
Award Date: 3-1-85
NYD Articles: Art. I, § 4

In merging the Sacramento Northern Railway into the Western Pacific, the parties agreed to ask the referee a series of questions regarding computation of guarantee, definition of displaced and dismissed employees, effects of seniority when change of residence is available, etc. The referee stated that none of these questions was answerable by the arbitrator because they did not come within the purview of Article I, Section 4, that if they arose under Article 1, Section 11 the parties would have to address them. In determining whether or not the ICC pronouncement gave authority to the arbitrator to abrogate collective bargaining agreements, he said "**No**". However, he stated: "*The Commission has authored an elaborate directive in NY Dock dictating what a transaction is; that certain coordinations may take place, for which employees adversely affected are allowed certain protective conditions. Surely, this elaborate process was not authored to impale itself upon a Section 2 interpretation so restrictive it could make the whole process impossible. Rather it must permit those modifications necessary to allow a transaction to attain fruition*."

AWD035
Referee: Marx
Fin. Docket: 30053
Carrier(s): SCL
Union(s): ATDA
Award Date: 3-7-85
NYD Articles: Art. I, § 4

Carrier proposed to transfer dispatching work from one location to another but did not intend to establish any additional positions. Referee stated that it was beyond his authority to force Carrier to establish positions, that he could only establish how the forces were selected. He did state that if any positions were established in the future to cover the work, that dispute should be handled between the parties; failing resolution, it would be handled pursuant to Article I, Section 4.

AWD036
Referee: Sickles
Fin. Docket: 28905
Carrier(s): SCL
Union(s): TCU
Award Date: 5-9-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Transaction combining forces was effectuated and some time later Carrier abolished positions. The Referee held that the abolishments were brought about by a decline in business and were unrelated to the earlier transaction. In placing the burden on Employees to prove that the transaction, and not the decline in business, caused the abolishments, Referee Sickles said: "*...the Carrier assertion that the decline in business caused the adversity stands unrebutted*".

AWD037
Referee: Yagoda
Fin. Docket: 28250
Carrier(s): CR
Union(s): UTU
Award Date: 6-18-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claimant, a Fireman, maintained that he was affected by the merger of Conrail and the Raritan River Railroad. Referee held that the Organization failed in its burden of proof to show that the transaction affected Claimant, noting that the charge was made by Claimant that other people were still performing the work of his abolished position. Carrier's position that the abolishment was part of a federal statute (Northeast Rail Service Act of 1981) which provided for certain termination allowances for employees whose positions have been abolished in conformance with NERSA's crew contraction provision.

AWD038
Referee: Yagoda
Fin. Docket: 28250
Carrier(s): CR
Union(s): UTU
Award Date: 6-18-85
NYD Articles: Art. I, § 3

In 1980, Claimants were given the choice of electing the benefits of the NY Dock or those of Title V of the Regional Rail Reorganization Act of 1973. Claimants chose the displacement allowances provided for in the latter. In 1981 the displacement allowance provisions of the RRRA were repealed and Claimants then attempted to elect the benefits of the NY Dock. Carrier argued that a prior award which ruled on the applicability of C-1 benefits of the National Railroad Passenger Corporation Agreement had resolved the issue in Carrier's favor. In pointing to the express provisions of Article I Section 3, and the fact that Appendix C-1 was not here involved, the referee said: "*Neither Article V or NYDC make such a statement as appears in C-1. Article I Section 3 of NY Dock does require a choice between sets of existing benefits and bars the deriving of 'the same type of benefits' from the unselected provisions while such benefits are being garnered from the elected set of arrangements. But it concludes with a proviso permitting the beneficiary to go on to a previously unselected set of benefits which may have survived the demise of the benefits originally chosen*."
[see Award Nos. 285, 286]

AWD039
Referee: Yagoda
Fin. Docket: 28250
Carrier(s): CR
Union(s): UTU
Award Date: 6-18-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claimants, all trackmen, argued that as a result of the merger of Conrail and the Raritan River Railroad, their positions were abolished. Carrier argued that as a result of track improvement work being completed in a normal fashion, the positions were abolished. Referee came down on the Carrier's side, stating: "*…this Committee is unable to reach such evaluations because Claimants have not met their burden under NYDC of proving either that the events described took place or that they resulted from the merger 'transaction' for which NYDC establishes benefits*."

AWD040
Referee: Cassle
Fin. Docket: 28490
Carrier(s): BAP
Union(s): UTU
Award Date: 7-20-85
NYD Articles: Art. I, § 1; Art. I, § 4

This hearing was the second phase of an earlier rendered decision involving the same parties, (Case #29). This phase involved whether or not ARCO complied with the earlier, sustaining award. In deciding this second phase, the Referee addressed a number of questions which were brought up by the Company when it declined the employees claims: 1) the employee did not have to identify the transaction as Phase One outlined it; 2) the employee did not have to identify a job displacement, because the Referee had found that they were placed in a worse position; 3) the employee did not have to prove that he held a job with

the BAP on the merger date (2-14-78) because "*public policy of the ICC (is that) no employees are to be affected by an acquisition of merger of railroads and that policy should extend to all employees of the railroad no matter when employed*"; 4) the employees did not have to prove they were members of the UTU as the coverage of NYDC extends to all regardless of affiliation; 5) the six year period will end 1-1-88; 6) the Company's allegation that the employees refused steady work was not sustained as the offer was not reasonable, practical, or possible under the UTU craft jurisdiction; 7), 8), and 9) the Company tried to withhold benefits from employees that were not currently employed due to death, retirement, resignation, discharge and the referee stated that they were eligible for benefits up until the dates of any of the above; 10) employees that did not sign their claim forms were not entitled to benefits; 11) benefits received under the Cantrell Agreement were proper offsets account they were part of the compensation the employees received; 12) time lost account a strike of Anaconda Copper Co. employees was not a voluntary guarantee to properly compensate the employees. Referee held in favor of the employees on almost all counts and stated: "*All benefits under New York Dock III, Appendix III are to bear interest at the Montana statutory interest rate from date upon which the employee suffered an adverse impact on his earnings*." (The ICC subsequently overruled this decision).

AWD041
Referee: Lieberman
Fin. Docket: 28905
Carrier(s): SCL
Union(s): TCU
Award Date: 7-31-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Referee held that the abolishment of the position of Car Distributor was caused by technological improvements and the Claimant was covered by the Protective Agreement on the property, not by the New York Dock.

AWD042
Referee: Sickles
Fin. Docket: 29720
Carrier(s): BM/MC
Union(s): ATDA
Award Date: 8-6-85
NYD Articles: Art. I, § 4

Carrier transferred dispatching functions. The negotiations between the parties went all right with some improvements over moving allowances and a lace curtain payment being negotiated. The Organization, however, wanted to include a temporary 60 day living allowance during which time an employee's home was on the market. Referee held that he could not expand upon what was in the NY Dock or what the parties agreed to.

AWD043
Referee: Peterson
Fin. Docket: Staggers Act
Carrier(s): SFTB
Union(s): TCU
Award Date: 8-16-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

There was no dispute that the Claimants were members of a rate bureau and if a causal nexus between the passage of the Staggers Rail Act of 1980 (Sec. 219), which provided protection against antitrust immunity was shown, the Claimants would be entitled to NY Dock protection. In referring to the obvious cessation of issuances by the SFTB after the Staggers Act, TCU argued that the connection was apparent. The Bureau argued that the abolishments were the result of the completion of a computerization program begun in the late 1960's and that after a "*tariff cleanup*" campaign a lot of unnecessary tariff provisions were removed and the reissue of tariffs no longer necessary. In stating that the employees had failed in their burden to show the causal nexus between Section 219 of Staggers, the referee maintained "*...the Board is of the opinion and belief that it may be properly concluded from the overall record as presented and developed it fails to show a clearly discernible relationship between the enactment of Section 219 of the Staggers Rail Act of 1980 and SFTB's abolishment of the positions in question which had resulted in the furloughing of Claimants. Simply put, the Board finds no reason to hold that once the identifiable programs and projects were completed that SFTB had either a statutory or agreement obligation to retain positions related to such programs and projects or to extend protective benefits status to employees as a result of the abolishment of such positions*."

AWD044
AWD045
Referee: Weston
Fin. Docket: 30053
Carrier(s): SCL
Union(s): ATDA
Award Date: 8-24-85
NYD Articles: Art. I, § 1(c)

Claimant(s), regularly assigned dispatchers, failed to bid on positions at transferred locations, so they would be displaced as a result of the job abolishments at their home point. They then wanted to become dismissed employees and draw dismissal allowances. Referee stated: "*Viewed realistically, this record establishes that claimant's displacement did not flow directly from the 'transaction' in this situation, namely, the coordination of June 1, 1983, but resulted from his failure to take reasonable steps and precautions to exercise seniority and protect his status. He knew of the options that were available to him and we are not impressed by his plea that he did not have to protect his rights as a regular assigned dispatcher until June 14, 1983 when no Birmingham train dispatcher position was still open.*"

AWD046
Referee: Weston
Fin. Docket: 30053
Carrier(s): SCL
Union(s): ATDA
Award Date: 8-24-85
NYD Articles: Art. I, § 1(b)

Also included in the above transaction (Case Nos. 44 & 45) were extra train dispatchers. As a result of the transaction, Claimant was placed further down on the extra dispatcher list and suffered loss in compensation. While the referee seemed to agree that even extra employees could qualify under the NY Dock account affected, he pointed to the provision in the working agreement that stated that extra dispatchers were not guaranteed any number of days' work.

AWD047
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): 2 Individuals
Award Date: 9-25-85
NYD Articles: Art. I, § 1

Claimants were Assistant Controller - Accounting Operations and Manager Personnel Accounting, respectively. In claiming that they were covered employees pursuant to the definition of employees in NYDC and ordinary usage each wanted a dismissal allowance. The referee went to the definition of employees and subordinate officials in the Railway Labor Act to show that officials, as Claimants were, are not covered by NYDC.

AWD048
Referee: Fredenberger
Fin. Docket: 28917
Carrier(s): SDAE
Union(s): UTU
Award Date:
NYD Articles: Art. I, § 1; Art. I, § 11(e)

The merger involved the Southern Pacific Transportation Company and the San Diego and Arizona Eastern Transportation Company. After the merger, the responsibility for operating the SD&AE (part of which extended into and through Mexico) fell to an outside firm, Railtex. After several applications to the ICC to abandon the line, storms which wiped out much of the remaining railroad embargoes by the RR, problems with the Mexican Government, devaluation of the peso which affected many of the customers, etc., the railroad went out of business. Referee held that the cause of the job abolishments was not the merger, but the above-related business problems. The referee also noted that the labor organizations were petitioning the ICC to authorize NY Dock benefits to those employees as a result of the acquisition of Railtex in 1979.

AWD049
Referee: Zumas
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): UTU
Award Date: 9-9-83
NYD Articles: Art. I, § 4

When the UP/MP merged, facilities at Kansas City were merged with a combined seniority roster and prior rights to the work of the two Carrier's apportioned on a percentage basis; employees were also placed on an extra board apportioned accordingly but could perform whatever work was available regardless of the origin. If the extra board was depleted, the work was given to employees holding prior rights on the railroad where the work occurred. The arbitrator also devised a new collective bargaining agreement and stated that if any provisions were not covered in the new agreement, the MP Working Agreement would control. The referee also devised a grievance rule to be followed on the merged properties.

AWD050
Referee: Sempliner
Fin. Docket: 28676
Carrier(s): GTW
Union(s): UTU
Award Date: 2-11-82
NYD Articles: Art. I, § 2; Art. I, § 4

The GTW acquired control of two railroads, primarily industrial switching roads. In determining the contents of the arbitrated agreement, the arbitrator provided that the employees of each would perform work on their former roads which comported to follow mile post designations. While he ruled that they could retain their former working agreements, if they bid on other than their home territories, they would be placed under the collective bargaining agreement in effect at the new location. The arbitrator also retained jurisdiction on any complaints filed within 24 months of the date of the award.

AWD051
Referee: Peterson
Fin. Docket: 28250
Carrier(s): SOU
Union(s): TCU
Award Date: 10-23-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claimant, an exempt employee holding clerical seniority was offered another exempt position but which would have required him to move his residence. Instead of accepting the offer, he displaced back into the clerical ranks and claimed a displacement allowance. In ruling that the move was a voluntary one, the referee stated that: "*...we think it evident Claimant had the opportunity to be afforded substantially the same levels of protection as are offered to members of labor organizations by having accepted one of the two options accorded him relative to his employment status at the time of the coordination as a non-contract employee." "The change in the employment status of Claimant from a non-contract to a contract position must, in our opinion, be treated as outside the protective pale of the New York Dock Conditions*."

AWD052
Referee: Gordon
Fin. Docket: 29486
Carrier(s): DH
Union(s): BRC
Award Date: 2-14-84
NYD Articles: Art. I, § 1; Art. I, § 11

Referee had issued a prior arbitrated implementing agreement which held that the purchase of a portion of Conrail Line by the Delaware & Hudson was a transaction pursuant to NY Dock and the affected employees were entitled to NY Dock protection. The issue of identifying the individual affected employees was remanded to the parties who were unable to resolve the issue. The referee identified as those affected the employees that had their jobs abolished at locations from which the Carrier transferred the work of classifying and switching. Each party then furnished voluminous information relating to the earnings of the employees and asked that the referee determine the amount due. He stated that he was unable to do so and that if the parties were still unable to resolve the question, the affected employee would have to submit to arbitration under Article 1, Section 11, which arbitration was beyond the purview of this arbitration proceeding. Rejected Carrier's argument that a decline in business had caused the job abolishments because Carrier produced no evidence beyond assertions of grain embargo, loss of accounts, etc.

AWD053
Referee: Fredenberger
Fin. Docket: 28905 (Sub. 1)
Carrier(s): BO/SCL
Union(s): BRC
Award Date: 5-1-84
NYD Articles: Art. I, § 4; Art. I, § 10

Carrier combined Mechanical Department facilities in the greater Cincinnati area. SCL carmen at DeCoursey were affected as follows: 43 original positions, abolished 14, transferred 13, retained 16. Dispute arose over how to handle seniority of these SCL carmen and those at the BO the facility that received the work. Agreement provided that the SCL carmen transferring have seniority dovetailed, are placed under coverage of BO Schedule Agreement, forfeit seniority on SCL roster. Furloughed employees are treated in the same manner, whether furloughed when the SCL jobs were abolished and transferred or whether furloughed at the time the transaction occurred. However, none of the furloughed SCL carmen will be permitted to exercise seniority over BO carmen holding regular assignments unless resignation, transfer, retirements, or force increase.

AWD054
Referee: Cushman
Fin. Docket: 29720
Carrier(s): BM/MC
Union(s): BRC
Award Date: 5-30-84
NYD Articles: Art. I, § 4; Art. I, § 10

Carrier planned to establish start-to-finish painting of locomotives, work allegedly not performed before. Organization wanted to establish that those employees furloughed at the time of the transaction were affected. Referee said no, but dovetailed their seniority dates into the roster where the work was being

established, permitted them to bid on the basis of their seniority, placed them under labor agreement at location (Maine Central) where the painting job was established when they acquired jobs there.

AWD055
Referee: Marx
Fin. Docket: 28905 (Sub 1)
Carrier(s): CO/SCL
Union(s): BRC
Award Date: 12-5-84
NYD Articles: Art. I, § 4; Art. I, § 2

Carrier wanted to consolidate all air brake work at one location. The Organization argued that Article I, Section 2 prohibited the arbitrator from placing employees of one Carrier on the roster of another Carrier because this would be abrogating the collective bargaining agreement between the parties which established the seniority rosters. The arbitrator ruled that his authority to select the forces, which came from Article I, Section 4 permitted him to allow for the method to place employees on separate seniority rosters. The arbitrator took into account that the transferred employees had maintained a separate point seniority only roster since 1938, and did not have system seniority, therefore, occupied the status of a relatively lesser seniority. As such, he proposed to dovetail the employees from the point seniority only into the other roster but to retain a prior rights to the air brake work for the period of NY Dock coverage. So long as other prior rights positions were available, they were required to displace on them; only if no junior prior rights employees existed could they exercise elsewhere on their new roster. If force increase occurred, they would have to exercise back to their prior rights work. The same held true for those on the roster to which the work was transferred in regard to a prior rights establishment for work.

AWD056; AWD057; AWD058; AWD059; AWD060
Referee: Peterson
Fin. Docket: 28905 (Sub 1)
Carrier(s): SCL
Union(s): BRC
Award Date: 5-29-85
NYD Articles: Art. I, § 11(e)

After the referee in Case #53 stated that an Article I, Section 11 arbitration hearing was the proper place to decide the dispute over the Organization's contention that several Carmen were laid off in anticipation of the transaction to combine forces in the Cincinnati area, the parties entered Article I, Section 11 arbitration in the instant case. Despite publications from the company regarding increased, even record earnings, the Board held that: "*...it (the Carrier) nonetheless experienced reduced work force needs as the result of reductions in carloadings, tonnage, cars being received from connections, net revenue train miles, etc*." Holding: no causal connection between the anticipated transaction and the force reductions.

AWD061
Referee: Peterson
Fin. Docket: 28905 (Sub 1)
Carrier(s): SCL
Union(s): BRC
Award Date: 5-29-85
NYD Articles: Art. I, § 5

For three days in September, 1982, Carrier failed to pay dismissal allowances to two Claimants, contending that on those days there was a strike in progress on the Carrier's property by the BLE and the claimants

would not have performed service if called, and therefore, they were voluntarily absent. Board sustained the claims, "*In our opinion, since the Carrier was not able to establish in the dispute before us that Claimants had been in a position to make a choice as to whether they would or would not have crossed the picket line, we think it evident the Carrier remained obligated to continue the Claimants' protective benefits*."

AWD062
Referee: O'Brien
Fin. Docket: 29772
Carrier(s): DH/MC
Union(s): BRC
Award Date: 6-12-85
NYD Articles: Art. I, § 1

In a companion case to Case No. 54, the Organization argued that two employees that were on the Painters Seniority Roster and were furloughed at the time of the transaction which moved all painting work were entitled to New York Dock protection. Even if the arbitrator ruled that they were not entitled to it at the time of the transaction, they should be entitled to protection if they were recalled and then subsequently furloughed, for whatever reason. The arbitrator ruled that the implementing agreement provided an equity right to the work and further stated: "*Inasmuch as they were not performing this work when it was transferred from the Colonie Shop since they were furloughed, they simply were not placed in a worse position with respect to their compensation or rules governing their working conditions as a result of the transaction.*" In regard to prospective future adverse effect should they be recalled and then furloughed, the referee stated: "*It is the effect, if any, on employees at the time of the transaction that is controlling, in my view; and not some prospective speculative effect*."

AWD063
Referee: Peterson
Fin. Docket: 30000
Carrier(s): MP
Union(s): BRC
Award Date: 11-6-85
NYD Articles: Art. I, § 4

When the MP/UP merged, the implementing agreement which was determined by arbitrator Fredenberger made a differentiation between those employees on the combined roster which were working at the time of the transaction and those that were furloughed. This language was included in the implementing agreement: "*Employees identified as furloughed will not be able to activate their seniority to a regular assigned position until such time as a regular assigned position is bulletined due to resignation, transfer, retirement, increase in force, etc.*,". In the application of this section, the Carrier was recalling junior protected (those working on transaction date) employees in preference to those senior employees that were not working on transaction date. Organization protested that this was a violation of the collective bargaining agreement. The referee upheld the Carrier's position, stating: "*Thus, while under the existing circumstances, placement of a furloughed employee's name on the consolidated roster would give a furloughed employee opportunity for employment in the broader and consolidated work environment, such seniority only may be exercised so long as it does not preclude an employee working on the date of the consolidation from continuing to have a first employment relationship to available jobs*." In determining that these junior, protected employees have "*employment rights*" over the senior, non-protected, the referee did state: "*...the aforementioned first employment relationship right...only extends ... for the period of time the junior is covered by NY Dock...*"

AWD064
Referee: Peterson
Fin. Docket: 30000
Carrier(s): MP
Union(s): BRC
Award Date: 11-6-85
NYD Articles: Art. I, § 8

As a result of the merger of the MP/UP, some of the Carmen at Kansas City, Kansas, that were not affected as of the date of the transaction, were later affected by force reductions, applied for, and received NY Dock benefits. However, after four months, the Carrier suspended making Health and Welfare payments for these employees, on the premise that any other furloughed employee is not entitled to payment of these premiums after four months. In upholding the Carrier's position, the referee stated: "*...the claimant carmen are only entitled to the same benefits as accorded to other non-protected employees of the MP while on furlough*."

AWD065
Referee: Suntrup
Fin. Docket: 30053
Carrier(s): SCL
Union(s): BRC
Award Date: 11-21-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Effective December 31, 1982, the LN and the SCL merged into the Seaboard System Railroad. Shortly thereafter, in early 1983, the merged Carrier conducted a survey of the train yard operations at Dothon, Alabama, and notified tile General Chairman that due to a decline in business, three carmen positions were to be abolished. After a request by the Organization for a joint survey, and several postponements of the survey, Carrier abolished two positions in May, 1984, and one more in November, 1984. When the Organization filed for New York Dock protection, the Carrier averred a decline in business, not the transaction, caused the abolishments. After the Organization presented data showing increased carloadings at the same time as the abolishments, and other statistical data to support their contention that the Carrier was flourishing, not declining, economically, the referee stated: "*The company's reasons for not providing such protection is based on contractual and financial arguments. The arbitrator has examined both closely and has found them wanting. Neither the 1959 Coordination Agreements in question, nor a decline in business, since there was none during the time frame in question, can serve as adequate reason for the transfer of work from Dothon to other points which resulted in the abolishment of three positions*."

AWD066
Referee: O'Brien
Fin. Docket: 28905
Carrier(s): CO
Union(s): MMP
Award Date: 3-83
NYD Articles: Art. I, § 1

Carrier operated a car-float rail service, whose employees were not covered by a labor agreement, and a tugboat operation which was. The preponderance of the duties of the tug crews consisted of docking and undocking coal ships a Newport News, Virginia. On April 22, 1981, due to the United Mineworkers strike, Carrier abolished all tugboat crews. Later, one crew assignment was reestablished. The organization

contended that had it not been for the Carrier's decision to re-route most of its car-float operations over land, which was approved by the ICC, there would not have been so drastic a reduction of tugboat crews. Arbitrator held that the Organization had not established a causal nexus between the April, 1981, lay-offs and the ICC approval in 1980 of Carrier's abandonment of car-float service.

AWD067
Referee: Fredenberger
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): BRC
Award Date: 12-6-83
NYD Articles: Art. I, § 2; Art. I, § 4; Art. I, § 1; Art. I, § 11(e)

This arbitration involved three issues--in the first, the Carrier was proposing to transfer Carmen's work and to consolidate seniority rosters. Due to different provisions in the two collective bargaining agreements as how seniority was established, the UP Carmen wanted retroactive seniority so as to increase their seniority dates. The Arbitrator ruled that he could not do so as that would be in violation of Article I, Section 2 as he would be abrogating the collective bargaining agreement provisions is relates to establishment of seniority. The second issue involved whether employees furloughed in mid-1983 were entitled to protective benefits account affected by a transaction. In adopting the Carrier's position that the lay-offs were generated by a general, system-wide decline in business, the Arbitrator stated that it was not valid to accept the Organization's position that there must be a point-by-point analysis of business, and not a system-wide analysis as the Carrier did. The third issue involved Carrier's notice to transfer one Carman from Omaha, Nebraska to Atchison, Kansas. The Organization argued that there was no evidence that enough work would be transferred to justify transferring and dovetailing an MP Carman. The Arbitrator accepted the Carrier's reasoning that the calculation was based upon expected emergency work that would have to be performed and approved the transfer. In doing so, the arbitrated implementing agreement provided that any MP Carman transferring to the UP would be credited with MP service for vacation, etc., but would be placed under the rules and working conditions of the UP agreement.

AWD068
Referee: Peterson
Fin. Docket: 28250
Carrier(s): GTW
Union(s): TCU
Award Date: 5-30-84
NYD Articles: Art. I, § 1

Pursuant to ICC authorization, Carrier served notice to transfer one position from Dearborn to Detroit. The proposed transfer involved separate seniority rosters. The incumbent of the position chose not to transfer, after which it was bulletined in the former seniority district and the Claimant bid it in. After occupying the position, she was displaced by an employee returning from leave of absence. As a result, she was unable to hold any positions on her new seniority roster and she filed for NY Dock protective benefits. Board held that the displacement was not caused by a transaction, that the returning employee made the move a voluntary one, that NY Dock benefits would not be forthcoming.

AWD069
Referee: Peterson
Fin. Docket: 28250
Carrier(s): GTW
Union(s): TCU
Award Date: 5-30-84
NYD Articles: Art. I, § 9

Pursuant to agreement between the parties, Carrier offered the incumbents of sixteen (16) positions to be transferred the option of following their work. When Claimant did so, the Carrier refused to pay his moving expenses because he had the option of not following the work, therefore, the move was a voluntary one and not as the result of a transaction. Board stated that the moving expenses were due, that the agreement to transfer recognized that the transferring of work and/or positions may require employees to change places of residence and that shows an intent that those exercising that right would be entitled to the moving expenses provided by Section 9.

AWD070
Referee: Dennis
Fin. Docket: 28905
Carrier(s): CO
Union(s): SIU
Award Date: 4-22-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Carrier suspended paying protective benefits to employees when its coal exporting business dropped off drastically. Arbitrator ruled that there was no language specifically in NY Dock which permitted a Carrier to suspend payment, for any reason other than dismissal, resignation, etc. However, he stated in referring to awards which ruled that employees unaffected by transaction were not entitled to protective benefits that "*these Boards and Arbitrators have not arrived at this conclusion based on language in the New York Dock agreement that specifically authorizes such a position, but rather by concluding that protective benefits only flow to employees that are affected by a legitimate transaction*". He went on to state: "*The facts of the instant case do not support the proposition that because Carrier makes money overall, it must continue to pay protection at a location where all employees have been furloughed because of a decline in business.*" Arbitrator ruled that Carrier did not have to continue making NY Dock protective payments.

AWD071
Referee: Vernon
Fin. Docket: 28250
Carrier(s): BN
Union(s): BRC
Award Date: 1-3-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Organization argued that lay-offs of 91 Carmen in December, 1979, was in anticipation of the merger which was ultimately approved in November, 1980. The Arbitrator disagreed, however, citing the evidence that Carrier had presented attributing the lay-offs to purely budgetary considerations caused by reduced billings and increased expenses which was accompanied by a dramatic decline in business.

AWD072
Referee: Vernon
Fin. Docket: 28250
Carrier(s): BN
Union(s): BRC
Award Date: 1-3-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

In what the Arbitrator characterized as a "*paper merger*" when the BN incorporated (merged) the FWD, Carrier discontinued all Carmen work at Childress, Texas and offered separation allowances to the 28 remaining Carmen. Most accepted the separation, a few exercised seniority elsewhere, but one opted to claim dismissal allowance instead. The Arbitrator ruled that the Carrier's assertion of a time limit controversy was unfounded, as "*...it is noted that there are no strict time limits in the New York Dock conditions*". Further, in sustaining the claim, he asserted that the Organization had filled its burden of proof, that the timing of the discontinuance of Carmen activity at Childress, combined with the offers of separation, clearly showed that there was a transaction and that, "*Therefore, the Claimant is entitled to reject the separation allowance and accept the dismissal allowance*."

AWD073
Referee: Vernon
Fin. Docket: 28250
Carrier(s): BN
Union(s): BRC
Award Date: 1-3-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Similar circumstances surrounding Case #72, above, except that the Claimants were laid off prior to the effective date of the merger between the BN and the FWD. Here, the Arbitrator ruled that the Organization had not established a causal nexus between the merger (transaction) and the lay-offs.

AWD074
Referee: Vernon
Fin. Docket: 28250
Carrier(s): BN
Union(s): BRC
Award Date: 1-3-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claimant had been employed on the SLSF prior to the merger with BN as a carman-painter. He continued to work as such for a period of four years after the merger. Due to the fact that the AAR made changes in stenciling requirements and the fact that Carrier retired its fleet of multilevel auto racks and replaced them with new, enclosed auto racks which did not require painting, the work which he was doing had gradually been eliminated to the point that his job was abolished. Arbitrator ruled that the Organization failed to establish a causal nexus between the merger and the fact that Claimant's job was abolished. He also noted that it appeared that it is likely that his position could have been legitimately abolished without regard to the merger, due to the diminished duties.

AWD075
Referee: Sharp
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 2-4-86
NYD Articles: Art. I, § 1; Art. I, § 4; Art. I, § 11(e)

When Carriers (UP/MP) contemplated a merger in 1980, a merger handbook was distributed which stated that the St. Joseph Terminal operations would be consolidated. Because of this statement, the General Chairman filed a merger impact statement before the ICC, which assertion went unchallenged by the Carriers. Later (in 1984), subsequent to the 1982 merger, the parties negotiated an agreement to provide transfer and separation allowances and employment opportunities to the employees of the St. Joseph Terminal Railroad as a result of the closing of the terminal. The agreement was approved by the employees. Later, several of these employees filed a lawsuit alleging that the closing of the terminal was merger related and should have been covered by NY Dock. The referee held that Carrier's argument that a general decline in business prompted the closing was not substantiated by the facts and that it was clear that the closing was merger related. As to the substantive issues, he held that the agreement negotiated by the Organization was superior to NY Dock in several provisions, namely the separation allowances provided, transfer allowances, and options to which an employee was entitled if he sold his home. "*After a complete examination of the record, the briefs of the parties, and the oral and written information revealed from the depositions, the Board finds that the General Chairman of TCU is bound by the agreement that he signed and which was approved by the affected employees. We find this because in our view he negotiated an agreement superior to the protective benefits which we would be enabled to award under the terms of NY Dock and because nothing disclosed by the depositions constitutes fraud to null an otherwise valid agreement. In our view it was most reasonable of the General Chairman to refrain from invoking a NY Dock arbitration, although he reserved that position at the time, before he heard the proposal of UP about those affected employees. After he had heard the proposal, there was no justification for such an invocation. We have found nothing from the deposition discoveries that would empower this Board to change the agreement. Although we could add to an agreement if it did not meet the terms of NY Dock, as is not the case here, nothing prohibits the carrier from making a more generous proposal than we could award.*"

AWD075
Referee: Sachs, Howard F.
Fin. Docket: COURT RULING
Carrier(s):
Union(s): Individuals
Award Date:
NYD Articles: Art. I, § 4

At the same time that TCU had taken the questions at issue in Case #75 to an arbitrator, several of St. Joseph Terminal Railroad employees brought suit in District Court charging that TCU had breached its duty of fair representation. While these employees brought an eight (8) count charge to try and establish their claim, Count I charged that the NY Dock provided that they could have refused to accept employment with the UP Railroad in Omaha, remained in St. Joseph, Missouri as dismissed employees, and drawn dismissal benefits as provided in Article I, Section 6. After a comparison of the various Court-imposed standards in cases involved a union's failure to afford fair representation and applying these standards to the instant dispute (i.e., whether the union's action was motivated by bad faith, was a demonstration of hostile discrimination, etc.), the Court had this to say about the NYD Conditions: "*...where NY Dock is applied, the parties may agree to alter specific provisions so long as employees' rights*

are not substantially abrogated" (p. 10). "*Indeed, the issue of whether plaintiffs could be classified as New York Dock terminated employees while refusing proffered employment in Omaha remains hotly contested as a matter of law. Plaintiffs rely on what they contend is the 'plain meaning' of Article III of the New York Dock provisions. That article, relating to Terminal company employees, is being read by plaintiffs (arguably out of context) to state that benefits of New York Dock are inapplicable to terminal company employees who fail to accept comparable employment, without good cause, only where such substitute employment 'does not require a change of place of residence.' Article 111, New York Dock, Appendix III, 360 I.C.C. 60, 84, 89-90 (1979). A full reading of the New York Dock provisions relating to Terminal company employees, shows repeated references, however, to like treatment with merged railroad employees. The identical form of words appears as an exception to the termination of dismissal allowances for such employees. 360 I.C.C. at 87 (Art. 1, Sec. 6(d)). The definition of "dismissed employee" does not, however, expressly cover employees who are offered relocation rights but reject them. 360 I.C.C. at 84 (Art. 1, Sec. I (c)). As shown in the Santa Fe brief filed Sept. 9, 1985 (Doc. 134), at pages 44-7, both the I.C.C. and arbitrators have been ruling that an employee who rejects relocation is not a dismissed employee, and does not enjoy New York Dock rights. See, Burlington Northern Inc.--Control--St. Louis S.F. Ry., 360 ICC 946-8, 1165 (1980) (attempt to treat relocation as a dismissal rejected); Norfolk & W. Ry. Co.--Purchase--Illinois Terminal Co.. 363 I.C.C. 822, 889 (1981) (same; tile proposal has appeal but rejected); CSX corp.–Control--Chessie & Seaboard C.L., 363 I.C.C. 521, 589-90 (1980); Norfolk Southern Corp.--Control–Missouri Pac., 366 I.C.C. 462, 620 (1982) (the transaction that initiated this litigation). A New York Dock arbitration board has recently stated the benefits of that program were inapplicable to these plaintiffs, because they rejected relocation. BRAC UP R. Co(T. Page Sharp, Feb. 4, 1986) (Ex. YY, filed Feb. 19, 1986, Doc. 157). While the current arbitration ruling is not deemed controlling, because plaintiffs seem not to have participated in the proceedings and it was handed down long after the agreement in question, it is simply the latest in a patten of rulings that very strongly support the defendants' view of New York Dock. Refusal to relocate does not seem to cut off benefits, once they start, but the general view seems to be that benefits do not begin unless employees are dismissed; and dismissal does not occur when employees are offered relocation but reject that means of saving their employment. The language relied on by plaintiffs probably means that employees who reject relocation can continue to receive some rights, if they were previously dismissed; it probably does not mean that Terminal employees and they alone shall be treated as dismissed employees if they reject relocation. The article states that Terminal employees are simply entitled to "the same conditions as apply to other employees" and are treated "as if employees of (the merging) railroad." 360 I.C.C. at 89,90. It seems likely the dominant purpose is equality of rights, not special favored treatment of Terminal Company employees. In the sum neither side's view of this issue appears devoid of merit. The union was therefore faced with a choice. It could push for implementation of New York Dock and, if successful, argue that under Art. III plaintiffs were entitled to refuse to move and still collect six years' pay as termination benefits. If unsuccessful at either stage, those Terminal employees not wishing to move would be left with nothing. Alternatively the union had the option to attempt to negotiate different conditions whereby those employees desiring to remain in St. Joseph could obtain prompt and certain benefits. It chose the latter course, and secured a severance allowance equal to one year's salary about ($35,000), payable immediately upon departure, for remaining employees. All of the plaintiffs accepted the severance pay and remained in St. Joseph. Outside the specialized area of regulated carrier law, this would seem to be a reasonably generous result, assuming a merger that is intended to save expenses.*" Defendant's motion for summary judgement granted, counts either dismissed or preempted by the Railway Labor Act and dismissed for lack of jurisdiction.

AWD076
Referee: Rehmus
Fin. Docket: 30000
Carrier(s): UP/WP/SN
Union(s): UTU
Award Date: 2-14-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

In Award and implementing agreement pursuant to Article I, Section 4 issued March 1, 1985, (Case 34) the Referee (Phipps) declined to answer several questions posed by the Organization and the Carrier account they were subject to Article I, Sec. 11 proceedings. The results of the instant award are in answer to the questions posed before but left unanswered. As a result of the implementing agreement, the rosters of the SN and WP were consolidated on a top and bottom basis with prior rights to work retained by the employees. The referee held that this consolidation, in and of itself, was a transaction but the Organization did not prove that any employees had been affected by the consolidation at that time. However, later, when the Carrier rerouted a train and consolidated yard switching, there clearly were affected employees. The Organization also contended that the reduction of the Extra Board was in anticipation of the merger, the Carrier stated that it was a managerial decision prompted by a decline in business. The referee held: "The Carrier responds that the reductions were the result of business declines, and this may have been a partial cause. But it is also true, as the Union asserts, that the Carrier has a financial incentive to keep Extra Board employment high during the test period to reduce average earnings and then to reduce the number on the Board when protection began. Without attempting to ascribe malicious motives to anyone, it is not unreasonable to view these cuts as being motivated at least in part by minimization of protection obligations. According to precedent, if a transaction is a partial cause of displacement, the fact that there may also have been other causes does not eliminate the requirement for protection of those adversely affected." A second issue decided by the referee held that an employee on a leave of absence for medical reasons had no position at the time of a transaction and, therefore, is not considered as affected by the transaction. A third Claimant, a Trainman, was affected by a transaction and afforded a displacement allowance. However, when he was later affected by a second transaction and furloughed, Carrier refused to continue his displacement allowance, claiming that he had been affected by a decline in business. Held: "*It is my conclusion that Lucas became and should have remained a 'displaced employee' for six years following the April 13, 1985 transaction. It is the purpose of the New York Dock Conditions to ensure that employees do not bear the full burden of adverse effects consequent upon railroad consolidations and similar transactions. Once having become displaced, an individual remains in that status regardless of subsequent transactions or even declines in business. He can only lose that status for one of the reasons stated in Section 5(c) of the New York Dock Conditions, none of which apply to Mr. Lucas. What may change after a displacement is the amount of monthly protection payments to which the individual is entitled. For example, if the Carrier has no work for a displaced individual who is furloughed from time to time, then his monthly allowance will equal his test period guarantee. But the displaced individual's status remains unchanged*." The last holding involved a Yardmaster that was displaced. Carrier contended that it was as a result of technological improvements. However, the referee noted that the SN was a small branch line and since technological improvements of the kind involved were very capital intensive, it was clear that the installation of the computer system was as a result of the transaction and the Yardmaster was affected and entitled to NY Dock protection.

AWD077
Referee: Rehmus
Fin. Docket: 30000
Carrier(s): UP/WP/SN
Union(s): UTU
Award Date: 2-14-86

NYD Articles: Art. I, § 1; Art. I, § 5(b); Art. I, § 5(c); Art. I, § 6(d); Art.I, § 8 [seePLB 5379 #36 TCU/SOOL]

This arbitration resolved the residual issues (Case 34) which Referee Phipps referred to Article I Section 11 arbitration as a result of the 3-1-85 award and implementing agreement. The issues and decisions were: 1) Section 8 requires that health and welfare coverage (fringe benefits) must continue as if an employee had not been affected by a transaction; 2) referee declined to rule whether a proposed crew consist agreement would entail NY Dock eligibility for the employees covered thereby; 3&4) as regards decline in business, Article I, Section 11 outlines the burden that the Carrier has when the employee identifies the transaction (the referee also referred to his decision in Arbitration I of the same date wherein he held that once an employee is entitled to NY Dock allowances, they must continue even if Carrier suffers a decline in business); 5) further identified when a change in residence is necessary; 6) held that arbitrary payments in the form of miles paid for are included in the phrase "total time paid for" even if they are not expressed in clock hours; 7) advised that the Carrier is responsible for advising displaced employees the necessary advance information on projected earnings of assignments so they can do all to protect their guarantees; 8) ruled that when a number of employees decline to place themselves on a job paying higher compensation than the one they occupy, all of them will be subject to a guarantee offset as provided for in Section 5(b); 9) part-time union officers are not entitled to have the time they lay off for union business to be computed into their test period compensation nor as time worked; 10) further identified when a change in residence is necessary; 11) Carrier is required to entitlement to continue revise and update the separate rosters as formulated by the 3-1-85 implementing agreement; 12) required that fringe benefit coverage the Carrier apportion mileage and/or positions on combined or commingled assignments over sections of track which was formerly exclusively that of one railroad or the other.

AWD078
Referee: Sempliner
Fin. Docket: 28250
Carrier(s): DTI
Union(s): UTU
Award Date: 9-27-84
NYD Articles: Art. I, § 8

Carrier argued that the portion of Article I, Section 8 reading: "*...under the same conditions and so long as such benefits continue to be accorded to other Employees of the Railroad...*" was controlling and if it was not obligated to pay a furloughed employees health and welfare premiums it was not obligated to pay the health and welfare premiums of a dismissed employee being paid NY Dock allowances. Referee held that the provisions of Section 8 are unambiguous and has been interpreted to afford a protected dismissed employee the same benefits as if he had continued to work. [see PLB 5379/36 TCU/SOOL]

AWD079
Referee: Harris
Fin. Docket: 28799
Carrier(s): SP
Union(s): UTU
Award Date: 10-14-85
NYD Articles: Art. I, § 4

In 1980, Carrier (SPTCO and its subsidiary SSW) received ICC permission to purchase a portion of the trackage of the defunct Rock Island. After rehabilitation of the line in 1983, the Carrier(s) began to reroute traffic formerly handled by SP Eastern lines employees over the trackage to be handled by SSW employees. After Referee Weston ruled in 1985 that the diversion of traffic was a NY Dock transaction,

the instant arbitration was convened to determine the procedural issues before making an implementing agreement. Since, as the referee put it, it was necessary to "*unscramble the egg*" because the Carrier had violated the provisions of NY Dock by going ahead with a transaction without the required agreement, most of the procedural issues raised by the Carrier were resolved in the Organization's behalf, and the Carrier was required to prepare listings of earnings for assignments, prepare forms for the employees to file for benefits and also permit a joint check of Carrier records to determine affected employees and levels of earnings.

AWD080
Referee: Harris
Fin. Docket: 28799
Carrier(s): SP
Union(s): UTU
Award Date: 12-23-85
NYD Articles: Art. I, § 4

This award was a continuation of Case #79 (above), which determined the procedural issues involved. The arbitrated implementing agreement referred to the fact that Carrier had violated NY Dock by entering into a transaction prior to negotiating an implementing agreement as called for in Article I, Section 4. As such, the referee stated that he may have to include provisions which would be outside the scope of an award which had been rendered if Carrier had followed the provisions of Article I, Section 4. Accordingly, he required that Carrier notify all affected employees by registered mail of their eligibility of NY Dock benefits, post a listing of potential earnings on road and yard assignments, permit the Organization to conduct a joint check of payroll records to determine test period earnings, and advertise all assignments for seniority choice. He refused, however, to allow the Organization's wish to include as compensation and time worked the remuneration received and time-off permitted to union representatives to fulfill Union business.

AWD081
Referee: Gershenfeld
Fin. Docket: 29772
Carrier(s): DH
Union(s): Individual
Award Date: 11-19-84
NYD Articles: Art. I, § 1; Art. I, § 11(e); Art. I, § 7; Art. IV

Claimant, Secretary to the D&H President, had her position abolished when Carrier centralized the executive and administrative offices of the DH, MEC, and the BM following ICC approval. Carrier argued that the abolishment of claimant's position was due to economic factors and was not related to an ICC-approved transaction. The referee held that: "*There is no doubt that moving the President's office to North Billerica was a transaction carried out by the Company to accomplish the consolidation authorized by the Commission. When the office in Albany was closed, the impact on Donna Gilchrist's employment was direct and immediate ... The arbitrator is convinced otherwise, that the grievant's position was not abolished through general restructuring of DH forces but came about as a direct result of consolidation in the office of President.*" Claimant was afforded a separation allowance as provided in Article I, Section 7.

AWD082
Referee: Fredenberger
Fin. Docket: 29720
Carrier(s): MC
Union(s): Individual
Award Date: 1-29-85
NYD Articles: Art. I, § 1; Art. I, § 11(e); Art. I, § 7; Art. IV

Claimant was the occupant of a management position in the office of Controller and Treasurer. Pursuant to ICC authorization, Carrier posted a notice on March 12, 1984 that the MeC Treasury Department positions were to be transferred to North Billerica, Massachusetts. Although Claimant was not occupying a position covered by the Scope of the Clerks' Agreement, the Organization had entered into an implementing agreement pursuant to Article I, Section 4 of NY Dock which provided that a covered employee may "(E)lect a separation allowance pursuant to the New York Dock Conditions or according to the terms of any applicable on-property protective agreement..." Therefore, according to the referee: "The Master Implementing Agreement, clearly negotiated pursuant to Article I, Section 4 of the New York Dock Conditions, specifically provides that employees covered thereby have a right to elect a separation allowance under the New York Dock Conditions or under any protective agreement applicable to their employment. Accordingly, the right to elect a separation allowance, whether under the New York Dock Conditions, the Stabilization Agreement or some other protective agreement, has become an important element in the level of protection afforded to TCU contract employees. This level of protection arises under the New York Dock Conditions as provided in Article IV thereof by virtue of the fact that it is provided for in the Master Implementing Agreement negotiated pursuant to Article I, Section 4 of those conditions. As we read the Master Implementing Agreement, TCU contract employees are afforded the option of a separation allowance under the New York Dock Conditions. There is no language in the agreement restricting that option to dismissed employees. We decline to infer, as invited by the Carrier, that one must be a dismissed employee as defined in the NY Dock Conditions in order to qualify for the separation allowance provided in the Master Implementing Agreement. We see no intent in that Agreement to so restrict the separation allowance. In conclusion, we find the option to elect a separation allowance under the "*New York Dock Conditions to be part of the level of protection afforded TCU contract employees, and as required by Article IV of the New York Dock Conditions that benefit must be afforded to Claimant as a non-contract employee*." Claimant was afforded a separation allowance as provided in Article I, Section 7.

AWD083
Referee: Peterson
Fin. Docket: 28905
Carrier(s): BO
Union(s): UTU (Yardmasters)
Award Date: 7-22-86
NYD Articles: Art. I, § 5; Art. I, § 6

Pursuant to a prior coordination of yardmaster work at Cincinnati involving the BO, the Master Coordination Agreement in that case provided that eligibility for a displacement allowance was not affected by the failure of a yardmaster receiving a displacement allowance to exercise seniority to a lower job classification when yardmaster work was not available. After the ICC imposed New York Dock for CSX's control of the BO, CO, SCL and LN, another transaction took place and the Carrier refused to include as test period compensation amounts paid to yardmasters under the Master Coordination Agreement. In referring to Docket No. 132 (WJPA Section 13 decision), the arbitrator held that normally re-computation due to the adverse affect of a second coordination should be based upon compensation for services actually rendered. However, taking note of the provisions of the Master

Coordination Agreement he stated: "(I)*t must be taken into consideration in the instant case that except for the Master Implementing Agreement having permitted protected employees not to have eligibility for a protective allowance affected by failure to exercise seniority to a lower job classification when yardmaster work is not available, that such employees would normally have worked such positions absent the coordination. Thus, as Referee Bernstein also indicated, we think that as concerns this element of a protective allowance, that it could be expected that protected employees in the instant case would normally have been expected to have continued the normal exercise of seniority to earn such compensation by working the lower job classifications when no yardmaster work was available. Thus, we believe that any protective allowances provided employees in this respect should be treated as service performed during the test period. In this same connection, and to clarify the record, the Board would note that while it finds no reason to here hold that certain other protective agreements or arrangements not be considered as payment for services performed at straight time and overtime, holiday pay, vacation pay, and other payments made in pursuance of the Schedule of Work Rules Agreement are to be properly used in the computation of test period earnings*."

AWD084
Referee: Peterson
Fin. Docket: 28905
Carrier(s): BO
Union(s): UTU (Yardmasters)
Award Date: 7-22-86
NYD Articles: Art. I, § 4

Prior to 1980 BO Yardmasters performed the work of supervising crews working at trailer ramps in Cincinnati. In 1980 the work was discontinued and transferred to LN supervision at another location, although in the Cincinnati area. Effective 6-18-84, the work was transferred back to the BO but the supervision of the crews was given to TCU. The referee held that the Implementing Agreement referred to the coordination of yardmaster functions "*now performed*" and that on the date of the Implementing Agreement (1-31-84) the work was not being performed by the BO yardmasters.

AWD085
Referee: Peterson
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): BRC
Award Date: 7-23-86
NYD Articles: Art. I, § 1; Art. I § 11(e)

As a result of the arbitrated implementing agreement issued in Case #67 (Fredenberger 12-6-83), certain provisions were included to provide for the dovetailing on a combined roster of the seniority dates of UP and MP Carmen. Subsequent to the dovetailing, the Carrier furloughed several employees, ostensibly based upon decline in business considerations. Claim was filed account the Organization contended that the furloughs would not have occurred had not the MP Carmen, with greater seniority, been dovetailed onto the roster ahead of the four claimants. The referee held that the Carrier had shown by substantial probative evidence that there was a direct relationship between an analytical study of declining business conditions and the Claimants' furlough. Further, "The mere fact that Claimants were on a merged seniority roster that had been brought about by reason of a consolidation of a facilities and operations did not automatically entitle them to a protective allowance under the New York Dock Conditions, since it must be presumed that even had the seniority rosters not been consolidated the Claimants would nonetheless have been furloughed as a result of the decline in business."

AWD086
Referee: Peterson
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): BRC
Award Date: 7-23-86
NYD Articles: Art. I, § 1; Art. I § 11(e)

When the Carrier petitioned to the ICC for permission to merge, it was stated that certain of the work of the BRC would be taken from those employed by the St. Joseph Terminal Railway Company (UP) and transferred to the MP. However, when the Carrier furloughed two employees in June, 1984, it claimed that declining business, not a transaction, caused the furloughs. The referee noted that the Organization had presented persuasive data as to the number of cars inspected and handled by the Carmen for the month in question which showed little difference and noted: "*Clearly, it must be presumed from overall actions both before and after merger of the MP into the UP that it was fully intended there be a consolidation of UP operations at SJTRC with MP operations at MP's St. Joseph Yard. The application for merger as submitted to the ICC included mention of the intended consolidation of operations at St. Joseph, MO; internal memoranda and correspondence described the extensive planning and consideration given to the UP abandonment of operations at the SJTRC and consolidation of operations at MP's St. Joseph Yard; and, the consolidation of operations did in fact take place in a manner not unlike that which had been contemplated both in the ICC application and in the internal documents of the carrier.*"

AWD087
Referee: Peterson
Fin. Docket: 29430
Carrier(s): NW/SOU
Union(s): UTU
Award Date: 8-86
NYD Articles: Art. I, § 1; Art. I § 11 [see PLB 3716/2]

When the two carriers, NW and Southern, consolidated their separate operations at Norfolk Terminal, the parties entered into an implementing agreement which consolidated the seniority rosters and assigned positions based upon the percentage of work which was contributed by each carrier. Claim was filed to identify each employee on the combined seniority roster as "affected" by the transaction, some because they were "repositioned to a lower relative ranking on the seniority roster which was placed into effect by the Implementing Agreement." Also, the facts revealed that subsequent to the consolidation of the Norfolk Terminal on June 1, 1982, regulation of the Yardman's Extra Board under the provisions of the Schedule resulted in some of the claimants being furloughed. The Carrier also argued that other reductions in force were mandated by a decline in business. The referee, in commenting on the Organization's request to certify all employees on the combined roster as being affected stated: "*As has been held in decisions of past boards of arbitration, the New York Dock Conditions neither contemplate nor extend blanket certification to employees as being adversely affected or entitled to a 'displacement' or 'dismissal' allowance merely because they are on a roster in either an active or inactive status on the date of a consolidation or transaction. Entitlement to such protective benefit status flows from each transaction as authorized by the ICC, not, as there, from an implementing agreement or the consolidation of rosters.*" Further, in denying the claim in full, the referee stated (in reference to adjustment of the extra Board by the provisions of the Schedule Agreement and reductions in force due to decline in business and other factors such as a Miners Holiday) that: "*It therefore seems evident that the purpose of the New York Dock Conditions was to protect employees against the adverse affects of a transaction, not to insulate all employees against all consequences of an employment relationship. Thus, it must be concluded that merely because previously furloughed employees came to be placed on a consolidated seniority roster in*

connection with the consolidation of operations and services did not automatically entitle them to protective allowances pursuant to the New York Dock Conditions. It must be presumed that even had the rosters not been consolidated the Claimants would have nonetheless have remained in a furloughed status with respect to work opportunities on their former railroads."

AWD088
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): TCU
Award Date: 9-3-86
NYD Articles: Art. I, § 4

As a result of the consolidation of the Carrier's Purchases & Materials Department, the parties entered into Implementing Agreement No. 11, which provided that the eleven positions transferred from St. Louis to Omaha be filled in the following manner: "*(1) The incumbents of the transferred position will be afforded to transfer with their positions; (2) The remaining unfilled positions will be offered in order to the remaining employees at St. Louis on Roster #8 - MANAGER PURCHASES & MANAGER MATERIALS; (3) Any remaining unfilled positions will be offered in reverse seniority order to an equal number of MP employees on Seniority Roster #8; (4) Positions not filled after affording other employees on Roster #8 the opportunity to transfer to Omaha will be bulletined to employees in Zone 200 - General Office, Headquarters Building, Omaha*." The Carrier complied with (1) and (2) but refused to offer the remaining unfilled positions to claimants, who were not regularly assigned to the positions in the Purchases & Materials Department at St. Louis but who were on Roster #8. In rejecting the Carrier's contention that the claimants had an opportunity to request the unfilled positions under (2) and it was therefore unnecessary to follow the provisions of (3), the referee stated that: "First, the express language in Article II, Section 3 included '....employees on Seniority Roster No. 8.' If the parties wanted to limit application of the third step, the parties could have utilized alternative terminology. The Carrier has not adequately explained why the parties settled on the unambiguous language in Article II, Section 1 of the parties intent to restrict the provisions to actively employed clerks. The plain meaning of the words in the Agreement is the best evidence of the parties' true intent. Second, forcing junior workers on Roster No. 8 to select one of the options was not unreasonable in light of the surrounding circumstances. Perhaps, at the time, the parties perceived that the consolidation might adversely affect Claimants sometimes after the transaction was implemented. Most importantly, although implementing contracts, such as Implementing Agreement No. 11, are negotiated pursuant to the criteria in Section 4 of the New York Dock Conditions, nothing in Section 4 prohibits the parties from formulating implementing agreement which protects more employees or provides for greater benefits than the minimum level of protection prescribed in the New York Dock Conditions. Often during the give and take of good faith bargaining, the parties may address subjects beyond the selection of forces and assignment of employees, as described in Section 4 to obtain a satisfactory agreement without resorting to compulsory arbitration. In summary, it is not the function of this Committee to second guess the parties' rationale for including certain employees, even if they were unaffected by the transaction with the protective scope of Implementing Agreement No. 11. This Committee may not alter the content of Implementing Agreement No. 11. Pursuant to Section 11 of the New York Dock Conditions, our jurisdiction is confined to interpreting and applying the agreement terms."

AWD089
Referee: Zumas
Fin. Docket: Staggers
Carrier(s): WRA
Union(s): TCU
Award Date: 9-23-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

The Western Railroad Association was a rate-making organization which was directly involved with the lifting of antitrust immunity imposed by the Staggers Rail Act of 1980. The Association consolidated its collective rate activities with SWFB, TCFB, and the Western Trunk Line Committee and reached agreement with TCU to provide New York Dock II Conditions to employees affected by the consolidation and centralization of the operations of the Association which took effect on June 1, 1982. Later, in October, 1982, the Association consolidated with the three other bureaus which established a "*date affected*" for some of the Association's employees. When the Association reorganized its four regional Tariff Bureaus and the Computer Conversion Department in Chicago effective March 16, 1984, TCU filed a claim for protective benefits for those affected. By date of June 4, 1984, Referee Roukis held that the reorganization was not a transaction and the Association was not required to serve notice under Article I, Section 4 to negotiate an implementing agreement with TCU. In October, 1984, TCU filed a claim in behalf of the same claimants that the elimination of their 25 positions as a result of the March 16 reorganization was covered under the Staggers Act. The referee held that there was no doubt that despite the Roukis ruling that the reorganization was not a transaction, Section 219 provides that employees "*who are affected by amendments made by this section*" are entitled to "*fair arrangements*" no less protective than those established by New York Dock. Therefore, being affected by Section 219 is the same as being affected by a transaction. However, he then referred to other factors such as the ICC's orders concerning boxcar deregulation and economic loss as well as "*...it should be noted that 21 of the 25 Claimants were already receiving protective benefits, as a result of the consolidation agreement of 1982. The agreement reflects the requirements of the Staggers Rail Act. Nothing in either Section 219 or the New York Dock Conditions indicates that the Claimants are entitled to a new protective period for an additional change caused by the statute. The changes which took place after January 1, 1984 are part of the continuing process, for which the Claimants are already receiving benefits*." All claims denied.

AWD090
Referee: Seltzer
Fin. Docket: 29486
Carrier(s): CR
Union(s): IBEW
Award Date: 12-16-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

In 1978, Conrail eliminated service on its Scranton-Binghamton Line and closed the Scranton Yard. The Scranton Diesel Shop remained open and performed overflow work from other locomotive repair facilities. In late 1980 Conrail notified its employees of its plan to sell the Scranton-Binghamton Line to the DH, which sale was consummated and approved by the ICC on May 27, 1981. Earlier in 1981, Conrail closed the Scranton Diesel Shop. In 1983, the IBEW filed claims for coverage under New York Dock for those employees affected by the closing of the repair facility. Initially, the referee disposed of the Carrier's claim that the claim was not timely filed and that under New York Dock the employee himself must file the claim, that the Organization could not file in its behalf. He stated: "However, the protective conditions concept in Railway Law is particularly attuned to the rights of employees. In the absence of very compelling facts, the panel would not be inclined to find a fatal defect in the Organization's claim letter. Obviously, at some point in time, a period of delay would constitute laches.

Here, the Organization and Carrier have a running dispute concerning the Organization's allegation that the Carrier failed to give notice to the employees of the transaction or any changes contemplated in connection with such transaction." "The Board is satisfied that the February 25, 1983 letter constitutes a proper and sufficient claim for benefits under New York Dock Conditions, and no fault can be properly assessed against the Organization for failing to meet its burden in that regard. It rightfully could stand in for its members in the presentation of the claim." As to the merits of the claim, the referee held that the abolishments were proved to be related to the deteriorating financial condition of the Carrier and earlier discontinuance of service and were not related to the DIT acquisition.

AWD091
Referee: LaRocco
Fin. Docket: 29430
Carrier(s): NW
Union(s): BRC
Award Date: 7-16-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Pursuant to ICC authorization, the Carriers (NW and SOU) consolidated their inspection work at St. Louis' Luther Yard, closing the Coapman Yard. This occurred on October 1, 1982. No employees were furloughed as a result of the consolidation. On January 28, 1983, the eight (8) claimants were laid off. They were recalled during the Spring of 1983. Claim filed account Carrier, as a subterfuge, did not transfer all the Carmen work at the Coapman Yard, instead contracted out a portion of that work to employees of a foreign railroad, the Alton and Southern. Board held that the Employees failed to establish a connection between any transaction and the furloughs, that the Carrier showed substantial financial data to prove that there was a decline in business, that even if the contracting out of work was shown to be the cause of the abolishment, that issue is for another forum, as the Board's authority is confined to the interpretation and application of the New York Dock Conditions and the Implementing Agreement.

AWD092
Referee: LaRocco
Fin. Docket: 29430
Carrier(s): NW
Union(s): BRC
Award Date: 7-16-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Pursuant to the 1982 ICC approval to coordinate operations between the NW and SOU, the Carrier closed the SOU's Winston-Salem Yard and implemented the two claimants from their Carmen positions to the consolidated facility at North Winston Yard effective June 1, 1982. Subsequent to that action, the Carrier offered employment to a MofW protected employee and placed him on the Carmen helper seniority district. (The two claimants were placed on a journeyman seniority roster.) On September 30, 1982, both claimants were laid off but the former MofW employee, with a lesser seniority date, continued employment. Referee was convinced by the decline in business data produced by the Carrier as to the furlough of one Claimant. However, as to the retention in service of the MofW employee, who had been offered a unilateral guarantee of employment, he sustained the claim in behalf of the second Claimant, noting: "*Unlike Claimant Hart, Claimant Shell persuasively argues that his furlough was the direct result of the Carrier's unilateral decision to provide a Carmen Helper position to a protected SOU Maintenance of Way Employee. This Committee need not address the propriety of furloughing a Carman while a junior Carmen Helper remains in service. We agree with the Carrier that such an issue primarily concerns an application of scheduled rules as opposed to the New York Dock Conditions or the May 7, 1982 Implementing Agreement. However, the Carrier utilized a decline in business as a subterfuge for laying*

off Claimant Shell and simultaneously promising continued compensation to a former, protected SOU worker who, until the Winston-Salem coordination, never held any type of seniority in the Carmen's craft. Indeed, Mr. Boler retained his maintenance of way seniority. We logically infer that the Carrier's maneuver was designed to evade paying protective benefits to either Claimant Shell or Mr. Boler. While a decline in business is a factor relieving the Carrier from paying protection to employees affected by the resulting force adjustments, the Carrier may not use a business downturn as a pretext for avoiding its obligations under the New York Dock Conditions. Although, in a purely technical sense, Boler was a new hire, his continued employment as a Carmen Helper led to the abolition of an additional carman's position when the September 30, 1982 force reductions occurred. Put differently, the Carrier's promise (to another labor organization) to grant Mr. Boler a position became a pretext when it provided Boler with employment to the detriment of another protected employee."

AWD093
Referee: LaRocco
Fin. Docket: 29805
Carrier(s): NW
Union(s): BRC
Award Date: 7-16-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

On December 24, 1981, the ICC approved the merger of the ACY into the parent company, NW. It stated that the merger would be exempted from the usual regulatory process because the transaction was entirely "*within the corporate family*" for the purpose of "*corporate simplification*." The Organization filed a claim on August 16, 1982, requesting New York Dock coverage for all ACY employees which were allegedly affected by the so-called "*paper merger*" of ACY and NW. Referee held that the Organization never identified a transaction which had affected the employees, that "...(E)*xempting a transaction from the formal scheme of interstate transportation regulation does not mean the merger was effected without the ICC's authorization. In this case, the ICC expressly imposed (on the Carrier) the New York Dock Conditions as "...a condition to use of the exemption..." Imposition of the New York Dock Conditions was undoubtedly a precautionary measure. The ICC guaranteed that in the unlikely event that any ACY employee was affected by the internal merger, they would receive either a dismissal or displacement allowance. Therefore, the Organization has properly identified a transaction as required by Section 11(e). Aside from designating a transaction, the Organization has failed to come forward with pertinent facts coherently connecting the merger to an adverse change in Claimants' employment status. Although it enumerated a plethora of economic injuries which Claimants purported absorbed, the Organization has not shown how these adverse effects flowed from the paper merger. The Organization is obligated to do more than identify a transaction and simply assert that protected workers lost compensation. Section 11(e) also requires the Organization to show some rational relation between a merger transaction and the alleged consequences of the transaction. BMWE v. MEC, NYD § 11 Arb. (2/26/85; Lieberman); MP v. ATD NYD § 11 Arb. (7/31/81; Zumas). While the effects of a merger might be felt long after a transaction is actually implemented, not every employment adversity occurring subsequent to a transaction presumptively entitles workers to merger protective benefits. The gap in the Organization's allegations is glaring. It has not been able to articulate how an innocuous and simple transformation of corporate structures within a holding corporation either changed ACY operations or led to the furlough of three Claimants. The record reveals that ACY operations, service, work and positions were unaltered after the merger. Since the Organization has not satisfied its Section 11(e) burden of going forward, we need not address or consider the Carrier's decline in business evidence.*"

AWD094
Referee: Marx
Fin. Docket: 28250
Carrier(s): BN
Union(s): BRC
Award Date: 8-30-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

The parties entered into an implementing agreement dated January 29, 1981, to cover the transaction of combining Carmen assignments at St. Louis and Kansas City. Subsequent claims were filed by 28 Carmen between September, 1981, and July, 1982, account affected by the consolidation of assignments. Board held that the Carrier presented persuasive evidence that a substantial decline in business occurred during the claimed period and the 28 Carmen were not affected by the transaction cited. Board also held that the Organization's claim was timely as the working agreement time limits are not applicable under New York Dock.

AWD095
Referee: Brown
Fin. Docket: 29455
Carrier(s): NW
Union(s): UTU
Award Date: 1-30-85
NYD Articles: Art. I, § 1(c); Art. I, § 6

Claim filed in behalf of an employee that was in a furloughed status on May 3, 1982, when the NW-IT consolidation took place. The Board referred to Amtrak Board of Arbitration No. 15 (Preston J. Moore) and quoted the referee's ruling in an Appendix C-1 arbitration hearing: "*In order for an employee to receive the dismissal allowance outlined in Article I, Section 6, he must fall within the definition of 'dismissed employee' set forth in Article I, Section 1(c). The protective conditions do not require the Carrier to speculate on which furloughed employees might have been working at some future date had the Carrier not joined Amtrak.*"

AWD096
Referee: LaRocco
Fin. Docket: 29430
Carrier(s): NW
Union(s): BRC
Award Date: 10-10-86
NYD Articles: Art. I, § 1; Art. I, § 6; Art. I, § 11

The Carrier instituted transaction which consisted of coordinating box car
repair work between the Roanoke Shops and the Hayne Shop at Spartanburg, S.C. which took place on or about January 2, 1986. Claims were filed by 39 claimants that had been furloughed prior to the transaction, most during May, 1985, at Portsmouth, Ohio, that contended that the Carrier had gradually removed box car repair work from Portsmouth and transferred it in anticipation of the coordination between Roanoke and Hayne Shops. Board held that the Organization had failed in its burden to identify the transaction which affected claimants, that the organization is required to "*...identify a Section 1(a) transaction (or transactions) and specify `.....pertinent facts of that transaction relied upon.' The Carrier's burden of proof is conditional. If the Organization first fulfills the burden of proving that '...factors other than a transaction affected the employees.' On the other hand, if the Organization fails to either identify*

a transaction or state pertinent facts, the Carrier prevails regardless of whether it has satisfied its burden of proof." The referee also referred to Carrier's citation of Amtrak Board of Arbitration No. 15 wherein Referee Preston J. Moore issued an Appendix C-1 denial award based upon his position that employees furloughed at the time of a transaction are not considered dismissed, that the reduced chance of being recalled to service because of a transaction does not automatically transform a furloughed employee into a dismissed employee.

AWD097
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): BRC
Award Date: 10-24-86
NYD Articles: Art. I, § 4; Art. I, § 11(e)

Some time in 1983 (subsequent to the September, 1983 ICC approval to merge the UP/MP/WP), Carrier began considering replacing its Sedalia, Missouri and Palestine, Texas car repair shops with one facility at Tucker, Texas. Later, Carrier decided against building the Tucker plant. Carrier then issued a notice dated March 8, 1986, of its intent to abandon the Sedalia Shops and transfer the work and employees to Omaha, Nebraska, Desoto and Jefferson City, Missouri. The closure occurred on June 11, 1986. On June 28, 1986, claims were filed in behalf of 31 Carmen that had been furloughed on or before December 30, 1985, contending that they had been laid off in anticipation of the closure of the Sedalia Shops. Board held that although the organization had identified the transaction which it was claimed affected the claimants, such nexus was rebuttable and Carrier's evidence of substantial business declines as well as budget cuts at the Sedalia Shops during 1984 and 1985 resulted in the conclusion that the claimants were not affected by the June 11, 1986, closure.

AWD098
Referee: Zumas
Fin. Docket: 29916, 29985, 30053
Carrier(s): SCL
Union(s): BMWE
Award Date: 8-20-83
NYD Articles: Art. I, § 4 [see AWD 261 & 267]

This case involves three separate finance dockets, all of which involved the CSX Corporation's consolidation of the corporate families SCL and LN and some other, smaller rail lines which it already controlled through stock ownership. Carrier served a notice to reduce the number of BMWE seniority districts on all of the lines from 22 to 13 and to combine all working agreements. The request to consolidate working agreements was later dropped by the carrier and the instant Article I, Section 4 arbitration was to decide whether Carrier's request to consolidate seniority districts was a "transaction" pursuant to New York Dock. The Organization's position was summed up in its 3-22-83 letter: "BMWE clearly pointed out to the Carrier representatives present at those conferences the fact that the notices did not contain proposed changes involving unification, consolidation, merging or pooling of any railroad facilities, operations or services and that only such changes as would affect employees would give cause for the issuance of notices and negotiation of agreements under the provisions of Article I, Section 4 of the NYD." The Referee ruled that Carrier's notice was not a valid one under Article I, Section 4 of New York Dock, that "`Transaction' is defined as any action taken pursuant to authorization of the I.C.C., on which the New York Dock conditions were imposed. Thus, in order for either party to invoke Section 4, the Carrier must be authorized to take some action pursuant to an I.C.C. order, the result of which would be a rearrangement of forces. While the New York Dock conditions may be applicable at some point, the

Arbitrator will not speculate on what set of circumstances would establish a transaction, given the very limited nature of the I.C.C. authorizations. In any event, this Arbitrator cannot adopt the Carrier's view that the I.C.C. would not have imposed the protective conditions if it did not envision changes in assignments, such as the consolidation of seniority rosters. Such contention by Carrier is without factual basis in this record. In essence, what the Carrier seeks is sanction in making changes in working rules. The New York Dock provisions may be used to gain that sanction, either through negotiations or arbitration, but only when the changes are necessary to implement an I.C.C. approved action. As indicated above, the I.C.C. approved a purely corporate restructuring that did not mandate the rearrangement of forces as a necessary consequence." Also, "In effecting seniority consolidation, Carrier has recourse to the provisions of the Railway Labor Act. Absent a 'transaction' that gives an Arbitrator jurisdiction, seniority consolidation cannot be accomplished under the arbitration provisions of New York Dock II. This Arbitrator agrees with the Organization that a contrary holding would embrace the premise that compulsory interest arbitration may be instituted in all cases in which the I.C.C. has imposed New York Dock II employee protective conditions." [see Award Nos. 261 & 267]

AWD099
Referee: Sickles
Fin. Docket: 29720
Carrier(s): GTI
Union(s): BMWE
Award Date: 12-3-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

As a result of the ICC's approval of Guilford Industries' application to acquire the Boston and Maine, it was able to combine that trackage with the Maine Central's trackage (already acquired) and run end-to-end trains. The Organization argued that this running of end-to-end trains was made possible by the merger and, therefore, was a transaction pursuant to New York Dock. The referee referred to a prior award (Maine Central v. UTU) which ruled on the identical issue: "...The establishment of run-through and/or run-through power by the Maine Central and the Boston and Maine, which commenced on or about August 11, 1982, did not constitute a 'transaction' as contemplated under the provisions of New York Dock. Several significant factors have compelled this Arbitration Committee to reach this conclusion, not the least of which is the definition of 'transaction'. The Award relied, to a significant extent, upon a conclusion that it is not uncommon for run-through trains to be operated in this industry and Carriers `...clearly do not need an ICC authorization to operate run-through trains.'"

AWD100
Referee: Sickles
Fin. Docket: 29729
Carrier(s): GTI
Union(s): BMWE
Award Date: 12-3-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Operating within the facts outlined in the arbitration ruling above, (Case 99) the Organization argued that when the Carrier, Guilford, chose to change the interchange point with a foreign Carrier, the Canadian Pacific Railroad, that resulted in the furlough of employees and, as such, constituted a transaction. Referee held that it was stated and not controverted, that it is a common practice for connecting Carriers to change interchange points, that it is something that is done without reference to the ICC and does not need ICC approval. It is, therefore, not a transaction under New York Dock.

AWD101
Referee: Lieberman
Fin. Docket: 29729
Carrier(s): MC
Union(s): BMWE
Award Date: 2-26-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Two (2) employees were furloughed on November 3, 1983. On or about that date the Carrier transferred two tampers and two tie handlers from the location at which the Claimants were furloughed. Organization argued that the end-to-end aspects of the two Carriers (MC and BM), which was addressed above, as well as the transfer of the machines, constituted a transaction under New York Dock. Carrier argued that a severe decline in business was the reason for the furloughs. Referee noted that the Carrier's was the more persuasive argument, that there had been a substantial decline in business; further, the organization did not show that any work had been transferred, that the transfer of equipment is not the equivalent of the transfer of work.

AWD102
Referee: Fredenberger
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): UTU
Award Date: 6-24-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Pursuant to the merger of the UP and MP, an Article I, Section 4 arbitration proceeding was completed in early 1983. One of the provisions of the arbitrated implementing agreement which provided for the selection of forces to accomplish Carrier's consolidation of the Omaha-Council Bluffs Terminal was to transfer, with their MP seniority, 12 MP yardmen to the UP Consolidated Yardmen-Brakeman-Conductors Seniority Roster. At that time, the Organization insisted that the transferred MP yardmen (although they also established road seniority) could not exercise their road seniority until vacancies in road service developed. When the MP transferees were allowed to exercise seniority under the applicable UP rules agreement as a result of Carrier offering 12 separation allowances to the employees on the roster, one former UP brakeman was displaced onto the extra board and suffered reduced compensation. The Organization petitioned for New York Dock benefits, contending that but for the initial transaction which placed the MP yardmen on the UP roster, the Claimant would not have been placed in a worse position with respect to his wages and working conditions. Referee held:

> *When the MP employees transferred to the UP yard they became subject to the UP agreements, including the Dual Rights Agreement which held the MP transferees in yard service for over thirty days and effectively precluded them from filling any of the vacancies created by the twelve additional separation allowances. Any adverse effect from the exercise of seniority by the MP transferees to UP road positions was the result of the application of UP agreements and not as a result of the consolidation of the Omaha-Council Bluffs Terminal. It is true, as the Organization urges, that but for the transaction one MP transferee would not have been in a position to exercise seniority to a road position which resulted in Claimant's displacement. However, we believe the Carrier's argument is well taken that, carried to its logical conclusion, the organization's position would of necessity mean that any exercise of seniority by an MP transferee at any time in the future would result in the Carrier being liable for protection for anyone*

bumped or furloughed. We read nothing in the New York Dock Conditions which would persuade us that they were intended to be applied in such broad fashion.

AWD103
Referee: Fredenberger
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): UTU
Award Date: 6-24-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

As a result of UP's acquisition of 19 miles of MP trackage in 1984, the ICC issued a Notice of Exemption and imposed New York Dock protective provisions. Subsequently, the MP local which operated on the trackage was eliminated and a UP local began performing the work. Two days after the elimination of the MP local, a pool turn was abolished at the request of the local chairman. The Organization argued that the pool turn was abolished as a result of the UP's acquisition of the trackage. Referee ruled that the abolishment of the pool turn resulted from a factor other than the transaction, specifically, the local chairman's regulation of mileage.

AWD104
Referee: Fredenberger
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): UTU
Award Date: 6-24-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

As a result of Carrier's notice to consolidate two locals into one, an Article I, Section 4 implementing agreement provided that the employees of the respective Carriers (UP and MP) would share equitably in the manning of the new local, with the UP crews to operate the local for five months of the year and the MP crews to operate the local for seven months of the year. This arrangement began on June 1, 1985, with the UP crews initially manning the assignment. As a result of this transaction, all members of the two locals which were combined were afforded New York Dock protection. When the MP crews began their operation of the local beginning November 1, 1985, claims were filed in behalf of the UP crew and all employees affected in the chain of displacement. Carrier denied the claims based on the proposition that the only transaction which occurred was on June 1, 1985, and any subsequent moves by the crewmen was not a transaction. Referee held that it was clear that the change-over was a transaction but that any subsequent change-overs would not be a transaction: "Even if the November 1, 1985 transfer was not itself a transaction under the New York Dock Conditions, we are persuaded that the displacements and dismissals suffered by UP employees as the result of the November 1 transfer were the result of the consolidation of the UP and MP locals on June 1, 1985. The Organization's point is well taken that those employees simply did not suffer adverse effect because it was postponed due to the fact that UP employees operated the Salina-El Dorado Local for the first five months from June 1 to October 31, 1985. MP employees who lost their positions as a result of the abolishment of the MP McPherson-El Dorado Local on June 1, 1985, and MP, employees who were in the chain of bumping initiated by that event, received full protection. Although the Carrier protected UP employees in June in fact those employees did not suffer a loss of positions or earnings and set forth a chain of bumping until November 1, 1985 when the local was transferred to MP employees. The fact that adverse effect on UP employees of the June 1 transaction was postponed does not change the fact that adverse effect resulted from the consolidation of the UP and MP locals on June 1. That the November 1 transfer was a creature of agreement between the parties is a factor supporting the Organization. That agreement was entered into pursuant to Article

I, Section 4 of the New York Dock Conditions to implement the consolidation of the UP and MP locals. In our opinion that very agreement provides the causal nexus between the consolidation and the adverse effect upon UP employees."

AWD105
Referee: Marx
Fin. Docket: 29720, 29772
Carrier(s): BM/MC/DH
Union(s): BRC
Award Date: 1-26-87
NYD Articles: Art. I, § 4

In January 1986, Carrier proposed to transfer the car repair facilities of the BM at North Billerica, Massachusetts, and of tile MC at Waterville, Maine, to the DH shops at Oneonta, New York. At that time the Carrier proposed to transfer a total of 19 positions. However, negotiations on this proposal began but were never completed and the Carrier abandoned the proposed transfer for the time being. Later, in October 1986, the Carrier proposed the consolidation again but this time proposed to only transfer 8 positions. Organization argued before the referee that the Carrier should be held to the January 1986, proposal and be required to transfer 19 positions. The Carrier argued that due to declines in revenue and lack of carloadings it was only necessary to transfer 8 positions. The Referee held that the provisions of Article I, Section 4 hold that the Carrier will serve notice of "*...full and adequate statement of the proposed changes ... including an estimate of the number of employees*", that the rearrangement of forces is a Carrier decision, that it is beyond the scope of an arbitrator to determine the size of the work force necessary to implement the transfer or the number of positions to be established. Referee also declined the Organization's request to certify all junior employees working at Oneonta as adversely affected as such blanket certification is also outside the arbitrator's purview and the New York Dock Conditions provide coverage only for those affected by a transaction.

AWD106
Referee: Marx
Fin. Docket: 29772
Carrier(s): MC/DH
Union(s): BRC
Award Date: 1-26-87
NYD Articles: Art. I, § 4

Carrier proposed to transfer start-to-finish painting of locomotives and cars from the MC shop at Waterville to the DH shop at Oneonta. Some similar issues as raised in Case 105, above, such as whether blanket certification as affected employees was proper prior to a showing of a transaction, and whether or not the number of employees proposed by Carrier to transfer was sufficient; same holding as above. However, the Carrier proposed that it need not make an offer of transfer to employees that were given this right in a previous transaction but refused to do so. Referee held that despite their earlier refusal, they are entitled, by virtue of their seniority, to be offered an additional opportunity to transfer.

AWD107
Referee: Peterson
Fin. Docket: 30004
Carrier(s): NW
Union(s): UTU
Award Date: 11-28-86
NYD Articles: Art. I, § 1; Art. I, § 10; Art. I, § 11(e)

As a result of ICC approval, the NW acquired the New Jersey, Indiana and Illinois Railroad (NJII). Negotiations were entered and an implementing agreement signed to become effective 12-15-82. Prior to the merger, only one NW assignment performed interchange work with the NJII, Local F-21-A. However, prior to the effective date of the implementing agreement, the NW abolished this assignment, as of 12-14-82, claiming that a decline in business forced the abolishment. Claimant was displaced from his assignment by a senior employee when the Local F-21-A was abolished and he filed for displacement allowance pursuant to New York Dock. Carrier resisted on two grounds: 1) that the abolishment was not pursuant to a transaction and 2) that Claimant's annual earnings after his displacement were greater than his annual earnings prior to displacement. Board held that it was clear that the abolishment was in anticipation of the transaction which merged the railroads, that prior to the abolishment only Local F-21-A performed interchange work with the NJII and after the merger this work was assigned to others, that the criteria of whether or not an employee suffers loss of earnings due to a transaction is contained in Section 5 of New York Dock: "...be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position from which he was displaced", that Claimant was clearly affected by a transaction pursuant to New York Dock and that he had suffered a loss in monthly compensation.

AWD108
Referee: Ables
Fin. Docket: 28905
Carrier(s): CO
Union(s): UTU/TCU
Award Date: 1-16-87
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Pursuant to the ICC's authorization of the merger of the CO and SCI, the Carrier coordinated the movement of coal traffic to and from the Portsmouth/Newport News areas in Virginia. After allowing protective benefits for a period, (from March 15, 1981), it suspended payments effective November 1, 1984, alleging a decline in business. The referee framed the issue as: "*The narrow but difficult question is whether the employer Chesapeake and Ohio Railway Company, can suspend paying 'protection' money to employees who, the employer and the Organization representing its employees, United Transportation Union, agree, have been adversely affected by a 'transaction' authorized by the Interstate Commerce Commission, based on a 'decline in business', unrelated to the transaction triggering the employer's obligation to pay such protection*." After comparing arbitration awards which have come down on either side of this issue, the referee concurred with the Carrier, noting that "*While there is no evidence that the parties specifically covered the contingency of decline in business, the long history of struggling with this problem in implementing agreements, which was known to the employees is this organization, support a finding that the employees were at their peril in not concluding an agreement specifically excluding a decline in business as a basis for reduction or suspension of protective payments*." (DISSENT ATTACHED)

AWD109
Referee: LaRocco
Fin. Docket: 28905
Carrier(s): CSX/CO [Carmen I]
Union(s): BRC
Award Date: 3-23-87
NYD Articles: Art. I, § 4

The merged carrier (CO and SCL) served notice to close the heavy repair shop at Waycross, Georgia, and transfer the work to Raceland, Kentucky. However, almost half of the current employees working at Waycross were covered by the Orange Book, a prior merger agreement covering those affected by the merger of the SAL and the ACL, into the SCL, which occurred in 1966. Negotiations were entered, but failed to achieve agreement. The Organization's position was based on the following: 1) the instant transaction was not stated in the carrier's application to the ICC for merger authority and is, therefore, barred; 2) since many of the employees involved in the proposed transfer are already covered by the Orange Book, they cannot be required to move from their original "*home*" carrier (SCL) to another carrier (CO); 3) Since the weather conditions in Kentucky are harsher than those in Georgia, the employees would be placed in a "*worse condition*" and, therefore, cannot be required to transfer. In fashioning the arbitrated implementing agreement, the referee held that the ICC is now arguing before the Supreme Court that it is required that certain elements of the employees' collective bargaining agreement can and must be changed in order to effectuate a transaction and so in the instant case those employees transferring from the former SCL to the CO will be covered by the CO agreement; there is nothing that would lend support to the Organization's defense that harsher weather conditions completely forbid transferring employees from one location to another; that the Carrier is entitled to withdraw its earlier, more favorable offer which was made in an effort to reach agreement with the Organization, that the Organization's request to have the Orange Book covered employees canvassed in reverse seniority order for vacant positions at Raceland is sound and would permit those senior employees to remain at Waycross where they will be covered by the Orange Book, anyway. Insofar as the Organization's position that an equal number of junior employees at Raceland should be automatically certified as affected by the transaction in a number equivalent to the senior employees transferring in, the referee held that there is no provision in New York Dock for automatic certification, that pursuant to Article 1, Section 11(e) an employee must show which transaction, if any, led to his being affected, and he must show that he was placed in a worsened position as a result thereof. [reviewed by ICC overturned on 6-08-88; 11-3-92]

AWD110
Referee: O'Brien
Fin. Docket: 29720
Carrier(s): Guilford
Union(s): IAM
Award Date: 2-2-87
NYD Articles: Art. I, § 4; Art. I, § 6

The Carrier (Guilford) was served a Section 6 Notice by the Organization (IAM) on May 10, 1984, requesting the carrier to negotiate certain protective arrangements, including a Master Implementing Agreement, which would govern prospective New York Dock transaction. On July 17, the three Guilford carriers (MC, BM, DH) served notices pursuant to Article I, Section 4 of New York Dock to rearrange system wheel work. The IAM filed suit to prohibit the Carrier from effectuating any change until its Section 6 Notice was resolved, which lawsuit was settled in 1986. Thereafter, the carriers amended their notice and the parties entered negotiations. They were able to agree upon all points of an implementing agreement save one: The Organization wanted an employee whose work and/or position was being transferred which would require a change of residence to remain at his home point in the category of a dismissed employee or to have the option to take a Section 7 separation allowance. The referee incorporated the agreed-upon implementing agreement in its entirety and ruled that where there is a position available to an employee pursuant to a New York Dock transaction, he does not have the option to refuse to take the offered position, thereby placing himself in a dismissed category with the option to request a separation allowance.

AWD111
Referee: O'Brien
Fin. Docket: 29720
Carrier(s): Guilford
Union(s): IAM
Award Date: 2-2-87
NYD Articles: Art. I, § 4; Art. I, § 6

In an almost identical factual situation to Case 110, above, the Carrier served notice on December 30, 1985, to transfer all locomotive and freight car air brake work from Waterville, Maine, to North Billerica, Massachusetts. This notice was modified on July 28, 1986. Negotiations on an implementing agreement were entered but failed, based upon the Organization's insistence that an employee be permitted to refuse to transfer with his work and/or position and place himself in a dismissed category with the option to request a Section 7 separation allowance. Referee referred to his ruling in Case 110, above, incorporated his findings therein, and denied the Organization's position.

AWD112
Referee: O'Brien
Fin. Docket: 29720
Carrier(s): Guilford
Union(s): IAM
Award Date: 2-2-87
NYD Articles: Art. I, § 4

This award involves the same notice as involved Case 111, above. Here, however, the issue was what should be the provisions in the implementing agreement for the one (1) Machinist at Waterville whose work and position is being transferred to Oneonta, New York, and whose position will be performed under the terms of the Carrier's collective bargaining agreement with the Brotherhood of Railway Carmen. Referee ruled that under the extraordinary circumstances involved in this claim, the transferred Machinist be allowed (as Carrier offered) the option of accepting a lump sum separation allowance or to elect to take a furloughed at Waterville, with a suspension of protective benefits.

AWD113
Referee: O'Brien
Fin. Docket: 29720
Carrier(s): Guilford
Union(s): IAM
Award Date: 2-2-87
NYD Articles: Art. I, § 4; Art. I, § 5; Art. I, § 6

Carrier served notice to transfer all locomotive air brake work from Colonie, New York to Billerica, Massachusetts. However, since there was no full time position at Colonie which performed this work, Carrier wanted to establish a new position at Billerica and offer it to the Machinist at Colonie that performed the work as part of his normal duties. All elements of a proposed implementing agreement were readied with the exception that the Organization wanted the senior furloughed Machinist at Colonie to have the option to refuse to accept the newly-established position yet be entitled to full New York Dock benefits. The referee referred to and incorporated this decision in Case 110, above, holding that if a Machinist at Colonie refuses to transfer with the available locomotive air brake work in order to become a dismissed employee he is not entitled to New York Dock benefits.

AWD114
Referee: O'Brien
Fin. Docket: 29720
Carrier(s): Guilford
Union(s): IAM
Award Date: 2-2-87
NYD Articles: Art. I, § 4; Art. I, § 6

Carrier served notice to transfer all locomotive wheel machine work from Colonie, New York, to East Deerfield, Massachusetts. As in Case Nos. 110 through 113, above, the parties reached agreement on all elements of an implementing agreement except the Organization still insisted that an employee whose work and/or position was transferred should be permitted to remain at his home point, in a dismissed category, eligible to dismissal allowance or, at his option, a separation allowance. Referee incorporated his rulings in the earlier cases and denied the Organization's proposal.

AWD115
Referee: O'Brien
Fin. Docket: 29720
Carrier(s): Guilford
Union(s): IAM
Award Date: 2-2-87
NYD Articles: Art. I, § 6(d)

During the 1986 strike by the BMWE, the work of Claimants' positions at the Oneonta wheel shop was suspended. When the work stoppage was settled on May 16, 1986, the Carrier did not reopen the Oneonta wheel shop and certain of Claimants' work was transferred to North Billerica, Massachusetts and their positions at Oneonta were not reestablished. On July 2, the Carrier offered the Claimants Machinists positions at Binghampton, which was approximately 60 miles from Oneonta. They refused and were placed in furloughed status by the Carrier, for which they were recognized as dismissed employees and paid New York Dock protective benefits for the period May 17, 1986 (the date the Emergency Board established a status quo with a cessation of picketing activity) until July 11, 1986, the day the bids closed out on the positions offered them at Binghampton. The question to be decided was whether the positions at Binghampton constituted a change of residence under New York Dock. The referee held that despite the ICC's declination to establish a strict definition of the term "*change of residence*", "*The Claimants, it should be observed, reside approximately fifty (50) miles from Binghampton. They would thus be required to commute approximately 100 miles each workday. Assuming no delays caused by traffic conditions or by inclement weather, this would add two (2) hours to their regular workday. It is unreasonable to impose such a commute on the Claimants, in our considered judgment. That other employees of the DH routinely commute comparable distances does not, by itself, render a 100 mile daily commute reasonable for all DH employees. As explained by the ICC, the facts attendant to each New York Dock proceeding must be examined when deciding whether a dismissed employee is required to change his place of residence. This Arbitration Committee is of the firm opinion that the Claimants in this particular dispute would be required to change their respective residences were they to accept the Machinist positions offered them at Binghampton, New York. Accordingly, they were not required to accept these positions and therefore their dismissal allowances did not cease on July 11, 1986, when they declined to accept them.*"

AWD116
Referee: Muessig
Fin. Docket: 29629
Carrier(s): SOU
Union(s): UTU(YDM)
Award Date: 2-17-87
NYD Articles: Art. I, § 1; Art. I, § 11(e)

On December 8, 1981, the ICC approved the Southern Railway's acquisition of the Kentucky and Indiana Terminal Railroad Company (KIT). At the time of the acquisition Claimants were not affected but on February 16, 1986, Carrier abolished four yardmaster positions in Louisville and claimants were forced to exercise displacement rights to other positions. Subsequently, they filed for New York Dock displacement allowances, claiming that they were affected by the acquisition transaction in 1981. Referee denied the claims, noting that the amount of time since the 1981 acquisition made it difficult to draw any connection with claimants displacement in 1986, that the Carrier had shown that there was a decline in switching at Louisville, that the Carrier's decision to implementing technological change in the form of computers had been addressed in an earlier ICC ruling when it was stated: "*However, the effects of subsequent internal technological improvements by either of the Carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction and it is not our intention that employees affected by such internal improvements shall be entitled to the benefits of the conditions*."

AWD117
Referee: Peterson
Fin. Docket: 28905
Carrier(s): BO
Union(s): BRS
Award Date: 2-28-87
NYD Articles: Art. I, § 5(a)

Claimant's position was abolished in anticipation of a transaction and after claim was filed the Carrier agreed to recognize him as a displaced employee effective October 28, 1983. By letter dated June 15, 1984, Carrier admitted that he was affected by a New York Dock transaction and advised that his test period would be for the period October 29, 1982, through October 28, 1983. However, in performing the computations, the Carrier included three (3) months in which Claimant performed no service: January, 1983, for which he was paid New Year's Day holiday pay, and June and August, for which he was paid two days' vacation pay in each month. Claim advanced on the basis that those three months should not be counted inasmuch as Claimant did not perform services. Referee ruled that the language of Section 5(a) is clear, that Carrier must recompute Claimant's test period earnings. In addressing the Carrier's contention that the claim be barred based upon a time limit violation, the referee stated that the New York Dock conditions make no reference to time limits, that even though at some period in time failure to file would be barred based on laches, in the instant case that is not so.

AWD118
Referee: Peterson
Fin. Docket: 28905
Carrier(s): BO
Union(s): BRS
Award Date: 2-28-87
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Carrier served notice dated November 9, 1983, to coordinate and consolidate certain operations in Cincinnati. As the result of a FDX position established on June 1, 1983, and abolished on December 30, 1983, two employees filed for displacement allowances. Board held that the position which was abolished was a temporary position, that it had been established for a specified purpose (rebuilding switch engines, cleaning and repairing cylinders) and was authorized as a force adjustment for the period specified. Its abolishment was not related to any transaction.

AWD119
Referee: Peterson
Fin. Docket: 28905
Carrier(s): BO
Union(s): BRS
Award Date: 2-28-87
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Due to Carrier's notice of November 9, 1983, and subsequent implementation of a transaction, the consolidation of signalmen activities at Cincinnati resulted in dismissed employees. Pursuant to working rules which provided that whenever the Grade Crossing Force was working on a seniority district where there were furloughed employees the furloughed employees could displace junior members of the Grade Crossing Force for the period of time it was working on their seniority district, claimant was bumped and filed for New York Dock protection. Carrier resisted on the grounds that the furloughed employee that actually displaced claimant was not in a dismissed category and that, therefore, the displacement was not due to the earlier transaction. Referee held that a review of the time sheets revealed that claimant was displaced by a senior employee that was drawing a New York Dock dismissal allowance, that the subsequent loss of earnings was due to the Cincinnati coordination. However, he was entitled to New York Dock protective benefits only for the period of time that the Grade Crossing Force worked in the Cincinnati seniority district.

AWD120
Referee: Lieberman
Fin. Docket: 29772
Carrier(s): MC
Union(s): TCU
Award Date: 4-1-87
NYD Articles: Art. I, § 1; Art. I, § 11(e); Art. IV

Claimant was the occupant of a position that was excepted from all of the rules of the Agreement except the scope and the Union Shop Agreement. When another employee retired, carrier advised her that it was transferring her and her position to North Billerica, Massachusetts, which would have required a change of residence. Exerting her claim that as a TCU member she was covered by the Master Implementing Agreement dated October 17, 1984, which provided that employees whose positions were transferred or abolished were entitled to opt for a separation allowance per Section 7 of New York Dock, claimant refused to transfer and petitioned for a separation allowance. Carrier denied the claim on the grounds that she was not covered by the Master Implementing Agreement and that the New York Dock provisions did not permit an employee to refuse to transfer and opt for separation pay. Referee referred to Question and Answer attachment to the Master Implementing Agreement which stated that the incumbent of a position listed for transfer had several options, none of which was separation but one which was that the affected employee could exercise options available under any protective agreement on the property which covered them. He reasoned that under the Master Implementing Agreement she would have had, therefore, the option of separation but since she was not covered by the Master Implementing Agreement by virtue of her non-coverage by the working rules agreement that protective agreement did not cover

her. In referring to the clear line of awards under New York Dock that an employee, even one not represented by a labor union, was not permitted to refuse to transfer with his or her work and/or position and place themselves in a dismissed category, the referee declined the claim on all counts.

AWD121
Referee: Harris
Fin. Docket: 29430
Carrier(s): NW/SOU
Union(s): ATDA
Award Date: 5-19-87
NYD Articles: Art. I, § 4

On September 12, 1986, Norfolk Southern served notice to the ATDA that it intended to transfer the work of supervising locomotive power distribution from the NW at Roanoke, Virginia, to the Southern at Atlanta, Georgia. The referee traced the history of representation of these employees on the NW in: "The NW was itself formed as a result of several mergers in the 1960's. ATDA had agreements with each of the railroads which merged into the NW. The agreements contained scope language which stated that the Assistant Chief Train Dispatcher would 'supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work.' Accordingly, the Assistant Chief Train Dispatchers issued instructions to mechanical department personnel regarding the number and identity of locomotives to be used on trains originating at their respective terminals. ATDA did not represent Train Dispatchers on the original NW. Following the merger, the NW 'power bureau' assumed responsibility for all of the merger carriers and the ATDA represented dispatchers were no longer assigned the work in question. ATDA appealed this assignment and the 3rd Division of the National Railroad Adjustment Board issued an award which sustained the position of ATDA. Thereafter, an agreement was reached between NW and ATDA that the supervisors who worked out of the 'power bureau' would be presented by ATDA." The employees which handled the distribution of locomotive power on the Southern were non-agreement officers and had been so for over 22 years. The parties entered negotiations on an implementing agreement to cover the transaction, but failed over the issue of whether the employees performing this work at the transferred location, Atlanta, should be represented by the ATDA or, as the Carrier proposed, be unrepresented. The referee examined a host of awards issued on the subject of the meaning of Article I, Section 2 of New York Dock which interpreted the language "The rates of pay, rules and working conditions ... shall be preserved unless changed by future collective bargaining agreements or applicable statues" and seized upon a recent (1985) ICC decision which purported to overrule the congressional intent of Article I, Section 2 and he then ruled that Article I, Section 4 was controlling, that once the ICC had made its intent known to permit a merger, it was mandatory that whatever steps must be taken to implement a transaction (i.e., to abrogate certain provisions of the collective bargaining agreement necessary to effectuate the transaction) permitted the entire elimination of the collective bargaining agreement and any attendant rights to representation by the NW employees. He then adopted the carrier's proposed implementing agreement en toto, even the section that provided for selection of force by only giving consideration to those NW employees at Roanoke that wanted employment in Atlanta. In other words, the carrier was permitted to staff the Atlanta Control Center with whomever it wished, and the ATDA lost representation for the entire group of employees that performed the work of locomotive power distribution. He also introduced some contrived language relative to the effect that "The protections afforded by New York Dock are to individual employees, not to their collective bargaining representative. Whatever rights the ATDA may have under the Railway labor Act as an 'incumbent' bargaining representative are for determination by the National Mediation Board, not this panel." The referee stated further, that if his review of the preeminence of the ICC's decision over the Railway Labor Act and the congressional intent as contained in Article I, Section 2 were incorrect, that: "...it is the courts, not this panel, that the Organization must turn for relief from the newly evolved

reconciliation of the conflict between the two sections" (Sec. 2 and 4, underscoring added). DISSENT FILED [see § 4 v. RLA ICC 5-24-88]

AWD122
Referee: Harris
Fin. Docket: 29455
Carrier(s): NW
Union(s): Individuals
Award Date: 11-26-85
NYD Articles: Art. IV

Four individuals, formerly holding high positions on the Illinois Terminal Railroad, were given separation allowances of one year's pay by the Norfolk and Western after the merger of the two railroads. They filed for New York Dock protective benefits, claiming that they were employees as that term was contained in Article IV. Referee held that all had been heads of departments and had been listed in the IT's annual report as "*management*", that the term "*employee*" as defined by the ICC and as discussed in hearings before Congress relative the WJPA and other employee protective agreements did not encompass higher than subordinate officials. Claimants not entitled to New York Dock coverage.

AWD123
Referee: Seidenberg
Fin. Docket: 29772
Carrier(s): DH
Union(s): Individuals
Award Date: 2-2-85
NYD Articles: Art. IV

Claimant was Carrier's Assistant Vice President - Customer Service, with direct supervision over three people. When the Carrier attempted to transfer him from Colonie, New York, to North Billerica, Massachusetts, he claimed that he should be entitled to a separation allowance pursuant to Article I, Section 7. The referee issued a lengthy dissertation regarding the definition of "*employee*" as contained in various employee protective provisions, court rulings, and decisions by the ICC, Congress, and the Department of Transportation in ruling that the Claimant was clearly an official of the company and there was no intent for the New York Dock labor protective provisions to apply to officials.

AWD124
Referee: O'Brien
Fin. Docket: 29772
Carrier(s): DH
Union(s): Individuals
Award Date: 11-29-86
NYD Articles: Art. IV

Claimant was employed as Carrier's Manager, Pricing and Marketing - Intermodal. His position was transferred from Albany, New York to North Billerica, Massachusetts effective July 2, 1984. He transferred and received the Carrier's relocation benefits. However, in August, he resigned and accepted employment elsewhere. He filed for a Section 7 separation allowance, contending he was an "*employee*" under the provisions of New York Dock. Referee noted that Claimant had, for many years, enjoyed benefits not granted to rank and file employees, that he clearly possessed transferrable skills, that he was not an employee but an official.

AWD125
Referee: Zack
Fin. Docket: 29720
Carrier(s): MC/BM
Union(s): IAM
Award Date: 2-16-87
NYD Articles: Art.I, § 4; Art. 1, § 6; Art. I, § 7

The arbitrator ruled on two issues:
ISSUE 1 - Can an employee turn down an offered position that requires a change of residence and still be entitled to a dismissal or severance allowance?
ISSUE 2 - Is the number of positions to be offered to employees subject to arbitration?
The Organization wanted a ruling that the Carrier was required to offer the same number of positions as the Carrier had offered in an earlier notice but which was withdrawn and a new notice issued after the parties failure to reach agreement on an implementing agreement. Organization also wanted a ruling that an employee was not required to follow his work and/or position when it required a change of residence and could instead opt for a Section 7 separation allowance. The referee ruled in favor of the Carrier on both issues.

AWD126
Referee: Peterson
Fin. Docket: 29690
Carrier(s): SOU
Union(s): RYA
Award Date: 5-18-87
NYD Articles: Art.I, § 1; Art. 1, § 11(e)

At the time of the Southern's acquisition of the Kentucky and Indiana Terminal Railroad, Claimant was working as an Assistant Trainmaster at Louisville, Kentucky. On January 6, 1982, Carrier advised him that although he was not "*technically*" entitled to the statutory benefits provided by New York Dock due to his position as an officer, he would be maintained at his current salary until 1988. However, some two months later, on March 19, 1982, he was advised that Carrier had overemphasized the need for supervisory positions at Louisville and offered him a comparable position at Chamblee, Georgia, which acceptance would have required a change of residence. Claimant declined the position and exercised his seniority back to the ranks, as a Yardmaster. Some 15 months later he began to file for New York Dock protective benefits. The referee ruled that the adverse affect on Claimant's compensation was due to his voluntary decision to exercise his seniority and not to take the offered position, further, that the doctrine of laches was to apply because Claimant stood silent for 15 months before filing claims under New York Dock.

AWD127
Referee: Peterson
Fin. Docket: 29430
Carrier(s): SOU
Union(s): RYA
Award Date: 5-18-87
NYD Articles: Art.I, § 1; Art. 1, § 11(e)

Claimant was working as a Yardman in Raleigh, NC. Pursuant to an implementing agreement, the Carrier had proposed to and did establish an additional Yardmaster position at Lynchburg, Virginia. Claimant, by virtue of his Yardmaster's seniority, voluntarily bid in the position and changed his place of residence.

Some three months after the Carrier established the position, it was abolished. Claimant stayed at Lynchburg for one more year, working extra, before he moved back to Raleigh. He filed claim for New York Dock benefits, as well as for moving expenses for his return to Raleigh. The referee held that the position that Claimant was working on at the time of the transaction, Yardman, was not involved in the transaction, that he had exercised his contract seniority to bid in the new position and had moved voluntarily. Accordingly, since all of the Claimant's actions were of a voluntary nature, he was not affected by a transaction nor was he eligible for New York Dock protective benefits.

AWD128
Referee: LaRocco
Fin. Docket: 28583
Carrier(s): BN
Union(s): BRC
Award Date: 5-20-87
NYD Articles: Art.I, § 1; Art. 1, § 11(e)

Carrier served notice dated May 14, 1986, to close the Springfield, Missouri Car Shops and transfer all the work to Havelock, Nebraska. An equivalent number of Carmen and Carmen Painters would be established after the closing of the Springfield Shops. However, the Carrier contended that the transfer was pursuant to the September 25, 1964 Agreement and not the New York Dock. Referee held that despite the fact that the work at Springfield, the only major repair facility left on the former SLSF territory, was being transferred to a point on the Burlington Northern, Havelock, that nexus alone does not support a finding that the transaction was taken pursuant to New York Dock. The Carrier introduced facts regarding a decline in business, the cancellation of a contract to re-fit air slide cars, and other economic factors. The Organization's sole argument was a "**but for**" argument, contending that the transfer would not have occurred "but for" the 1980 merger; which was not persuasive, that courts and arbitrators have unanimously held that it is not proper to consider all operational or organizational changes taken subsequent to a merger as having been transactions pursuant to that merger. ["but for" see FD 28583 (Sub-No. 24) 6/8/88]

AWD129
Referee: Marx
Fin. Docket: 30061
Carrier(s): BN
Union(s): ATDA
Award Date: 5-21-87
NYD Articles: Art.I, § 4; Art. 1, § 5; Art. I, § 6

Carrier contended its proposed transfer of Dispatcher's work from Fort Worth to McCook, Nebraska and Springfield, Missouri, was not taken pursuant to New York Dock, but by virtue of the June 16, 1966, Agreement. The parties agreed to convene this arbitration board which would have the responsibility of determining under which agreement the transfer was to be covered and also to determine the terms of the implementing agreement. The Organization also wanted the referee to rule on the question of whether an affected Dispatcher could remain at his home point and exercise his seniority to another craft and draw New York Dock protective benefits and whether a Dispatcher with no seniority in another craft was free to remain at his home point in a dismissed category and draw dismissal allowances rather than transfer with his work. The referee held that it was clear that the proposed transfer of work was a transaction pursuant to New York Dock and implementing agreement pursuant to Article I, Section 4 would be determined. As to the Organization's questions it was ruled that a Dispatcher who was offered work at the transferred location as a Dispatcher does not have the option of remaining at his home point and placing himself in

a dismissed category, nor is he entitled to exercise his seniority to another craft and draw displacement allowances.

AWD130
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 6-15-87
NYD Articles: Art.I, § 1; Art. 1, § 11(e)

Claimant was working the non-contract position of Manager of Property Systems in the Union Pacific's Omaha, Nebraska office in September 1983. At that time, concurrent with several implementing agreements entered into between the Carrier and TCU, consolidations were taking place in the Accounting Department where Claimant worked. On July 26, 1984, Carrier informed Claimant that it was instituting a voluntary force reduction program for non-agreement employees, which offer Claimant declined. On September 4, 1984, he was reassigned to a lesser position but the Carrier maintained his then-current salary. On May 1, 1986, the Carrier announced another voluntary force reduction for non-agreement employees, as part of a continuing effort to "*stream-line*" the Carrier. Again, the Claimant did not participate but on June 13, 1986, the Carrier advised him there were no non-agreement positions available to him and he exercised his seniority rights to the clerical ranks and began filing for New York Dock benefits. Carrier resisted his claims on the basis that he was not an employee as contemplated by New York Dock and that he had failed to identify the transaction which allegedly affected him. By the time the case progressed to arbitration, the Carrier abandoned its first defense and agreed, for the purposes of arbitrating the issue. that he was, indeed, an employee. The referee held that the Claimant had identified the transaction, which had been an on-going effort by the Carrier to reduce and consolidate positions in the Accounting Department, that the several implementing agreements covering BRAC employees was evidence of this, that once he had successfully identified the transaction pursuant to Article 1, Section 11(e) the Carrier had the responsibility to prove "*factors other than a transaction affected*" him, which it did not do.

AWD131
Referee: Sempliner
Fin. Docket: 28250
Carrier(s): DTI
Union(s): UTU
Award Date: 9-27-84
NYD Articles: Art.I, § 8 [see PLB 3367/4 & AWD 136]

The Question at Issue asked whether New York Dock displacement or dismissal allowances are to be considered the equivalent of rendering service in determining whether an employee qualifies for a vacation and also be considered as compensation earned in determining the amount of vacation pay to which an employee is entitled. The referee ruled in the negative, stating that "*Compensated service is the basis for vacation credit. The benefits provided here are not for compensated service. We therefore, find that the dismissal and/or displacement allowance cannot be calculated with the earnings received in qualifying for vacation pay.*"

AWD132
Referee: Prover
Fin. Docket: 28250
Carrier(s): CO/BO
Union(s): UTU
Award Date: 5-18-87
NYD Articles: Art.I, § 1; Art. I, § 11(e)

Claimants were from the former Toledo Terminal Railroad, which was consolidated into the CO/BO and all of their positions abolished on July 1, 1984. At that time, they were permitted to place themselves on the consolidated assignment at the Toledo Terminal. Claims were filed by the affected employees and paid until October, 1984, when the Carrier claimed a decline in business occurred and declined the claims. The referee noted that there had been an unusually active period of business at the terminal for the six months prior to October because customers were stockpiling coal in anticipation of a UMW strike, also that a comparison of cars entering the terminal for the last quarter of 1984, the first quarter of 1985 showed no appreciable decline in cars handled. Based on this, the referee refuted the Carrier's statements and held that the employees had shown a direct causal nexus between the transaction which occurred on July 1. He also denied the Carrier's assertion that the adverse effect from the transaction must be immediate and held that a monthly determination of displacement allowances due was proper.

AWD133
Referee: Peterson
Fin. Docket: 30000
Carrier(s): UP
Union(s): UTU
Award Date: 8-20-87
NYD Articles: Art.I, § 1; Art. I, § 11(e)

Pursuant to the ICC authorization to merge the UP and MP railroads, an Article I, Section 4 arbitrated implementing agreement was fashioned by Referee Zumas to be effective November 1, 1983, when the Carrier consolidated the Kansas City Terminal operations. However, prior to that date, on October 20, it became necessary to recall an additional 20 UP extra board employees. The Carrier began notifying all furloughed employees in seniority order of the recall, but only 14 of the senior-most furloughed employees responded, requiring that an additional 6 junior employees were recalled. As of the transaction date (11-1-83) all 20 were certified as affected and were entitled to New York Dock. However, the Organization wanted the six senior employees that did not respond to be certified as affected, as well as the six junior employees that responded to recall. The Organization made an additional argument that the Carrier had intentionally restricted the levels of employment and that all employees in active service as of the transaction date should be certified as affected and receive New York Dock benefits. The referee held that only the 20 employees that responded to recall prior to the transaction date would be certified as affected, that several junior employees that worked for only a portion of this time awaiting the arrival of the recalled employees would not be certified and that the Organization's position that all employees in active service were affected failed to fulfill the requirement under New York Dock that a defined transaction must be the cause for an employee's worsened position in order for him to be eligible for benefits.

AWD134
Referee: Rehmus
Fin. Docket: 30000
Carrier(s): UP/WP/SN
Union(s): UTU
Award Date: 8-25-87
NYD Articles: Art.I, § 1; Art. I, § 5

Three Article I, Section 11(e) claims. The first two involved employees that were affected by the abolishment of their combined road-yard assignment. After they were displaced, however, they were able to place themselves, on assignments paying more than their pre-transaction assignments. However, six months later they were, again displaced and were unable to place themselves on positions producing equal compensation. Although the Carrier was willing to pay their claims, the Organization wanted their test period earnings to be based on the 12 month period prior to their displacement to lower-rated positions, not the 12 month period prior to the transaction that affected them. The referee held that it is not necessary for an affected employee to show worsened compensation immediately after the transaction that displaced him but that his test period earnings are based on the 12 month period "*...immediately preceding the date of his displacement as a result of a transaction...*" In the third claim, the claimant had been affected initially when the SN engineers' extra board was abolished and he was placed at the bottom of the WP engineers' seniority roster, retaining rights to prior SN engineers' work. As a result, he transferred his place of residence and was paid a lump sum of $5,000 in lieu of moving allowances. About one year later, he was reassigned to another engineers' extra board some 200 miles distant, at which time he filed for benefits, claiming that he was not required to move again under New York Dock. The referee held that he was certified for New York Dock benefits as a result of the first extra board abolishment but he was now working under the provisions of the WP schedule agreement and the transfer was due to the rules of that agreement, that if he refused available work he would not be entitled to a dismissal allowance.

AWD135
Referee: Rehmus
Fin. Docket: 30000
Carrier(s): UP/WP/SN
Union(s): UTU
Award Date: 8-28-87
NYD Articles: Art.I, § 1; Art. I, § 11(e)

Subsequent to merger of the WP and SN, the Carrier established a co-mingled road switcher to service industries on the former separate systems between Yuba City and Oroville. At the time of the establishment of the co-mingled switcher, claimants were assigned to a WP-Oroville yard switcher that was assigned to work beginning 4 p.m. The co-mingled switcher was assigned to start at the same time so the yard switcher was re-bulletined to begin work at 8 p.m., with the co-mingled switcher servicing the same industries from 4 p.m. to 8 p.m. as the yard switcher serviced beginning at 8 p.m. After the change in hours of assignment, the Carrier invoked the provisions of the 1964 National Agreement and conducted a tune study of the remaining work on claimants' assignment and found that it fell below the minimum standard and abolished their assignment. The Organization claimed that due to the establishment of the co-mingled road switcher work which had been performed by claimants' assignment had been diverted and, hence, they were affected by a New York Dock transaction. The referee agreed, and held that despite the pretextual reasons given under the 1964 Agreement, the real reason for the abolishment of claimants' position was the New York Dock transaction establishing the co-mingled road switcher.

AWD136
Referee: Speirs
Fin. Docket: 28250
Carrier(s): GTW
Union(s): UTU
Award Date: 11-5-85
NYD Articles: Art.I, § 8

In holding that dismissal or displacement allowances are not considered as "compensation" for the purposes of computing vacation, the referee referred to a prior denial award on the DTI (Case No. 131). He also traced the history of the National Vacation Agreement, specifically the Morse Interpretations. He noted that "protective payments" were not listed in the exceptions which constituted compensation under the Interpretations, that "*...it is our opinion that to include protective payments under the New York Agreement as 'compensation earned by employees under schedule agreements' for purpose of calculating vacation allowances would be writing a new provision into the Vacation Agreement. It is not within our authority to do so*."

AWD137
Referee: Brown
Fin. Docket: 30000
Carrier(s): MP
Union(s): Individuals
Award Date: 5-11-87
NYD Articles: Art.IV

Eight individuals, holding positions from departmental directors down were informed by the Carrier that their management positions would be abolished in St. Louis. They filed suit in U. S. District Court based on contractual misrepresentations by the Carrier. The case was subsequently remanded to arbitration by the court for a determination on the issues of New York Dock coverage. The first issue to be decided by the arbitrator was whether the Claimants waived their rights to arbitration when they filed a court action. To this, the arbitrator ruled that they had not, that the court action was based on alleged contractual misrepresentations and this arbitration is for New York Dock coverage. The second issue to be decided was whether the eight were "employees" as that word is contained in New York Dock. The Carrier's position was that only those employees entitled to unionization, but not actually unionized, were entitled to New York Dock coverage under Article IV. In sustaining the Claimants' position, the arbitrator researched the use of the word "*employee*" in the Railway Labor Act, ICC pronouncements, and Congressional statutes. It was held that under the RLA the use of the word employees only pertained to the right to unionize and had no applicability to whether or not an employee was entitled to New York Dock coverage, that the ICC has always deferred such questions to arbitration and never has explicitly ruled on the issue. However, in the only three Congressional statutes passed (Milwaukee Restructuring Act, Rock Island Railroad Transition and Employee Assistance Act, and the Staggers Rail Act of 1980) the word employee was defined as "*employee ... does not include any individual serving as President, Vice President, Secretary, Treasurer, Comptroller, Counsel, Member of the Board of Directors, or any other person performing such functions.*" Accordingly, the Claimants are entitled to New York Dock coverage. However, since each was offered a position in Omaha and failed to accept, none is a dismissed employee pursuant to Article I. The referee also referred to the term "*substantially the same levels of protection*" and held that the level of coverage as contained in implementing agreements, if superior to the basic New York Dock coverage, is to be afforded to these employees (he noted that the word substantially does not mean exactly, which leaves some room for differences). With respect as to whether the eight were entitled to the option of separation allowance which was negotiated by the TCU General Chairman, the referee stated that the separation allowance provision stemmed from the February 7, 1965 Job

Stabilization Agreement and that the Carrier's obligation predated the transaction and, therefore, the eight were not entitled to opt for the severance rather than accept the employment offered at Omaha.

AWD138
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): TCU
Award Date: 12-18-87
NYD Articles: Art.I, § 1; Art. I, § 4

Carrier proposed to consolidate all crew calling functions for the merged UP/MP system at one location, Omaha, Nebraska. In doing so, three Crew Management Centers would be relocated, one from the former UP system and two from the former MP system. However, Carrier took the position that only those employees transferred from the former MP locations were entitled to New York Dock; the employees transferred from the former UP location to Omaha (also a UP location) would only be entitled to benefits of their on-property protective agreement. In other words, the Carrier was seeking to "**split**" a transaction and avoid paying New York Dock benefits to all affected employees. The issue placed before the arbitrator was whether the proposed consolidation was a transaction as that term is contained in New York Dock and, if so, whether the Carrier was required to enter into an implementing agreement to effectuate the consolidation/coordination. The referee traced the meaning of the term "*transaction*" and held that both the federal courts and the ICC have held it to mean the same as the term "coordination" as contained in Section 2 of the WJPA, that it was clear that Carrier's proposed consolidation of crew calling centers would not have been possible without the ICC's approval in Docket 30000, that the proposed consolidation of seniority rosters has been specifically pointed to as an example of a transaction by the ICC, and that the proposed consolidation is a single integrated transaction which requires an implementing agreement to effectuate.

AWD139
Referee: Lieberman
Fin. Docket: 28905
Carrier(s): CSX
Union(s): TCU
Award Date: 2-11-88
NYD Articles: Art.I, § 2

In 1983 Carrier proposed to purchase 10 miles of track from the ICG. In November of that year the Carrier outlined how the clerical work currently being performed on that portion of track would be distributed among CSX employees. Based on this assertion, the parties entered into an Implementing Agreement pursuant to Article I, Section 4 of New York Dock to provide for the transaction. In October 1985, Carrier began operations at Union Camp corporation, a paper mill where switching work and demurrage work had been performed by the former ICG clerks. However, at that time the Carrier began utilizing Union Camp's demurrage records for the purposes of billing. Claim was filed account work removed from the Scope of the Agreement and in violation of Carrier's representations under the Implementing Agreement. Board held that the removal of the work violated the New York Dock conditions: "With respect to the fundamental issue, it is apparent from the facts, even as related by Carrier, that the work in question was not eliminated but rather removed from the jurisdiction of employees of Carrier. Such action was a clear violation of both the letter and intent of the New York Dock conditions as well as those in the Implementing Agreement. The abrogation of the New York Dock conditions by Carrier's unilateral action in removing the work from the jurisdiction of its clerical

employees is sufficient to move this Board to sustain the claim. Until and unless there is agreement with respect to elimination of this work, the employees covered by this agreement have a right to the work."

AWD140
Referee: Marx
Fin. Docket: 29430
Carrier(s): NW/SOU
Union(s): TCU/ATDA
Award Date: 2-26-88
NYD Articles: Art.I, § 4

This was a three-party arbitration: Carrier (N&W/SR), ATDA, and TCU. The Carrier had served notice to transfer approximately one hours' work from the ATDA-covered location at Greensboro, North Carolina, to TCU-covered location at Crewe, Virginia. The notice did not contemplate any force-reductions or establishment of new positions, but the ATDA insisted that a Greensboro Dispatcher be permitted to follow the work, displace a TCU employee and have seniority established on the TCU roster. The referee held that there was no justification to transfer an ATDA-represented employee to Crewe to follow the modest amount of work, that if subsequent effect was had on employees due to the transaction, Article I, Section 11 arbitration was available.

AWD141
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): TCU
Award Date: 3-1-88
NYD Articles: Art.I, § 5(a)

Claimant's protected rate was $21.90 more per day than the position he occupied. When he was absent due to illness on two days, Carrier only paid him the amount of the position occupied, despite the fact that sick leave had been included in his test period compensation. Board held that:

> *The third paragraph of Section 5(a) of the New York Dock Conditions unequivocally provides that the (Carriers may offset from displacement allowances those days that employees are voluntarily absent. While it is true that employees do not intentionally contract a disease, arbitration decisions under both the New York Dock Conditions and the Appendix C-1 Conditions have decided that an absence from work due to illness suspends the guarantee for the period of the absence. IBT v. CR NYD § 11 Arb. (Blackwell; 8/9/84); UTU v. ICG Appendix C-1 Arb. (Rohman); 5/8/80. [sic] See also Special Board of Adjustment No. 605, Award No. 379 (Friedman). Put simply, even though the employee does not want to be absent, his unavailability cannot be attributed to the Carriers. Within the confines of the scant record before us, this Committee is unable to correlate the amount of sick leave pay Claimant received during his test period with any complementary benefit he might receive during each year of his protective period. Furthermore, it is infeasible to match sick leave pay included in the test period average with a displacement allowance. In summary, if Claimant received any sick leave pay during his test period, he reaps the benefit of the compensation, albeit a small fraction thereof, on each day he actually works.*

AWD142
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): TCU
Award Date: 3-1-88
NYD Articles: Art.I, § 4

Pursuant to implementing agreement, the Carrier was to establish seven exempt auditor positions and to select the incumbents from three tier preference
groups: 1) from those already occupying similar positions; 2) from employees in the MP Accounting department; 3) from employees on the Master Seniority Roster. Claimant was among those in Tier 2 but after filling four of the positions, the Carrier abolished the remaining three and did not assign Claimant. The referee held that the Carrier had over-estimated the need for these auditor positions and had the right to abolish them at any time, that so long as Carrier did not select applicants from Tier 3 the question of Claimant's qualifications was moot.

AWD143
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): TCU
Award Date: 3-1-88
NYD Articles: Art.I, § 1; Art. 1 § 11

Claimant alleged she was placed in a dismissed category as a result of a transaction and petitioned for separation allowance. The Referee held: "*The record reflects that Claimant has never been deprived of employment due to the transaction implemented on January 1, 1986. Implementing Agreement No. 22 gave her preferential rights for procuring a new St. Louis position in compliance with Implementing Agreement No. 22. Claimant's bid was a valid exercise of her MP clerical Accounting Department seniority. Claimant did not have to undergo any special training to obtain the position although she may have received some on the job training. Since Claimant's active employment was uninterrupted, she was never a dismissed employee as defined by Section l(c) of the New York Dock Conditions. She failed to satisfy a mandatory eligibility criterion to receiving a Section 7 separation allowance. Claimant predicts that the MP will soon eliminate its Interline Accounting area. Although Claimant submitted some vague evidence to support her prognostication, any claim for separation pay based on the fallible assumption that she will soon lose her present position (and be transformed into a dismissed employee) is premature and speculative*."

AWD144
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): TCU
Award Date: 3-1-88
NYD Articles: Art.I, § 1(b); Art. I, § 5(a)

As a result of a transaction to transfer and coordinate UP and MP Accounting offices, Claimant was displaced from his assignment as a General Clerk and held over to train the employee that displaced him. During the time he was being held on his former position, Carrier created another General Clerk in the same office, with the same rate of pay, and Claimant bid on and was assigned to the position. He claimed

a displacement allowance of $245 per month and was paid for two months before Carrier took the position that since he had displaced to a position paying the same monthly rate he was not eligible for a displacement allowance, despite the fact that his test period earnings exceeded the compensation he was receiving in his new assignment. The Carrier instituted the same interpretation for all employees it had been paying displacement allowances and this claim was taken as a lead case to interpret the meaning of "*displaced employee*". The referee held:

> *Section l(b) lays down a two pronged, cause and effect test for determining if a worker is a displaced employee. The causation step of the test concerns whether Claimant was directly or indirectly affected by a New York Dock transaction. In this case, the parties concur that Claimant was displaced from his General Clerk position as a result of a transaction. To satisfy the second prong of the test (the effect), an employee must have been placed in a worse position with respect to either his compensation or rules governing his working conditions. It should be noted that the employee need not suffer both a reduction in compensation and be placed in a disadvantageous position with respect to rules covering his working conditions. The employee must only show one or the other. As the Organization points out, the words "adversely affected" do not appear within the four corners of the New York Dock Conditions. Therefore, a worker may still satisfy the definition of a displaced employee even though an adverse effect may not materialize until long after the transaction is implemented ... The ICC, when it promulgated Section 5(a), realized that the amount of the displacement allowance might fluctuate from month to month. The Commission began Section 5(a) with the words "so long after..." which demonstrates the Commission's recognition that the displacement allowance would have to be computed on a month by month basis. Moreover, in the third paragraph of Section 5(a), the Commission stated that whenever an employee receives compensation less than his test period earnings in any month (not necessarily every month), the employee is entitled to the difference. Therefore, if Claimant earned less than his test period average earnings (which includes his overtime compensation) in any month after his displacement, the Carrier was obligated to pay him a displacement allowance computed in accord with Section 5(a) of the New York Dock Conditions.*

AWD145
Referee: Vernon
Fin. Docket: 28250
Carrier(s): SDAE
Union(s): TCU
Award Date: 7-20-84
NYD Articles: Art.I, § 1; Art. I, § 11(e)

After the transfer of ownership of the SDAE Railway Company to Kyle Railways effective 11-79, Claimant filed claim for NY Dock benefits on 4-17-80 account he was furloughed as a result of a merger-related transaction. Carrier maintained that the furlough was due to a decline in business and because another trainman returned from his scheduled annual vacation. Carrier denied the claim and on 7-20-81 the Organization advised that the dispute would be taken to Article 1, Section 11 arbitration. No further handling was given on the property for about 2 _ years until the Organization invoked arbitration. The arbitrator ruled the Carrier's assertion of a T/L violation by the Organization invalid because that defense was not raised on the property, that the Organization failed to show any causal nexus to an identifiable transaction which caused Claimant's furloughed and that the Carrier's assertion of a decline in business was not refuted by the Organization.

AWD146
Referee: O'Brien
Fin. Docket: 29720
Carrier(s): MEC/PT
Union(s): UTU
Award Date: 8-10-84
NYD Articles: Art. I, § 1; Art. I, § 11(e)

The issue before the arbitrator was whether the establishment of run-through trains and/or run through power bypassing Portland Terminal constituted a transaction or was merely an action taken by two independent carriers and not requiring ICC approval. The arbitrator ruled: "*It is the considered judgment of this Arbitration Committee that establishment of run through trains and/or run through power by the Maine Central and the Boston and Maine on or about August 11, 1982, was not an action undertaken pursuant to authorizations of the ICC. It is certainly not uncommon for run through trains to be operated in this industry. Carriers clearly do not need ICC authorization to operate run through trains. Thus, despite the pending merger between the Maine Central and the Boston and Maine, the ICC was not required to authorize their decision to establish run through trains on or about August 11, 1982 ... Certainly, the order issued by the ICC on April 23, 1982, did not grant the Maine Central a right that it previously did not possess since the right to establish run through trains antedated the ICC order, in the judgment of this Committee. Simply stated, no ICC authorization was needed for the Maine Central to operate run through trains*."

AWD147
Referee: Seidenberg
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): BLE
Award Date: 1-17-85
NYD Articles: Art. I, § 2; Art. I, § 3; Art. I, § 4

The issue before the arbitrator was whether the provision of Article I, Section 2 preserving collective bargaining agreement rights and privileges could withstand the ICC's determination that an Article I, Section 4 Implementing Agreement provision combining work forces was controlling under NY Dock. In referring to the ICC's determination of October 19, 1983, the referee stated:

> *On the basis of the record before us we conclude that we now have jurisdiction to consider the dispute involving the allocation and assignment of forces through implementing agreements drafted pursuant to New York Dock Conditions, even though these implementing agreements may result in the assigned forces operating under a different set of operating rules and different labor agreement than the ones under which they formerly functioned. We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions.... In summary we are*

aware that any consolidation of rail properties disturbs the status quo and is unsettling to the affected organization and employees. However, the Interstate Commerce Commission held that the consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement. We find that the Carriers have sought to select and assign the forces in a fair and reasonable manner, and still achieve the efficiency and benefits which were the prime motivations for seeking the consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation.

AWD148
Referee: Weston
Fin. Docket: 28799
Carrier(s): SP
Union(s): UTU
Award Date: 2-4-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

In early 1979, the SP and its subsidiary SSW acquired a portion of Rock Island Railroad east of Tucumcari to Kansas City. Subsequently, as a result of the UP/MP merger, the SP/SSW gained trackage rights from Kansas City to St. Louis but it wasn't until 1983, after extensive renovation of the Tucumcari line that traffic was re-routed over that route. The issue was whether affected SP employees had been affected by the initial Rock Island acquisition or whether it was the granting of trackage rights which caused the rerouting of traffic. The referee held that the carrier's own statements before the ICC revealed the plan to utilize the Tucumcari line as a permanent line once the renovation was completed and that the affected employees were entitled to NY Dock benefits.

AWD149
Referee: Dennis
Fin. Docket: 29430
Carrier(s): NW
Union(s): TCU
Award Date: 3-8-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Pursuant to NY Dock Implementing Agreement signed March 29, 1982, the Carriers (N&W and Interstate) coordinated their separate facilities at Norton, Virginia. Concurrent with the coordination, the work of weighing coal cars was transferred to clerks at Andover, Virginia. The Organization filed a claim alleging a Scope Rule violation and demanding that carrier comply with the General Implementing Agreement of May 19, 1982, which requires a fifteen (15) day notification whenever carrier coordinates work which would not result in transfer of employees or job abolishments. Referee held that the fifteen (15) day information notice, if served now, would serve no constructive purpose; that since the work involved amounts to approximately 25 minutes per day the claim will be sustained at that amount for the period of June 1, 1982 (the date the work was transferred) to July 14, 1982 (the date the claim was filed).

AWD150
Referee: Ables
Fin. Docket: 30582
Carrier(s): NW/IRR/SOU
Union(s): UTU
Award Date: 9-25-85
NYD Articles: Art. I, § 2; Art. I, § 3; Art. I, § 4

This arbitration hearing confronted, once again, the conflict between Article I, Section 2 (preservation of Collective Bargaining Agreements) and the ICC's authorization to the Carrier to utilize the means necessary to effectuate the merger of the two Carriers (N&W and Interstate) under Article I, Section 4. The Referee traced the development of this conflict as it has progressed through arbitration awards, court decisions, and ICC decisions. The referee's insightful analysis pointed out the parties' respective positions and ruled that the ICC continues to avoid its responsibility to bring some order to the controversy, instead "*ducking*" the issue and allowing arbitrators to deal with it on a case by case basis. With respect to the award the referee held that carriers must explain why certain transactions require the elimination of Collective Bargaining Agreements, that in this dispute the placement of Interstate employees under the NW Collective Bargaining Agreement would create work opportunities for the Interstate employees and avoid friction between the employees and this provision would be included in the Implementing Agreement.

AWD151
Referee: Rhemus
Fin. Docket: 30000
Carrier(s): SN/WP
Union(s): UTU
Award Date: 2-14-86
NYD Articles: Art. I, § 8

In remand on Case No. 77, the parties were unable to agree upon the application of Article I, Section 8 as it impacted upon SN employees bidding back and forth from SN to WP assignments covered by different Rules Agreements. After admonishing the parties for their inability to resolve the issue the referee stated: "The Implementing Agreement of March 1, 1986 stated that prior rights SN employees working WP or commingled SN/WP assignments would do such work under the terms of the WP/UTU Bargaining Agreement. Further, it was contemplated there that at the end of the protection period the WP/UTU Agreement would supersede and replace the SN/UTU Agreement. Health and Welfare benefits for the employees here involved undoubtedly arise from their Collective Bargaining Agreement. As noted in my February 14, 1986 award, employees cannot and should not be expected to shift back and forth between health and welfare plans on a weekly or necessarily even a monthly basis. Nevertheless, there certainly may come a time when an employee has worked so long under an agreement that all of his rights, privileges and benefits should be derived only from that agreement, without possibility of further shifting back and forth. On balance, I have concluded that so long as prior rights SN employees are shifting back and forth between agreements they should remain under SN health and welfare benefits. After an individual has worked continuously for six months under the WP Agreement, however, it seems time that his benefits should also arise under that Agreement. Finally, in accordance with the New York Dock Conditions, protections only remain in effect for six years following an Implementing Agreement... Any prior rights SN employee working only on WP or commingled SN/WP assignments for six consecutive months following March 1, 1986 shall, beginning with the seventh month, be transferred to health and welfare coverage under the WP/UTU program. Under no circumstances is it intended that any employee shall be deprived of benefits or receive dual payments or coverage because of such a transfer. Finally, all

prior rights SN employees who remain covered under SN/UTU health and welfare plans shall be transferred to WP/UTU health and welfare plans on March 1, 1992."

AWD152
Referee: Dennis
Fin. Docket: Staggers Rail Act
Carrier(s): WRA
Union(s): TCU
Award Date: 2-18-86
NYD Articles: Art. I, § 5

Claimants were highly paid computer operators that began drawing protective guarantees on 10-1-82. During the months of August and September (during the test period) they worked on weekends and after hours moving furniture for the Association, which was moving into new quarters. The Association refused to include these earnings in the total compensation earned during their test period. The referee held that these earnings were not pursuant to a Collective Bargaining Agreement and were more akin to earnings as a subcontractor and, therefore, were not properly included in the total compensation earned during their test period.

AWD153
Referee: Seidenberg
Fin. Docket: 30000
Carrier(s): UP
Union(s): BLE
Award Date: 9-2-86
NYD Articles: Art. I, § 1; Art. I, § 11(e)

As a result of the UP/MP merger, the carrier consolidated its Kansas City Terminal operations. The Implementing Agreement, executed on August 3, 1983, provided for certain prior rights to work assignments and placed all of the employees under the BLE-MP Agreement. Claimants were 20 pool freight firemen who claimed they were forced to lower-paying hostling assignments in the consolidated terminal as a result of the transaction. The referee held that there was no causal connection between the merger transaction and the worsened compensation, that the number of hostling positions before and after the consolidation was the same and that the "*prior rights*" provision in the Implementing Agreement required the claimants to exercise their seniority to work in the terminal.

AWD154
Referee: Seidenberg
Fin. Docket: 30000
Carrier(s): UP/MP
Union(s): Individuals
Award Date: 12-17-87
NYD Articles: Art. IV

Claimants all held positions in the MP Marketing Department prior to the MP-UP merger. After the merger, the two carrier's Marketing Departments were consolidated and Claimants were offered jobs in Omaha. All declined and accepted a voluntary separation allowance offered by the company but later filed claims for NY Dock benefits. Noting that each occupied highly-paid management positions, the referee held that: "*We find from our study of the record, and the history of merger protection and conditions that there is a definite and close relationship in the railroad industry between union labor relations and the protective conditions prescribed by the Congress and the Interstate Commerce Commission for merger*

affected personnel. A review of the history of labor protection conditions compels us to hold that the term 'employee' was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term, as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as being other than administrative, managerial, professional or supervisory in nature." The referee further ruled that because Claimants declined employment in Omaha they did not qualify as displaced or dismissed employees.

AWD155
Referee: Scheinman
Fin. Docket: 28905
Carrier(s): CO
Union(s): TCU
Award Date: 3-25-88
NYD Articles: Art. I, § 1; Art. I, § 11(e)

As a result of merger transaction on 2-15-84 coordinating the LN/BO work at Cincinnati, Ohio, an implementing Agreement provided that "*any former BO employee at Cincinnati or Hamilton furloughed as a result of job abolishment due to the performance of coordinated functions by former LN employees, would be considered 'dismissed employees' entitled to protective benefits*" (the agreement was to be effective for 6 years). On 12-1-86 carrier abolished some former B&O positions and the affected employees filed for NY Dock benefits. The referee held that the coordination occurred 2 _ years prior to the abolishments and the subsequent change of starting and stopping locations caused the furloughs, that this affected claimants who are entitled to benefits.

AWD156
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): BLE
Award Date: 4-5-88
NYD Articles: Art. IV

Claimant, a non-agreement employee, was working as a Management Trainee in the Labor Relations Department when his job was abolished effective 8-30-86. He exercised his seniority as an engineman and began filing for NY Dock benefits 7-21-87, almost one year later. Carrier declined his claims on the basis that 1) the claims were untimely; 2) he was not affected by a merger-related transaction; and 3) he was not an "*employee*" as that word is contained in NY Dock. The referee held that NY Dock conditions does not contain a time limit, that eventually a non-filed claim would be subject to the concept of laches but the instant claim was timely. With respect to the merits the referee held that unless an employee fit the definition of "*employee*" in the Railway Labor Act (rank and file employees and subordinate officials) that employee would not be protected by NY Dock, that in this case Claimant was a Carrier official and not covered by NY Dock.

AWD157
Referee: Harris
Fin. Docket:
Carrier(s): SOU/IC
Union(s): UTU
Award Date: 5-88
NYD Articles: Art. I, § 2; Art. I, § 3; Art. I, § 4 [see Carmen II]

The Southern acquired 200 miles of IC trackage, for which acquisition the ICC imposed the labor protection of NY Dock. The instant dispute is over whether an Article I, Section 4 Implementing Agreement can supersede the IC employees' collective bargaining rights protected by Article I, Section 2. After comparing the arbitral history of the issue the referee stated:

> *Whatever may have been the earlier view, it is clear that the I.C.C. and the Circuit Court for the District of Columbia believe that the I.C.C. order is controlling. While the I.C.C. did not state specifically that the inconsistencies between Sections 2 and 4 of New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the I.C.C., this panel is bound to the I.C.C. view. If that view is incorrect, it is to the courts, not this panel, that the Organization must turn for relief from this newly-evolved reconciliation of the conflict between the two sections. It is the conclusion of this panel that, assuming the I.C.C. imposes its usual New York Dock type labor protective conditions, it will not be possible for the newly-assumed IC employees to carry with them the protection they may have gained from collective bargaining with the IC.* [see Carmen II]

AWD158
Referee: Scheinman
Fin. Docket: 28905
Carrier(s): CO
Union(s): TCU
Award Date: 6-24-88
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Carrier's coordination of the BO/LN work at Cincinnati, Ohio, on 6-18-84 pursuant to Implementing Agreement, led to claims being filed on 8-19-85, one year later, because 13 former BO employees were no longer at the top of the seniority roster and had lost wages attributable to overtime which was being monopolized by the former LN employees. The referee held that any lost wages was attributable to lack of seniority, not the transaction.

AWD159
Referee: Scheinman
Fin. Docket: 28905
Carrier(s): CO
Union(s): TCU
Award Date: 8-88
NYD Articles: Art. I, § 1; Art. I, § 11(e)

One week after consolidation of seniority rosters which resulted in the transfer of 44 positions, carrier changed the rest days of one of the transferred positions, which initiated a chain of displacements. As a result, claimant was placed on a lower-paying assignment and filed claim. The referee quoted from the Secretary of Labor's statements that after an employee identifies a transaction the burden is on the carrier

to show that factors other than a transaction affected the employee, that in this dispute it is clear that the carrier changed the rest days to make the coordination work, that "the term of a coordination includes the period after a coordination, and it involves those consequent, and sometimes unforeseen, changes which may be required."

AWD160
Referee: Sickles
Fin. Docket: 28490
Carrier(s): BAP
Union(s): BMWE/BRC
Award Date: 1-88
NYD Articles: Art. I, § 11(e)

In 1978 the Butte, Anaconda & Pacific Railroad was acquired by Atlantic Richfield (ARCO) and in 1980 New York Dock imposed. This arbitration pitted the union's contention that after the acquisition ARCO intentionally farmed out much of the BA&P work to truckers against the company's contention that general decline in business and other non-acquisition related factors (strikes, etc.) caused the layoffs. The referee held that there was no evidence that any transaction caused the effects cited by the union, that the "**but-for**" argument failed. "*We continually return to the rhetorical question of what would have occurred if ARCO had not purchased Anaconda. The record persuades the Undersigned that the employees of BA&P would have been unemployed within a very short period of time. There is nothing to suggest that the transaction, in any manner, caused or hastened the unemployment. In fact, it may have even extended certain periods of gainful labor before the inevitable demise of the railroad operation*."

AWD161
Referee: Edwards
Fin. Docket: 29455
Carrier(s): IT
Union(s): UTU
Award Date: 3-16-82
NYD Articles: Art. I, § 4

When some of the involved local chairmen refused to sign the implementing agreement negotiated by the General Chairman the referee followed Case No. 7 and adopted the parties' negotiated agreement as the implementing agreement.

AWD162
Referee: Fredenberger
Fin. Docket: 29217
Carrier(s): ATSF
Union(s): UTU
Award Date: 1-23-87
NYD Articles: Art. I, § 11(e)

After the merger between the ATSF and the TPW railroads, Conrail canceled its rates and routes with the TPW. Referee held that this was not a transaction but a business decision Conrail was free to make.

AWD163
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): MP/UP
Union(s): IAM
Award Date: 7-10-87
NYD Articles: Art. I, § 11(e)

Union argued that Carrier's imposition of a new, unilaterally promulgated safety rule was a transaction. Referee held Carrier had the right to institute such rules absent the merger.

AWD164
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): WP/UP
Union(s): IAM
Award Date: 7-10-87
NYD Articles: Art. I, § 5(a)

Claimant completed an apprenticeship program increasing his hourly rate during his protected period. The Organization argued that his test period averages should be similarly increased. The referee held: "*...the term 'general wage increase' was intended to apply to increases in the rate of pay to those positions which the protected employee occupied during his twelve month test period*."

AWD165
Referee: Peterson
Fin. Docket: 30000
Carrier(s): MP/UP
Union(s): UTU
Award Date: 10-20-87
NYD Articles: Art. I, § 11(e)

Ten days after agreement to combine and consolidate all work in and around Salina, Kansas, under the UP Rules, Carrier pulled off a pool turn and those displaced from the turn alleged a New York Dock transaction. Referee held that the regulation of mileage caused the reduction in the pool, not a transaction.

AWD166
Referee: Peterson
Fin. Docket: 30000
Carrier(s): MP/UP
Union(s): UTU
Award Date: 10-20-87
NYD Articles: Art. I, § 11(e)

Referee ruled that Claimant not affected by the transaction, but by employees returning from vacation.

AWD167
Referee: Peterson
Fin. Docket: 30000
Carrier(s): MP/UP
Union(s): UTU
Award Date: 10-20-87
NYD Articles: Art. I, § 11(e)

Referee ruled that claimants affected not by transaction but by post-transaction operational job changes.

AWD168
Referee: Seidenberg
Fin. Docket: 28905
Carrier(s): CO/BO
Union(s): UTU
Award Date: 10-5-88
NYD Articles: Art. I, § 4

Where a run-through crew change point was the proposed transaction, the dispute in the implementing agreement was the percentage of work equity to be allotted to the employees involved (BO and CO). The referee totaled the miles of the run and divided by the number of miles to be protected by each group to get the percentage of work equity.

AWD169
Referee: Ables
Fin. Docket: 28905
Carrier(s): CSX
Union(s): ATDA
Award Date: 11-11-88
NYD Articles: Art. I, § 4

Carrier proposed to transfer the work of ATDA represented employees from Corbin, Kentucky, to Jacksonville, Florida, where non-contract employees would perform it. The Referee reviewed the long history of New York Dock decisions holding that the Carrier was given great latitude in effectuating transactions, including assigning former agreement-covered work to non-agreement employees performing the same work. Here, referee refused to require that the agreement-covered employees had a right to follow their work, although they would be certified as affected employees when the work was transferred. [reviewed by ICC and upheld 9/15/89 Sub-No. 23]

AWD170
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): Individual
Award Date: 2-5-89
NYD Articles: Art. I, § 11(e)

The UP decided to consolidate all customer service work in St. Louis and the consolidated CSC was housed in a building owned by the MP. At the same time the MP performed similar consolidations of customer service work, housing it in the same building but on a different floor. Claimant contended it was a

transaction but the referee ruled that no work of the separate carriers was commingled, hence no transaction.

AWD171
Referee: Kasher
Fin. Docket: 30800
Carrier(s): UP
Union(s): UTU
Award Date: 2-14-89
NYD Articles: Art. I, § 4

When the UP took control of the MKT and OKT railroads, its notice under Article I, Section 4 contemplated eliminating the collective bargaining agreements on the two carriers (MKT/OKT), consolidating all seniority rosters of the MKT/OKT into UP rosters and eliminating all prior understandings and agreements. The UTU protested that these changes were beyond the authority of either the Carrier or the arbitrator and invoked arbitration. The two arbitrators held that the Carrier's proposals were not necessary to effectuate the transactions contemplated and that the procedural issues raised by the Carrier in asking that the arbitrators exempt the ICC-approved transaction from the Railway Labor Act were denied. The parties were sent back to the bargaining table to negotiate a proper implementing agreement.

AWD172
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 2-28-89
NYD Articles: Art. I, § 11(e)

After the UP/MP/WP Merger was approved, the Carrier instituted so-called "*Voluntary Force Reduction Programs*" and "*Involuntary Force Reduction Programs*" and induced non-agreement employees to accept sums of money in return for leaving their management positions and exercising their clerical seniority. In doing so, they were required to sign release forms agreeing not to sue the Carrier or file claims, including New York Dock claims. As a result of an earlier award (Case No. 130) the organization successfully asserted that some of the employees affected by the force reduction programs were entitled to New York Dock protection. The issue in this dispute was whether the release forms were valid or whether the employees could now claim their entitlement to New York Dock. The referee held:

> *Thus, where, the Carrier specifically has told an employee that he or she was not eligible for New York Dock benefits, the Committee concludes that the Claimant did not intend to release the Carrier from paying these benefits when they signed the releases. Therefore even though the release is stated in very general terms, under the circumstances of the instant dispute the Committee concludes that the parties intended it to have a more restricted meaning. Thus, the Committee will not find the waiver effective to release the Carrier from claims based upon the New York Dock Conditions where the above-detailed factual circumstances can be shown to have existed at the time the affected claimant signed the disputed release and waiver.*

AWD173
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 2-28-89
NYD Articles: Art. I, § 5 [see AWD 173]

This dispute involved employees affected by a transaction but who had held a non-agreement position as well as an agreement position during their test period year. Carrier refused to include as test period earnings those earnings that were non-agreement. The Referee stuck to the literal interpretation of Article I, Section 5 (total compensation), stating: "*This evidence suggests that the Carrier is seeking to deny credit for any compensation, even that earned in agreement positions, if a Claimant held more than one job in the applicable year. This interpretation directly contradicts the New York Dock language at issue here, which does not refer to the last job held by a Claimant prior to the transaction. In contrast it refers to the 'total compensation' earned by an affected employee in the prior year, in the service of the Carrier. This expansive language suggests that the drafters of the document contemplated that an employee might hold more than one position in the course of that year. Furthermore, if the Parties had intended the result sought by the Carrier, there would have been no need to calculate an average compensation for the entire prior year. The Parties simply could have taken the wages of an employee at the time of his transaction, or gone back a month or two to even out any irregularities caused by calculations made on only one or two weeks' pay. The Committee concludes therefore that nothing in the language of the New York Dock Conditions suggests that the Parties intended to exclude wages earned from a job other than the job held at the time of the transaction. Furthermore, nothing suggests that there was an intent to differentiate between compensation earned in agreement as opposed to non-agreement jobs*." [see Award No. 260 IBEW/CSX (Fletcher)]

AWD174
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 2-28-89
NYD Articles: Art. I, § 8; Art. IV

Non-agreement employees affected by a transaction petitioned to have a continuation of their non-agreement fringe benefits, including life insurance, health insurance, etc., after they exercised their clerical seniority. The Referee held that the fringe benefits afforded as a result of "*corporate action*" were of total exclusion and could not be given to those affected employees now working under the agreement.

AWD175
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 2-28-89
NYD Articles: Art. I, § 11(e)

After a sustaining award received in Case #130, several non-agreement employees that had been affected by transactions filed claims, some up to four years after being affected. The Carrier invoked the concept of laches and tried to convince the referee that a "*reasonable*" time limit under New York Dock would

be 90 days. The referee refused to apply the concept of laches in the disputes, noting that no other referee has ever done so under New York Dock and there are no time limits specified in the Conditions.

AWD176
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 2-28-89
NYD Articles: Art. I, § 6(d)

The arbitrator ruled that if a non-agreement employee refuses a comparable position and instead exercises craft seniority, whether the position required a change of residence or not, the employee is not entitled to New York Dock benefits; here, however, the Carrier failed to prove the non-agreement employee was offered a comparable job and the arbitrator remanded the dispute to the parties for that determination.

AWD177
Referee: Zumas
Fin. Docket: 28250
Carrier(s): BN
Union(s): BMWE
Award Date: 3-13-89
NYD Articles: Art. I, § 11(e)

In 1982 the BN and WWVR merged. The Carrier suffered severe declines in business and when Claimant was furloughed in 1983 he claimed New York Dock benefits. The referee held he was not affected by a transaction but by a decline in business.

AWD178
Referee: Zumas
Fin. Docket: 28250
Carrier(s): BN
Union(s): BMWE
Award Date: 3-13-89
NYD Articles: Art. I, § 11(e)

After the merger of the BN and the SPS the BN began to consolidate sections and abolished foreman positions. Because the remaining section foremen were supervising larger territories, the organization petitioned for a wage increase based on prior agreements. Referee held the work was of the same character and quality, that performing a task more often does not turn it into a different task. Claim denied.

AWD179
Referee: Zumas
Fin. Docket: 28250
Carrier(s): BN
Union(s): BMWE
Award Date: 3-14-89
NYD Articles: Art. I, § 11(e)

As a result of the Milwaukee Railroad Restructuring Act, the BN assumed operation of some Milwaukee trackage. Although the MRRA exempted acquiring Carrier employees from New York Dock, the parties

entered into an agreement to provide monthly allowances to BN employees affected by the assumption of operation. Five claimants argued that they had been bumped in March, 1984, the same time that several MILW employees were dovetailed onto their seniority rosters, and were entitled to benefits. The Carrier argued that the claimants were not "*working in the zone or working district of the acquired property*." The arbitrator held that the geographic location of the zone or working district was the same as that of the claimants, that they were displaced as a result of the dovetailing of MILW employees on their roster, so they were entitled to the monthly allowance.

AWD180
Referee: Roukis
Fin. Docket: 29430
Carrier(s): NS
Union(s): TCU
Award Date: 4-19-89
NYD Articles: Art. I, § 5

Carrier took the position that if an employee working a daily-rated position was displaced as a result of a transaction and placed himself on a position paying the same rate, he was not a "*displaced employee*" and not entitled to receive his test period computations nor displacement allowances. The referee sustained the Organization's position, holding that "*Pursuant to Article I, Section 5 (a), an employee displaced by a transaction who is unable to secure a position producing compensation, not rate of pay, equal to or exceeding the compensation he received in the position from which he is displaced shall be paid a monthly displacement allowance during the protective period. Said allowance shall equal the difference between the monthly compensation in the retained position and the average monthly compensation of the position from which displaced. Further, the allowance is 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 immediately preceding the transaction. Since this methodology as indicated before includes overtime compensation, the Claimant's prior straight time rate of pay is not the benchmark measurement criterion*."

AWD181
Referee: Roukis
Fin. Docket: 29430
Carrier(s): NS
Union(s): TCU
Award Date: 4-19-89
NYD Articles: Art. I, § 5 [see PLB 3540/36]

Claimants were affected employees with less than 12 months' service. Carrier computed their test period averages by totaling all compensation they received since their hire date and divided by 12. The Organization sought that the total earnings be divided by the total months of service, not 12, as a proper measure of their displacement allowance. The referee held: "*The proper method for determining an employee's displacement or dismissal allowance under New York Dock protective conditions is to divide total compensation and total time paid as set forth in Section 5 by twelve (12) when said employees have less than twelve (12) months employment*."

AWD182
Referee: Muessig
Fin. Docket: 29430
Carrier(s): SOU
Union(s): IAM
Award Date: 5-22-89
NYD Articles: Art. I, § 11(e)

Carrier transferred the work of 28" wheel and bearing mountings from the Southern to the Norfolk & Western without notice or entering into an implementing agreement. The referee held: "*The Claimants continued to work at their same location, in the same craft and without a reduction in compensation until two years later, when in April 1987 they were furloughed. Clearly, it becomes more difficult to establish a* ***'causal nexus'*** *when a lengthy time span exists between the time of the 'transaction' and the Claimants' furlough. However, the Claimants have not met their burden in showing that the April 1985 transfer of work caused the abolition of their positions two years later. We find that the Carrier's reasons for denying these claims, as summarized in its letter of August 28, 1987 to the Organization, are persuasive*."

AWD183
Referee: Muessig
Fin. Docket: 29430
Carrier(s): SOU
Union(s): IAM
Award Date: 5-22-89
NYD Articles: Art. I, § 11(e)

As a result of the transfer of steam train and office car work from the Southern to the Norfolk & Western the Organization argued that Claimant became a dismissed employee. The referee held that: "*Turning first to Claimant Lee, the Organization has the threshold burden to provide facts that raise a sufficient or reasonable presumption that the November, 1984 transfer of steam train and office car work from Southern's Hayne Shop to NW's Roanoke Shop adversely affect Claimant Lee. The burden then shifted to the Carrier to prove that factors other than a 'transaction' affected the employee. We find that the Organization has met its burden because it has identified the 'transaction' as well as specified the pertinent facts of that 'transaction' it has relied upon. In our judgment, the Carrier's bare assertion, on the property, when it denied the claim, that Lee was furloughed in March 1987 as a result of a reduction in maintenance gang work at Hayne Shop, does not effectively refute the Organization's claim. Moreover, it ignores the fact that Lee's position was abolished in November 1985 and, as we read the record that is properly before us, he did not exercise his seniority in the normal sense, but rather was placed in a furlough status and worked, in effect, on a day-to-day basis under the provisions of Rule 27, Furloughed Employees. A furloughed employee is not a regular employee and this status, in the situation before us, did place him in a worse position with respect to the rules governing his working conditions. In summary, with respect to Claimant Lee, we find a causal nexus between the November 1984 transfer of work (as previously identified) and the abolishment of Claimant Lee's position one year later. Accordingly, his claim is sustained*."

AWD184
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP
Union(s): Individuals
Award Date: 5-26-89
NYD Articles: Art. I, § 11(a)

As a result of a prior Article I, Section 11 arbitration (Case #75 in this Index), it was held that an Article I, Section 4 Implementing Agreement complied with the substantive requirements of New York Dock. Several of the employees affected by the closure of the St. Joseph Terminal Railroad opted for the one year's separation allowance contained in that agreement but brought the instant claim based on their belief that they were entitled to draw six years' dismissal allowance without being required to exercise seniority on the UP, the Carrier which operated SJT jointly with the ATSF. The referee held that the claimants' contentions were addressed in Case #75, and that they were forum shopping, and that there were several New York Dock decisions which held that affected employees were required to exercise their seniority to available positions, even if they were on a foreign carrier.

AWD185
Referee: Roukis
Fin. Docket: 29430
Carrier(s): NS
Union(s): TCU
Award Date: 8-10-89
NYD Articles: Art. I, § 6(d)

Claimants, all clerical employees drawing dismissal allowances, were offered positions as Yard Brakemen, Road Brakemen, or Machinists. The issue was whether these positions were comparable employment as that term appears in New York Dock. The referee held: "*In a generic sense, many of the skills needed for effective performance in the clerical craft are applicable to positions in other crafts or classes, and as such, the rationale for crossing crafts is understandable. In the absence of a showing that the comparable positions offered to Claimants were demeaning or a correlative showing that Claimants clearly lacked the skills equivalence to perform the jobs preferred, the Board must find that the positions contested herein were comparable within the meaning of Article I, Section 6(d) of the New York Dock Conditions The term 'comparable employment' extends beyond craft boundaries with distinctions centering on comparative skills. Had the Organization conducted a detailed comparative analysis of the skills needed to perform the jobs proffered and demonstrated that Claimants lacked the skills needed to perform the non-clerical jobs, the Organization's position would have had compelling merit. This type of showing would have given an employee a more defensible position to reject a job offer. Accordingly, and upon the record, the Board must find for Carrier on the three questions at issue. In the future and within the defining parameters of this Award, the Board advises the parties to conduct this type of skills equivalence analysis when comparable positions are proffered. It provides a more accurate measure of qualifications, when crossing crafts or classes is at issue, and provides an employee with qualitatively stronger justification to refuse a job offer.*"

AWD186
Referee: Scheinman
Fin. Docket: 28905
Carrier(s): CSX
Union(s): BRS
Award Date: 9-5-89
NYD Articles: Art. I, § 1(d)

Claimant, a signalman with an employment date of 1977, was affected by a transaction in 1986 involving a position he held in a seniority district where he had a seniority date of 1985. Carrier allowed him his test period averages but advised him his protective period was 16 months, based on his seniority on the position he held when affected. The Organization cited the language of Section 7(b) of the WJPA as support for its position that Claimant was entitled to a full 6 years' protection. The referee held that the claim was moot because claimant was subsequently furloughed due to the reduction of system signal positions and therefore his protective payments would have ended at that time anyway.

AWD187
Referee: Eischen
Fin. Docket: 28640
Carrier(s): Soo
Union(s): UTU
Award Date: 9-24-89
NYD Articles: Art. I, § 1(a)

As part of its statutory obligation assumed by purchasing a major portion of the Milwaukee Road, the Soo entered into an implementing agreement which provided for protective benefits as a result of a "*change in operations, services or facilities of the Railroad arising out of the Acquisition*." In 1986 Carrier established a separate business unit called the Lake States Transportation Division (LSTD). Approximately 13 months later the major portion of the LSTD was sold to the Wisconsin Central limited. The Carrier refused to treat the sale as a transaction under the implementing agreement. The referee held that: "*This evidence of record persuasively demonstrates that the redundancy of lines arising from or growing out of the Acquisition made it viable for Soo to sell the LSTD and the financial burden arising from or growing out of the Acquisition made it necessary for Soo to sell the LSTD. Thus, I am persuaded that the Sale of LSTD is causally linked in a reasonably direct and proximate way to the Acquisition. Accordingly, I find that the Sale of LSTD was a 'transaction' as that term is defined in Article l(a) of the EPA*."

AWD188
Referee: Cluster
Fin. Docket: 28250
Carrier(s): BN
Union(s): Individuals
Award Date: 10-17-89
NYD Articles: Art. I, § 11(e)

This claim was brought by 36 individuals, all BN employees, claiming that they were affected as a result of the BN-SLSF Merger 26 of the Claimants were party to prior arbitration awards dealing with the identical issue but whose claims had been declined. Carrier's argument in this dispute, as in the earlier arbitrations, was that a decline in business and not a merger-related transaction had caused the furloughs. The arbitrator stressed that his decision in this claim was based on the evidence and information presented by the parties and was made independent of the decisions in the prior cases. However, in declining the

claims he emphasized that re-arbitration of disputes was contrary to sound labor-management relations and at some point in time the Claimants must accept the fact that severe declines in business and not a merger-related transaction had caused their furlough.

AWD189
Referee: Kasher
Fin. Docket: 29601
Carrier(s): IHR
Union(s): TCU
Award Date: 11-13-89
NYD Articles: Art. I, § 4

In December 1981, the Carrier (Indiana Hi-Rail) acquired a 6-mile line from Conrail, the Beesons Line. The UTU has representation rights on the Indiana Hi-Rail for all crafts except Yardmasters. There are no clerical positions on that Carrier. As a result of the acquisition, for which New York Dock was imposed, one Conrail clerk was displaced. The issues before the referee were whether an implementing agreement is required to provide labor protection to the Conrail employees affected, when the protective period should begin (in 1981 or after the implementing agreement was signed) and whether displaced Conrail employees are required to accept employment with Indiana Hi-Rail. The referee held that although Carrier should have complied with the notice requirements of Article I, Section 4 in 1981, he found that the failure to do so was not motivated by bad faith, that the protected period would run from the date of the Implementing Agreement (November 13, 1989) and that only Conrail employees affected by the transaction and drawing dismissal allowances could be offered comparable employment with the Carrier. The referee also held that if a dismissed employee chose not to accept the offer, he could opt for a separation allowance.

AWD190
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 12-17-89
NYD Articles: Art. I, § 11(e)

This dispute was related to the award issued in Case No. 130 involving non-agreement employees being affected by a transaction. In the instant dispute, the employees were working in the Information and Communication Systems Department. In 1986, the Carrier advised that it was initiating a voluntary force reduction program as a result of downsizing. Both non-agreement Claimants in this case participated in the program and exercised their seniority as clerks. After the sustaining decision in Case # 130, both filed for New York Dock benefits. The referee held that no transaction was identified, that other factors affected Claimants.

AWD191
Referee: Stallworth
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 12-17-89
NYD Articles: Art. I, § 11(e)

Same fact pattern as Case #190, above. This Claimant did not elect to participate in the voluntary force reduction program and was involuntarily reduced from his non-agreement position. The referee adhered to the result in Case #190, above, and denied the claim.

AWD192
Referee: Seidenberg
Fin. Docket: 30000
Carrier(s): MP/UP
Union(s): RYA
Award Date: 5-18-83
NYD Articles: Art. I, § 4

Article I, Section 4 arbitration to provide for the allocation and rearrangement of forces made necessary by the coordination of yards in the Omaha/Council Bluffs area. As a threshold issue the referee rejected the union's argument that the issue of bargaining agent representative and union dues collection must be addressed in the implementing agreement. Among the provisions included in the arbitrated implementing agreement were prior rights on a dovetailed seniority roster with all MP yardmasters placed under the UP work rules agreement. Former MP yardmasters would receive service credits for agreement purposes as though their MP service was performed on the UP.

AWD193
Referee: Cluster
Fin. Docket: 28905
Carrier(s): CSX
Union(s): UTU/BLE
Award Date: 5-26-88
NYD Articles: Art. I, § 1; Art. I, § 2

Prior to ICC merger approval in F.D. 28905, the CO and the SCL each owned 40% of the RFP, a carrier running from Washington, D.C., to Richmond, Virginia. Thus, the RFP became part of the CSX "*family.*" After the merger, traffic which the CO formerly interchanged to the RFP at Washington was now interchanged to the RFP at Richmond. As a result, the remaining yard assignment at Charlottesville was abolished, with the unions petitioning for New York Dock protection for the affected employees. The referee held that the re-routing of traffic was not a transaction, that the re-routing accomplished increased efficiency as mandated by the ICC merger authority, that there was no joint action because the CO and the RFP are both subsidiaries under the control of CSX and no longer in competition with each other for road haul traffic.

AWD194
Referee: Muessig
Fin. Docket: 28250
Carrier(s): GTW
Union(s): UTU
Award Date: 2-7-90
NYD Articles: Art. I, § 1; Art. I, § 11

Carrier began diverting rail traffic on October 9, 1985, resulting in the abolishment of Train 410/411. 72 claims were consolidated in this proceeding; some of the claims were sustained, some dismissed, some denied. As a procedural matter, since the UTU was the Organization party, several claims which were proceeded in behalf of engineers (now represented by the BLE) were dismissed.
The union had filed claims in behalf of all DTSL employees, whether affected in the chain of displacements or not so many were denied because the claimants had not shown that they were affected by a transaction. The referee recognized that the abolishment of the train was a transaction and all claimants able to trace their displacement to the abolishment were therefore entitled to NYD protection. One group of claimants had been hired in 1985, three years after the merger; the referee cited ICC decisions that "*employees employed after the merging of work forces are hired by the new, merged Carrier. Therefore, because this condition was known to these employees and because an extension of protective benefits would run counter to one of the major reasons for mergers, namely anticipated economic advantages, these employees would not be entitled to receive NYD protection.*"

AWD195
Referee: Muessig
Fin. Docket: 28250
Carrier(s): SOU
Union(s): IBFO
Award Date: 2-13-90
NYD Articles: Art. I, § 1; Art. I, § 11

Claims dismissed on the basis of **laches**. The referee noted that the first claims filed predicated on a September 6, 1985 transaction were in July and August, 1988, that despite the General Chairman's aggressive efforts to handle the claims the claimants' failure to act in a timely manner precluded consideration of the issue.

AWD196
Referee: Harris
Fin. Docket: 31393
Carrier(s): CSXT/BVRY
Union(s): TCU/BLE/BMWE/BRS/UTU
Award Date: 4-16-90
NYD Articles: Art. I, § 4

Although the ICC's approval of the sale of a portion of CSX track to the BVRY was not a merger transaction, it did impose New York Dock protection. When the parties (the unions, CSXT and BVRY) could not reach agreement on how to implement the transaction, this arbitration was invoked. In devising the implementing agreement, the referee was faced with the unions' position that the Brandywine Valley Railroad should be required to assume the CSXT collective bargaining agreement of the CSXT employees it hires. The referee rejected the unions' position, noting several ICC decisions as well as recent court cases, including the PLE Supreme Court decision.

The Referee refused to require Brandywine to assume CSXT's collective bargaining agreements on the ground that he "*does not have authority to transfer the provisions of the CSXT collective bargaining agreements to BVRY when the ICC has specifically found that those agreements should not be so transferred*."

The award rejected Brandywine's assertion that it has the right under its purchase contract with CSXT to refuse to hire more than six CSXT employees; ruling that Brandywine must accord priority to CSXT employees and "***cannot refuse to hire more than six CSXT employees for reasons having nothing to do with occupational qualifications***." With respect to selection of forces, Article V of the implementing agreement requires CSXT to furnish Brandywine with a list of operating employees and a list of nonoperating employees. Each list will be divided into dismissed and displaced employees and will list the employees in each category by date of hire. Brandywine is required to interview dismissed CSXT employees and then displaced CSXT employees in the order that their names appear on the lists. Brandywine must first consider all CSXT employees before it considers non-CSXT employees and may reject applicants only on the basis of bona fide occupational qualifications. Article IV of the implementing agreement gives incumbents who accept employment with Brandywine the right to seek a leave of absence from CSXT and to claim dismissal allowances.

AWD197
Referee: Eischen
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): SMWIA
Award Date: 5-22-90
NYD Articles: Art. I, § 1; Art. I, § 11

As a result of the coordination of locomotive repair facilities, 45 positions were abolished at South Louisville and the work transferred to Huntington. 24 of the affected employees followed their transferred work. Approximately four months after the transfer of work was completed, carrier furloughed 35 employees working at Huntington, among them 3 of the employees affected in the original transaction. Of the remaining 32 furloughed employees, 12 had been recalled after the transfer and 20 were working both before and after the transaction. This arbitration involved only the 20 working at the time of the transfer and later furloughed. There was no question that the 3 that had followed their work were entitled to continuation of New York Dock benefits. The referee held that there was no causal nexus between a transaction and the furloughs, that due to declines in business and system-wide furloughs the reductions were not related to the merger.

AWD198
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 6-26-90
NYD Articles: Art. I, § 5; Art. I, § 6

At the time of the UP-MP merger in 1982, each carrier maintained a customer service center in St. Louis, Missouri. In 1985 the UP center was moved into the same building which housed the MP center, along with work and employees from other customer service centers located throughout the UP system. Although at that time there was no coordination of the separate centers and the carrier took the position that the UP consolidations were subject to the UP Job Stabilization Agreement, the parties entered into several implementing agreements which provided UP employees transferring to St. Louis with New York

Dock benefits, including the option to retain their JSA protection. The arbitration addressed the issue of whether UP employees who elected New York Dock benefits were entitled to continuation of those benefits during their protective period after they bid out of the St. Louis customer service center to other departments and/or locations. The referee quoted Article I, Sections 5(c) and 6(d) which provide the reasons for which a displacement or dismissal allowance may cease, noting that "*a voluntary exercise of seniority out of the St. Louis Customer Service Center is not among the conditions listed*", that the carrier's position argues for an equity solution, which the Board is not empowered to do. Because of the legal maxim that equity abhors a forfeiture, "*Prematurely terminating New York Dock protection is such a critical condition, as the Organization asserts, that the negotiators' failure to expressly provide for such a forfeiture of benefits for employees subsequently leaving the Customer Service Center means such a condition was deliberately excluded*."

AWD199
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 6-26-90
NYD Articles: Art. I, § 1; Art. I, § 4

In 1987 UP transferred all wire chief work from three field offices to Omaha and consolidated the work with that of five communications specialists. The transfer was purportedly taken pursuant to the on-property Job Stabilization Agreement. Concurrently, the carrier agreed that six MP non-agreement employees would be given an opportunity to transfer to Omaha and claim newly established System Network Specialist positions. Because of the fact that all wire chief work for the UP-MP system would now be performed in the coordinated office, the Organization took the position that the five UP employees already working in Omaha and whose jobs were abolished as part of the coordination were also entitled to New York Dock. In sustaining the claims the referee held that the Organization had presented evidence at the hearing that a modicum of MP wire chief work was being performed in Omaha and that utilizing the Omaha Communications Department to perform even a small amount of MP wire chief work constituted a coordination because the two railroads had pooled their resources.

AWD200
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 6-26-90
NYD Articles: Art. I, § 1; Art. I, § 11

In 1986 the parties entered into an implementing agreement coordinating and consolidating crew calling functions formerly performed by the separate carriers (UP and MP) in Omaha. The claimant in this arbitration was involved in a chain of displacements created by the transaction on November 14, 1986; however, since he placed himself on a position paying the same monthly rate of pay Carrier did not afford him his test period averages nor did he file for New York Dock benefits. As a result of an arbitration involving an identical situation (Case no. 144 in this index) the Organization's position that if an employee is affected by a transaction he is entitled to his TPA, whether or not he places himself on an equally-rated position was sustained. After hearing of this award, the claimant began filing claims, the first of which was dated August 24, 1989, nearly three years after his displacement. The referee recognized that there are no time limits under New York Dock; however, due to the claimant's unreasonable delay which prejudiced the carrier the claim was barred by laches.

AWD201
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 6-29-90
NYD Articles: Art. I, § 5 [see SBA 1009/64]

Pursuant to the 1986 National Agreement covering wages, employees working on either service or intermodal positions were paid lump sums in lieu of general wage increases. Since their basic rates of pay were not increased the parties agreed that their protected rates of pay would not be increased either so long as they worked on the service or intermodal position. When these employees worked other clerical positions they received general increases and their protected rates were increased as well. The claimant in this arbitration was affected by a transaction in January, 1986. He placed himself on a Customer Service Representative position and held similar assignments until January 1, 1988, when he was affected by job abolishments and forced to place himself on a service worker position. Because he was then occupying a position which did not receive general wage increases, the carrier began paying him a displacement allowance which did not include general wage increases, the effect of which was to reduce the guarantee to which he was due to his original January, 1986 test period average compensation received. This claim was progressed based on the Organization's position that carrier had reduced Claimant's New York Dock guarantee. In denying the claim the referee stated that claimant had not been placed in a worse position with respect to his compensation because he was receiving his original level of displacement allowance, that to permit him to receive lump sum payments and a guarantee which had been increased by the subsequent general wage adjustments would place him in a better position in that he would be receiving duplicate payments.

AWD202
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 6-29-90
NYD Articles: Art. I, § 5

In an issue related to Case No. 201, above, the referee addressed whether lump sum payments received under the 1986 National Agreement should be included in the calculation of test period average earnings. In denying the Organization's claim the referee noted that inclusion of these lump sums in test period averages would result in duplicate payments over time, that the New York Dock conditions do not contemplate that an employee will be better off as a result of a transaction and that the carrier had been consistent in its application of these lump sums because they are not used as off-sets to displacement allowances received during an employee's protective period.

AWD203
Referee: Scheinman
Fin. Docket: 28905
Carrier(s): C&O
Union(s): TCU
Award Date: 7-24-90
NYD Articles: Art. I, § 5

The claimants in this dispute all had less than 12 months seniority when they were affected by a transaction. In computing their test period averages, carrier took the total compensation received and divided by 12 as called for in Article I Section 5(a) rather than dividing this amount by the number of months of employment. The referee stuck with the literal language in that section and denied the claims.

AWD204
Referee: Fredenberger
Fin. Docket: 31485
Carrier(s): IC/IRRC
Union(s): UTU
Award Date: 8-8-90
NYD Articles: Art. I, § 4

The Indiana Rail Road Company, a non-union carrier, purchased some trackage from the IC. In devising the implementing agreement, the referee refused to include a provision requiring IRRC to hire IC employees or to assume the IC collective bargaining agreement or to recognize the UTU as representative of IRRC employees, sticking instead to the "*floor*" of benefits provided for in New York Dock.

AWD205
Referee: Peterson
Fin. Docket: 30965
Carrier(s): GTI
Union(s): UTU
Award Date: 8-30-90
NYD Articles: Art. I, § 5

The claimant in this arbitration had held several management positions, the most recent being that of Car Superintendent. Three months prior to being affected by a transaction he resigned this position and in a voluntary exercise of seniority placed himself on the position of Car Foreman. When the carrier constructed his test period average, rather than including his pervious 12 months earnings, it totaled his earnings on the Car Foreman position and divided it by 3 to determine his displacement allowance. After he filed claims for a proper test period average the carrier offered to raise it by about $500 per month to $2900 but still far less than the $3800 per month claimed. The referee held that the claimant would be well disposed to accept the carrier's offer, that the purpose of New York Dock guarantees is to "stabilize that level of income which attached to and most likely would have continued for an adversely affected employee had the transaction not taken place", and that the only other way to construct claimant's test period average would be to determine the total compensation received while working on agreement-covered positions, which calculation would have required going back several years to the last period of time claimant occupied a union-represented position.

AWD206
Referee: Peterson
Fin. Docket: 30965
Carrier(s): GTI
Union(s): UTU
Award Date: 9-17-90
NYD Articles: Art. I, § 5

In calculating the test period averages with respect to total time paid for, the carrier unilaterally imputed an hourly value to payments received in the form of arbitraries. This action had the effect of artificially raising the test period average hours worked. In addressing the fact that the carrier had unilaterally transferred all of the employees of the former BM, MEC, and Portland Terminal to the Springfield Terminal and placed them in the category of a "Railroader", paying them based on a 40 hour work week rather than by miles worked on their former carriers, the referee stated that:

> *Calculation of a TPA in the manner urged by the Carrier, i.e., the converting into total time of all elements of compensation received by an affected employee would, therefore, in the light of the particular nature of the work rules in the ST/UTU CBA, be contrary to the intent of the ICC-imposed modified Mendocino Coast conditions. The Carrier's desired method of computation would place an affected employee in a worsened position relative to their employment as a result of the transaction. It would wrongfully inflate a TPA with respect to total time worked by attaching a time factor to varied elements of compensation which are not present or separately compensated for under the ST/UTU CBA.*
>
> *In making this determination the Arbitration Committee recognizes that an employee who had received additional compensation for the performance of certain work to which a penalty attached, i.e., such things as the coupling of air hoses or throwing a switch for another train, may well have performed such work function within the normal or regular hours of an assignment. Thus, compensation allowed for such service, while a payment in addition to base pay, may not have necessarily required the employee to work any additional time beyond a normal work day. Moreover, as indicated above, such work functions are not, in any event, separate compensable factors under the all services rendered concept of a work day under the ST/UTU CBA.*
> *This Arbitration Committee is also mindful that in some respects the Carrier is receiving certain other time related benefits under the ST/UTU CBA as presently in effect. Under prior work and pay rules, the employees had benefit of each day being considered an entity in itself. They had occasion to work assignments which at times called for less than eight hours work, yet remain entitled to a guaranteed eight hours pay for such assignment. The employees had a prior benefit of overtime payment on a daily basis rather than on a 40-hour weekly basis, as under the ST/UTU CBA. They also had benefit of additional payment for the performance of work considered to be traditionally outside the scope of their own craft or class of service and, additional payment account employees of another class or craft of service performing work contractually or traditionally recognized as work belong exclusively to their own craft or class of service.*
>
> *Therefore, that the Carrier determined, in its prerogative, to unilaterally change the service and compensation system for the affected employees while waiting to negotiate or arbitrate an implementing agreement, may not now be looked upon as giving the Carrier a right to assign an hourly wage factor to each separate element of past work on the theory that any compensation from whatever source paid by the Carrier to the covered*

employee should have a time factor attached to it and thereby considered an offset against a protective allowance.

The referee's decision also addressed the fact that the parties have yet to enter into an appropriate implementing agreement. With this fact in consideration, the decision reads as follows:

The Carrier request to include in "total time" for which an affected employee was paid, an hourly component factor related to each element of total compensation received by an affected employee is denied as concerns the period of time from the date that such covered employee is adversely affected to the date that an implementing agreement becomes effective. On the date that the implementing agreement becomes effective, the Carrier shall have the right to recompute an affected employee's TPA. At that time it shall include, for the balance of that employee's protective period, an hourly equivalent to varied elements of compensation paid which were in addition to basic compensation and overtime compensation. The elements of total compensation to which such a time factor shall apply will be those elements of compensation which were in fact computed and reported as time factors on ICC report forms.

AWD207
Referee: Suntrup
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): SMWIA
Award Date: 12-12-90
NYD Articles: Art. I, § 5

The claimant in this dispute was working on a non-agreement position until August 20, 1987, when he voluntarily relinquished that position and exercised his craft seniority. On August 24, 4 days later, he was affected by a New York Dock transaction. He was given his test period computations which included his compensation received on both agreement and non-agreement positions for the previous 12 months. He received a displacement allowance based on these computations until December, 1988, when the carrier recomputed his TPA and excluded all non-agreement earnings. In order to reconstruct the new TPA, carrier took the earnings of the employee immediately above him on the seniority roster and the earnings of the employee immediately below him on the seniority roster and averaged them. In this dispute the Organization took the position that his reconstituted TPA should reflect the earnings of the most senior employee on the roster. In denying the claim, the arbitrator held that the carrier's theory in attempting to devise a reasonable approach to the situation was sound but that the computations should be an average of the two employees above claimant on the seniority roster and the two employees below him on the seniority roster.

AWD208
Referee: Suntrup
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): SMWIA
Award Date: 12-12-90
NYD Articles: Art. I, § 5; Art. I, § 6; Art. I, § 7

The claimant in this dispute was affected by a transaction in 1987 and received displacement allowances until he was furloughed in November, 1988, some fourteen months later. Upon being furloughed, Claimant petitioned for a separation allowance under Article I, Section 7. The referee held that to permit claimant

to now opt for a separation allowance, after receiving displacement allowances, would be a form of pyramiding and denied the claim.

AWD209
Referee: LaRocco
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): TCU
Award Date: 12-12-90
NYD Articles: Art. I, § 11

During 1987 and 1988, carrier consolidated its train and engine crew calling functions in Jacksonville, Florida. Initially, the consolidation was accomplished pursuant to the on-property job stabilization agreement but the Organization took the position that it was, in fact, a coordination that was taking place. In an effort to resolve the dispute, the parties agreed that those employees previously affected would be granted the option of selecting New York Dock benefits. The claimant in this dispute had been one of those affected; however, because he had subsequently exercised his seniority out of the consolidated crew dispatching office, the carrier refused to afford him NYD benefits. The referee held that there was nothing in the implementing agreement nor in NYD which would require an affected employee to remain in the same department, that if carrier contends that permitting this subsequent exercise of seniority gives a windfall to the employee, the language of Article I, Section 5 with respect to treating a protected employee as occupying a position to which his seniority entitles him provides the remedy to prevent abuse.

AWD210
Referee: Marx
Fin. Docket: 28250
Carrier(s): BN
Union(s): BRC
Award Date: 1-17-83
NYD Articles: Art. I, § 1; Art. I, § 11(e)

When the BN and the SLSF merged, each had separate yards in the Kansas City area. An implementing agreement provided that in early 1981 some carmen assignments at the SLSF yard would be abolished and consolidated with other assignments at the BN yard. Carrier subsequently abolished additional carmen assignments at the SLSF yard in September 1981, allegedly due to decline in business. The SLSF yard was completely closed in September 1982. The referee analyzed the decline in carloadings and train miles on the district of which Kansas City was a part and determined that there had been a decline in business in the 20% range; therefore, it was the decline in business that affected the employees, not a transaction.

AWD211
Referee: Gordon
Fin. Docket: 29772
Carrier(s): D&H
Union(s): BRC
Award Date: 1-26-83
NYD Articles: Art. I, § 1; Art. I, § 11(e)

After negotiations and consummation of an agreement with Conrail to purchase a 2 mile stretch of track, including classification tracks, the ICC imposed NYD. Prior to the acquisition D&H stated that only local

service would be needed over the track and stated its intention to reduce the number of trains from 8 to 1. At the same time, D&H was abolishing jobs and transferring employees to the classification facility it had purchased from Conrail. NYD claims were filed; however, D&H stated that the abolishments were not related to a transaction. The referee held that "*It is equally clear from the record that these operational changes by D&H would not have been feasible without the acquisition of Conrail's Scranton-Binghamton Line. Thus, the elimination of the classification and switching operation would not have been possible without the utilization of the Binghamton facility and the transfer from Green Ridge could not have been accomplished without the acquisition of the Taylor Yard. Moreover, even a most cursory examination of the geography involved makes it clear that with the elimination of the D&H Line from Nineveh, New York to Scranton, Pennsylvania, the classification and switching operation at Oneanta, New York became obsolete and was logically performed at Binghamton, a northern terminal point of the Conrail Line*." The claims were sustained.

AWD212
Referee: Peacock
Fin. Docket: 29455
Carrier(s): N&W
Union(s): BRC
Award Date: 2-24-83
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Carrier resisted NYD claims filed by Illinois Terminal employees who were furloughed prior to the IT merger with the N&W. Carrier claimed the furloughs were due to a decline in business. Referee cited "*furlough was in the course of normal business practices exercised in depressed economic times, and not in anticipation of the transaction*."

AWD213
Referee: Peacock
Fin. Docket: 29455
Carrier(s): N&W
Union(s): BRC
Award Date: 2-24-83
NYD Articles: Art. I, § 1; Art. I, § 11(e)

The N&W closed down its boxcar facility at Decatur, Illinois, in early 1982. The Decatur facility was a former IT facility. The referee held the closure was due to poor economic times, not a NYD transaction.

AWD214
Referee: Peterson
Fin. Docket: 29720
Carrier(s): MEC/PT
Union(s): BRC
Award Date: 10-21-85
NYD Articles: Art. I, § 1; Art. I, § 11(e)

On April 23, 1982, the ICC imposed NYD when Guilford acquired the MEC/PT. One month later, Carrier abolished several positions, citing declines in business and the institution of run-through trains. The referee cited the union's burden to show a causal nexus, stated it had not, that run-through trains were possible absent ICC approval and denied the claims.

AWD215
Referee: LaRocco
Fin. Docket: 28583
Carrier(s): BN
Union(s): BRC
Award Date: 5-20-87
NYD Articles: Art. I, § 1; Art. I, § 11(e)

In 1985 Carrier maintained a supplemental wrecking crew at Springfield, Missouri, that operated special heavy equipment that was leased. Carrier determined that this wrecking crew had only been utilized for 12 derailments in 1984; however, the Denver Region had experienced 125 derailments during 1984. Carrier abolished the Springfield wrecking crew and established another one at Alliance, Nebraska. Referee denied the claim for NYD benefits because Carrier had the right to make the operational change.

AWD216
Referee: LaRocco
Fin. Docket: 28583
Carrier(s): BN
Union(s): BRC
Award Date: 5-20-87
NYD Articles: Art. I, § 1; Art. I, § 11(e)

When Carrier closed the former SLSF car shops at Lindenwood Yard, St. Louis, in 1983, former SLSF carmen who had their seniority dovetailed onto a BN roster and were unable to obtain regular assignments filed for NYD. The referee cited Award 74 as having decided the identical dispute and that decision was controlling and the claims would be denied.

AWD217
Referee: Suntrup
Fin. Docket: 28905
Carrier(s): B&O
Union(s): TCU (Carmen)
Award Date: 8-13-87
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Carrier consolidated and coordinated the work of two yards, Cone Yard (B&O) and East St. Louis Yard (L&N) on or about July 1, 1981. Claims were filed by the union alleging that after the transaction the B&O had laid off 8 carmen who were due NYD benefits. After ruling on the Carrier's laches objection in favor of the union, the referee held that 3 of the claimants had been the subject of a favorable award before SBA 570 (#659), where the union took the position that their work had been wrongfully subcontracted out and that they were not entitled to also claim NYD benefits for the same transaction. With respect to the remaining 5 claimants, the referee held that severe declines in business, not a NYD transaction, affected them.

AWD218
Referee: Muessig
Fin. Docket: 29455
Carrier(s): SR
Union(s): TCU (Carmen)
Award Date: 12-14-88
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Citing the fact that over 37,000 boxcars were in storage in 1984 and 46,000 in 1985, the referee declined NYD claims for employees at Hayne Shop that said transactions between the Southern and the N&W, not lack of boxcars in service to repair, had caused their furloughs.

AWD219
Referee: Suntrup
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): TCU (Carmen)
Award Date: 1-31-89
NYD Articles: Art. I, § 1; Art. I, § 11(e)

This award addressed two issues. 1) The referee ruled that furloughed employees, even though they performed vacation and other relief work or were recalled by bulletin at some point in the year prior to a transaction, are not considered affected by a NYD transaction. 2) A supervisor with inadequate seniority to have held a carman position prior to the transaction and working at another location, was not considered affected when his supervisory position was abolished in a downsizing move and he returned to the carmen ranks.

AWD220
Referee: Marx
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): UTU
Award Date: 11-29-90
NYD Articles: Art. I, § 4

As part of the consolidation of separate C&O-B&O-L&N facilities at Cincinnati's Queensgate yard, the parties entered into a reserve agreement which provided that affected employees would fill positions that would otherwise require hiring or recall of furloughed employees. When Carrier attempted to recall these reserve employees to positions beyond Queensgate, claims were filed. The referee held the Carrier could not do so as the reserve pool agreement restricted their assignment to Queensgate positions.

AWD221
Referee: Muessig
Fin. Docket: 29217
Carrier(s): ATSF
Union(s): UTU
Award Date: 1-9-91
NYD Articles: Art. I, § 1; Art. I, § 11(e)

In late 1980 the ICC gave the AT&SF permission to become the sole owner of the TP&W and imposed NYD. Although the parties did not enter into an implementing agreement, they agreed that if, in the

future, the ATSF/TPW were to undertake a transaction which would cause the displacement or dismissal of employees, they would enter into an implementing agreement. In 1987 the ATSF sold its "*Peoria Subdivision*" (the former TP&W) to a non-carrier. The ICC did not impose employee protection in the sale. When the union filed claims for NYD benefits over the sale, the referee cited the fact that the ICC has exempted the sale and denied the claims.

AWD222
Referee: Fredenberger
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU (Carmen)
Award Date: 2-1-91
NYD Articles: Art. I, § 4

Carrier implemented a NYD transaction transferring mechanical forces and work from the UP Omaha Shops to three locations on the MP at Desoto, Missouri, Palestine, Texas, and North Little Rock, Arkansas. However, the parties were unable to agree upon how former UP Apprentices and Upgraded Mechanics would establish journeyman seniority because there were different rules on the respective carriers for doing so, one rule (UP) allowing retroactive seniority after completion of so many days service and the other (MP) not allowing retroactivity. In assessing whether allowing the transferring UP employees to establish journeyman seniority pursuant to the UP would substantially damage those current MP employees, the referee held that to permit the UP employees to retain their rule would be less disruptive to the involved employees and in this instance the 3 transferring UP employees were permitted to retain and establish journeyman seniority as called for under the UP agreement, despite working under the MP Agreement.

AWD223
Referee: Duffy
Fin. Docket: 31063
Carrier(s): MidLou
Union(s): Individual
Award Date: 7-23-91
NYD Articles: Art. I, § 1; Art. I, § 11(e)

Claimant, an individual not represented by a union, was a former employee of North Louisiana and Gulf RR (NorthLou). The MidSouth Corporation had formed a separate carrier, MidLouisiana Rail Corporation (MidLou) for the purpose of acquiring trackage rights and rail lines from a third carrier. The ICC imposed labor protection in the control transaction involving MidSouth and MidLou. In a separate proceeding before the ICC, MidSouth acquired rail lines and trackage rights from Claimant's employer, NorthLou. However, the ICC did not impose any labor protection in this transaction. When Claimant's position was abolished, he petitioned for NYD benefits, despite the fact that NYD had not been imposed by the ICC. The referee held that the imposition of NYD did not involve Claimant's employer, that pursuant to a Federal Court decision (914 F.2d 276) parties "*involved*" in a transaction means only those that formally participate in a proceeding before the ICC. The claim was denied.

AWD224
Referee: Stallworth
Fin. Docket: 29430
Carrier(s): N&W
Union(s): TCU (Carmen)
Award Date: 10-14-91

NYD Articles: Art. I, § 1; Art. I, § 11(e)

Carrier, the N&W, ceased performing certain functions at its Portsmouth, Ohio, facility, including classifying cars, coupling air hoses, flat switching, etc. As a result, 17 carmen positions were abolished and NYD claims filed, asserting that the work was transferred to facilities on the Southern Railway. Carrier took the position that the blocking, etc., performed at Portsmouth was transferred as a result of an internal carrier change and relocated to other terminals on the N&W, such as Decatur, Chicago, Bellevue, and new yards at Roanoke. The referee held that the union had not fulfilled its burden of proof and denied the claims.

AWD225
Referee: Peterson
Fin. Docket: 29455
Carrier(s): N&W
Union(s): UTU
Award Date: 11-27-91
NYD Articles: Art. I, § 5

This dispute centers around the computations of Article I Section 5 regarding "average monthly time paid for" and the meaning of the language that a displaced employee who "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." When the parties entered into an implementing agreement, they agreed upon Question and Answer 9 addressing a situation where a displaced employee had test period computations of $1600 average monthly compensation and 200 hours average monthly time paid for, reading as follows: "Q. Jones was available for service the entire month and worked 210 hours and earned $1680. What compensation would be due Jones? A. The $1680 he earned." Here, claimant had worked in excess of his average monthly time paid for in several months; however, carrier declined to pay him any additional compensation for the excess hours worked. The referee noted that the parties had applied the agreed-upon language of Question and Answer 9 for many years and that the claim was filed almost 2 years after the Implementing Agreement became effective and stated:

> *It may well be, absent the Implementing Agreement and the agreed-upon Questions and Answers, and in particular Question and Answer No. 9, that the language of Section 5(a) of Appendix III of the NY Dock Conditions which is in dispute, is susceptible to being read in the manner sought by the claim. However, this Board does not have the right to here make such determination....The Board does not have the authority to abrogate, much less to either modify or amend the terms and conditions of the agreement which the parties themselves adopted in the quid pro quo of collective bargaining negotiations*. (Claim was denied)

AWD226
Referee: Fredenberger
Fin. Docket: 32000
Carrier(s): SP
Union(s): TCU
Award Date: 1-92
NYD Articles: Art. I, § 5

In computing affected employees' test period averages, Carrier refused to include any overtime, maintaining that all overtime earned in the previous year by employees in the Accounting Department and the Crew Dispatching Center was extraordinary, having been caused by prior consolidations of those departments wherein work was transferred from outlying points which resulted in understaffing and a lack

of qualified employees. The situation was further exacerbated by a self-imposed hiring freeze. In addition, based on these factors, Carrier alleged much of the overtime was also generated by the anticipated transaction which was the subject of the dispute. The referee held that the overtime was generated by the relocation of the functions of the Accounting Department to Houston, in the first place, and in connection with the transfer of these functions under NYD to San Francisco, in the second place, and denied the claims. DISSENT FILED

AWD227
Referee: Van Wart, Sr.
Fin. Docket: 29430
Carrier(s): N&W
Union(s): BLE
Award Date: 1-30-84
NYD Articles: Art I, § 1; Art I, § 11

Six months after the parties had entered into an implementing agreement to consolidate facilities, Claimants were furloughed as a result of the proper regulation of the number of firemen in accordance with the formulas set forth in the National UTU Manning Agreement. The referee held they were affected by the UTU Manning Agreement, not a NYD transaction.

AWD228
Referee: Van Wart, Sr.
Fin. Docket: 29430
Carrier(s): N&W
Union(s): BLE
Award Date: 1-30-84
NYD Articles: Art I, § 1; Art I, § 11

Referee held that general declines in business, not a NYD transaction, affected Claimants.

AWD229
Referee: Brown
Fin. Docket: 29455
Carrier(s): N&W/IT
Union(s): UTU
Award Date: 1-28-85
NYD Articles: Art I, § 1; Art I, § 6

Claimant was off due to an on-duty injury at the time a NYD transaction took place. The parties had agreed-upon interpretations of NYD which did not require that an employee be displaced from his assignment or position in order to establish eligibility for protective benefits, he only had to show that as a result of a transaction the employee was placed in a worse condition with respect to compensation. The referee held that when he returned to service he could no longer hold a position, therefore, he was placed in a worse position with respect to compensation and entitled to NYD benefits. In computing his displacement allowance, the carrier was required to count the last 12 months in which he had received compensation, even though it had to go back over two years to find 12 qualifying months.

AWD230
Referee: LaRocco
Fin. Docket: 30249
Carrier(s): ATSF
Union(s): BMWE
Award Date: 11-8-88
NYD Articles: Art I, § 1; Art I, § 11

To implement the AT&SF's acquisition of the TP&W, the parties agreed to dovetail seniority roster of the employees of the respective carriers, with prior rights to jobs on their former territories. However, a problem arose with respect to floating or non-headquartered gangs, the result being frequent displacement as these gangs moved between prior rights territories. To resolve this the parties reached a memorandum of agreement which provided for strict seniority exercise, without any recognition of prior rights, for non-headquartered gangs. A dispute arose with respect to whether the memorandum agreement covered only floating gangs (the union's position) or also covered non-headquartered gangs (the carrier's position). The referee noted that the agreement stated "the carrier may organize non-headquartered gangs" and resolved the dispute through strict contract construction, denying the union's position.

AWD231
Referee: LaRocco
Fin. Docket: 30249
Carrier(s): ATSF
Union(s): BMWE
Award Date: 11-8-88
NYD Articles: Art. I, § 1, Art. I, § 11

To implement the AT&SF's acquisition of the TP&W, the parties agreed to dovetail seniority roster of the employees of the respective carriers, with prior rights to jobs on their former territories. However, the carrier filled temporary vacancies, regardless of whether it occurred on the former ATSF or TPW territories, in seniority order, refusing to acknowledge prior rights. The referee noted that the agreement gave prior rights for "service on...their former territories" and held that it meant temporary, as well as permanent, assignments, and sustained the union's claim .

AWD232
Referee: Zumas
Fin. Docket:
Carrier(s): CSX
Union(s): BMWE
Award Date: 2-21-91
NYD Articles: Art. I, § 1, Art. I, § 5

Once again, a carrier refused to acknowledge that employees affected as a result of a transaction were entitled to displacement allowances even when they placed themselves on positions paying the same rate of pay. The referee sustained the claims, citing Docket No. 62 of the WJPA Section 13 Committee:

> *From this discussion it may be seen that neither "rate of pay" nor the "test period" average earnings is dispositive. The Agreement makes "compensation" the test of "worse(ned) position" and the test period formula provides the normal and usual yardstick of compensation. But, the eligibility of an employee for an allowance depends upon whether any of the*

difference in compensation is a result of the coordination. Once the eligibility is shown all the difference between a month's compensation after the coordination and the "test period" average is due the employee. By adopting the average test, the parties undoubtedly anticipated that some few windfalls would occur.

Even the fluctuations inherent in the ordinary course of business, make the rate of pay only a useful but not determinative criterion to examine. It is the compensation filtered through the TPA that shows whether or not an employee has been placed in a worse position.

The decline in Claimants' compensations coincided in time and place with the transaction in question which was approved by the I.C.C. This proximity, and the absence of proof of an intervening factor, establishes the causal nexus between the transaction and the loss of compensation to Claimants. The change in compensation clearly constitutes a harm to Claimants, thus satisfying all the elements necessary for applying the NYD benefits.

AWD233
Referee: Fredenberger
Fin. Docket: 30800
Carrier(s): UP
Union(s): BMWE
Award Date: 6-24-91
NYD Articles: Art. I, § 1; Art. I, § 11

Claimant was working on a special project when the ICC authorized the UP/MKT merger. After the special project was completed, he was unable to hold any position and was furloughed. Claims for dismissal allowances were denied by the Carrier. Referee held that Claimant had established no causal nexus that the abolishment of his position was as a result of a transaction and not as a result of the completion of the special project.

AWD234
Referee: LaRocco
Fin. Docket: 31088
Carrier(s): IC
Union(s): UTU
Award Date: 9-30-91
NYD Articles: Art. I, § 1; Art. I, § 11

As a result of the sale of line to the SR, claimant was affected in a transaction-related chain of displacements and displaced from his flagging position in through freight. Although another flagging position in through freight was available, claimant exercised to a position producing less compensation, the Extra Board. Carrier denied claims for displacement allowance, stating that any worsening in claimant's compensation was due to his displacing to a position producing less compensation. The union agreed that claimant could have exercised his seniority to an equivalent flagging position but that did not alter the fact that he was affected; therefore, the carrier's remedial action was limited to treating claimant as occupying the flagging position, not to refuse to certify him as a displaced employee. The referee denied the union's position, in effect holding that claimant's worsened position was his own fault.

AWD235
Referee: LaRocco
Fin. Docket: 31088
Carrier(s): IC
Union(s): UTU
Award Date: 9-30-91
NYD Articles: Art. I, § 1; Art. I, § 11

Claimant had been furloughed for about a year when carrier, in anticipation of the sale of the sale of the Birmingham line, diverted a daily complement of coal cars to the BN. Claims were filed because of this loss of work opportunity for claimant. Referee held that employees furloughed at the time of a transaction are not entitled to protective benefits.

AWD236
Referee: LaRocco
Fin. Docket: 31088
Carrier(s): IC
Union(s): UTU
Award Date: 9-30-91
NYD Articles: Art. I, § 1; Art. I, § 11

Identical factual situation as AWD No. 234, above with same result.

AWD237
Referee: LaRocco
Fin. Docket: 31088
Carrier(s): IC
Union(s): UTU
Award Date: 9-30-91
NYD Articles: Art. I, § 1; Art. I, § 11

Similar facts to the AWD Nos. 234 and 236, above, except here claimant was able to displace to the same service (flagman), working the same trains. Referee held claimant was not placed in a worse position with respect to either his compensation or the rules governing his working conditions.

AWD238
Referee: LaRocco
Fin. Docket: 31088
Carrier(s): IC
Union(s): UTU
Award Date: 9-30-91
NYD Articles: Art. I, § 1; Art. I, § 11

Same facts as AWD No. 237, above, except here claimant was a brakeman and after his displacement was able to place himself on the same turn he held before he was displaced. Referee held claimant was not placed in a worse position with respect to either his compensation or the rules governing his working conditions.

AWD239
Referee: Peterson
Fin. Docket: 29430
Carrier(s): N&W
Union(s): UTU
Award Date: 4-9-92
NYD Articles: Article I, § 1; Article I, § 11

Claims filed on behalf of yardmen that were forced to exercise seniority to brakeman positions after the consolidation obviated the need to switch out SR coal cars, work which had encompassed a large portion of each yard crew's duties. The carrier argued that the same amount (on a percentage basis) of SR coal car switching remained and that the general decline in coal business had led to the abolishment of the good jobs. The referee held that the evidence supported the carrier's position.

AWD240
Referee: Peterson
Fin. Docket: 31922
Carrier(s): Soo
Union(s): BMWE
Award Date: 4-28-92
NYD Articles: Article I, § 1; Article I, § 5

The "*Question at Issue*" to be decided was whether the carrier was required to furnish test period averages to employees whose positions were abolished as a result of a transaction. The union argued that once an employee was affected by a transaction, he was entitled to his TPA, otherwise, he had no way of determining to what position to displace. Carrier argued that unless the employee could first show a worsening of compensation (adverse effect) as a result of the transaction, he was not entitled to a TPA. The referee sided wish the carrier; "In our view, the New York Dock Conditions clearly intend that employees not be given a TPA or be certified as entitled to the protective benefits of the New York Dock Conditions until they have been adversely affected as a result of the transaction as concerns their compensation and rules governing their working conditions." (Union dissent and arbitrator's response attached.)

The BMWE petitioned the STB for review of the decision; on April 3, 1995, the STB affirmed the Award and denied the BMWE petition in stating: "*While we are not convinced that carriers would bear a substantial burden in providing TPAs in advance, it is evident in any event that TPAs are of little or no use in helping an employee exercise seniority to bid on new jobs. TPAs are historical averages, reflecting past hours worked, including elective time as well as rate of pay... It is true that the amount of overtime is an important factor in evaluating a job, but there is no evidence that the hours to be working in the new job can be predicted. It therefore does not appear that employees affected by a transaction would be better able to exercise their seniority rights if TPAs were furnished on demand in advance of attaining new positions.*" [ICC Affirmed 4/3/95]

AWD241
Referee: Eischen
Fin. Docket: 28905
Carrier(s): C&O
Union(s): TCU
Award Date: 7-4-92
NYD Articles: Article I, § 5

The issue was whether non-agreement earning received during the 12 month's prior to the transaction are to be included in determining test period averages. Claimant had worked as an assistant trainmaster for several years prior to a management force reduction in September 1987, at which time the exercised his union seniority. Some two months later he was displaced as a result of a transaction and became a displaced employee. However, carrier established a TPA for him by averaging the earnings of the employee's on his seniority roster immediately above and below him. The referee cited the unambiguous language of Article I, Section 5 at an earlier decision by referee Stallworth (AWD 173) and held that all compensation, both agreement and non-agreement, must be included in computing claimant's TPA. [see Plb 5713 # 2 CSX/BRC]

AWD242
Referee: Duffy
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): ATDA
Award Date: 8-31-92
NYD Articles: Article I, § 5

Carrier announced plans to consolidate all system train dispatching functions in Jacksonville and an implementing agreement was reached. Beginning on or about March 1, 1988, several dispatchers worked 7 days a week, filling in for dispatchers that were in training or being transferred. When his job was abolished on June 18, 1988, as part of the coordination, the carrier omitted the recent overtime earnings, claiming they were caused as a result of the impending transaction. The union cited the clear language of Article I, Section 5 ("*all compensation*") and argued for inclusion of the overtime earnings. The referee followed a long line of awards and excluded the overtime earnings in anticipation of the transaction. [ICC Affirmed 11/2/93]

AWD243
Referee: Twomey
Fin. Docket: 30800
Carrier(s): UP
Union(s): UTU
Award Date: 9-92
NYD Articles: Article I, § 5

Claimant occupied the Extra Board prior to and after the merger of the UP/MKT. However, Carrier erroneously certified him as a displaced employee. Referee held that there was no proof that claimant was placed in a worse position with respect to compensation and there is no legal basis to require the carrier to pay protection.

AWD244
Referee: Marx
Fin. Docket: 32432
Carrier(s): CR
Union(s): BMWE
Award Date: 10-9-92
NYD Articles: Article I, § 5

Claimants were furnished test period averages after CR sold 16 miles of track to CSX. They then filed claims for displacement allowances because of loss of overtime work. Referee noted they held the

same jobs before the transaction and after and that their employment history showed that most had increased earnings after the transaction; therefore, they were not displaced employees.

AWD245
Referee: LaRocco
Fin. Docket: 31875
Carrier(s): CR/MGA
Union(s): UTU
Award Date: 10-29-92
NYD Articles: Article I, § 4

As a result of the Monongahela, a coal carrier, merging into Conrail, an Article I, Section 4 arbitration was held, with the primary dispute being whether the MGA engineers and firemen should become covered by the CR CBA, with the resultant elimination of the MGA CBA. The referee held that because of the fact that the operation of the MGA would be complete integrated with CR, in order to accomplish the efficiencies of the merger the MGA CBA would be eliminated and the M or A engineers and firemen placed under the CR CBA.

AWD246
Referee: Rehmus
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 12-30-92
NYD Articles: Article I, § 1, Article I, § 11

In early 1986 a carrier supervisor displaced Claimant as a result of the abolishment of his management position. However, at that time, the carrier refused to acknowledge the abolishment was a result of a NYD transaction. Subsequently, the supervisor challenged the carrier's position in arbitration and prevailed in an award 19 months after the displacement of Claimant. Claimant subsequently initiated claims in 1992, nearly 5 years after her displacement. The claims were denied on the basis of **laches**.

AWD247
Referee: Rehmus
Fin. Docket: 30000
Carrier(s): UP
Union(s): TCU
Award Date: 12-30-92
NYD Articles: Article I, § 12

Claimant was affected by a NYD transaction, was required to change his place of residence and sold his residence. The issue in this dispute was whether costs attributable to the claimant in the sale of his home - sales commissions, closing costs, etc. -- should be absorbed by the carrier as part of the "loss suffered in the sale of the home for less than its fair value." While noting a clear contradiction in awards issued on this matter, the referee held that in selling real estate the seller always receives less than the agreed-upon sales price; accordingly, the fair value represents the fair market value only; thus, any costs attributed to the seller must be absorbed by him and not by the carrier.

AWD248
Referee: Kasher
Fin. Docket: 31880, 31882, 32043
Carrier(s): CNW
Union(s): BLE/UTU
Award Date: 1-9-93
NYD Articles: Article I, § 4

As a result of a sale of trackage to the WC and associated trackage rights transactions, the carrier proposed to shut down a designated home terminal, Spooner, Wisconsin, and transfer that home terminal 67 miles to Itasca. Home terminals were established pursuant to the CBA. Notwithstanding the carrier's persuasive arguments that the retention of Spooner as a home terminal made no sense, either operationally or financially, the referee ruled that there was no showing that the carrier's proposed change was necessary to effectuate the transaction.

AWD249
Referee: Twomey
Fin. Docket: 28905, 31954
Carrier(s): CSXT
Union(s): UTU
Award Date: 2-5-93
NYD Articles: Article I, § 1, Article I, § 11

Following acquisition of 100% interest in the RF&P, the CSXT rerouted several trains. As a result, claims were filed asserting that the rerouting was as a result of the acquisition. The referee cited carrier news releases and internal documents and held that CSXT planned and directed the diversion of merchandise from the C&O main line to the RF&P, the WM, and the B&O for the benefit of the CSXT community of interest and sustained the claims.

AWD250
Referee: Scheinman
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): TCU(CARMEN)
Award Date: 7-12-93
NYD Articles: Article I, § 6

As result of a sale transaction in 1991, two carmen positions were abolished. At that time, they began receiving dismissal allowances because they were unable to exercise their existing seniority to any positions. However, a dispute arose over whether they had an obligation to exercise their privilege of preferential transfer under the work rules agreement to other points where carrier needed their services. The union argued that once they exercised their seniority to the fullest at all points where they maintained a current seniority date, they became dismissed and had no further obligation because they did not have existing seniority at other points. Further, there was no provision in the work rules agreement which would have allowed them to displace to points where they did not have seniority at the time they became affected by the transaction. The carrier argued that under New York Dock dismissed employees have an obligation to seek out any and all means by which to exercise to available work, whether the affected employee had pre-existing seniority at other points or not. The referee held that "both Claimants have seniority with which they can exercise to positions at Atlanta, Georgia. While it is true that Rule 23 (f) does not require and employee to make application for such vacancy, by failing to do so

it is the employee's discretion and not the results of a transaction, that deprived the employee of railroad employment."

AWD251
Referee: Dennis
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): TCU
Award Date: 8-2-93
NYD Articles: Article I, § 6

As result of transactions occurring in 1991, six female clerks working in the Accounting Department in Baltimore, Maryland, became dismissed employees. After drawing dismissal allowances for a year and one-half, the carrier advised them that there were vacant positions in the Crew Dispatcher's office in Jacksonville, Florida. Although the Claimants had no seniority in Jacksonville, the carrier cited a letter of agreement permitting clerks to bid on unfilled jobs in other seniority districts, if they so chose. The union's position was that the letter of agreement was a voluntary choice on the employee's part, not a mandatory act, and promptly canceled the letter of agreement. The carrier took the position that dismissed employees had an obligation to exercise to any available position after receiving notice from the carrier that there was a need for their services. Further, the carrier served notice upon the six that there was a need for their services in Baltimore working as brakemen. With respect to the new notice, the union argued that by no stretch of the imagination could brakeman work be a comparable position for any of the six. The referee sustained the union's position on both issues, as follows:

> *After a review of the extensive material presented on the issue by the parties, it is the opinion of the Arbitration Panel that Carrier has attempted to extend the reach of New York Dock requirements beyond the confines of the working Agreement covering Claimants in Seniority District 3 in Baltimore. Claimants, as dismissed employees, exercised their seniority under the working Agreement, as required by Article 1, Section 5, of New York Dock. There is no language in New York Dock in the working Agreement or in the 5-party Agreement that requires more.*
>
> *Arbitrator LaRocco in a New York Dock case involving TCU and the Union Pacific in June 1990 (cited above by the Organization) clearly set forth the arbitrable principle controlling in this case: 'This Committee is powerless to add items triggering a cessation of an employee's New York Dock protective status not found in the New York Dock Conditions. Once an employee elected New York Dock coverage, the protective period for the employee could only cease upon the occurrence of one of the events listed in Sections 5(c) or 6(d) of New York Dock conditions.' Those comments apply equally as well to this case.*
>
> * * * *
>
> *There is no question that, under certain conditions, a Brakeman's position can legitimately be considered a comparable position for a Clerk. That point has been made in numerous arbitration awards on the subject. Both parties have presented awards that essentially make this point. Practically, however, one should not be allowed to obtain a position that he or she can not properly cover and employees should not be forced into positions that they are not capable of performing.*
>
> *Claimants in this instance were by no stretch of the imagination candidates for Brakemen positions. There is no evidence whatsoever in the record to support the notion*

that any of the claimants could have performed the duties of a Brakeman. There is however, considerable evidence to the contrary.

The methods used by Claimants to resist the Brakemen positions offer to them and then, on advice of Counsel, to accept the positions under protest could have been anticipated by anyone familiar with the situation. The Committee does not find Claimants' actions in this instance to be a refusal to accept Brakemen positions, but rather an appropriate response on their part, given the uncertainty that existed.

This Committee is of the opinion that if any of the six Claimants were forced into a Brakeman's position given the knowledge of railroading they appear to possess and their physical and mental make-up, an unimaginable amount of mischief could result. This Committee can not, based on the record before it, believe that a responsible Carrier would make any of these Claimants Brakemen.

CSX petitioned the ICC for review of the decision; on January 4, 1994, the ICC declined such review and stated: "*...we also disagree with CSXT's argument that the panel's decision reflects a material misinterpretation of, and does not draw in essence from the protective conditions in New York Dock when the six employees failed to 'return to service after being notified in accordance with the working agreement' as required by New York Dock Article I, Section 6(d). To protect the integrity of the conditions, CSXT asks us to exercise our authority to review and the award and to vacate it.*

*Even if CSXT is correct, it is apparent that the 5-Party Agreement was a voluntary agreement designed to benefit both CSXT in relocating its work force across seniority districts and also clerical employees who elected to move from their present positions to jobs available on other roads. That it was not intended to require them to move is evidenced by the opening words of the agreement, which state that it intended 'to give Clerical employees * * * an opportunity to fill new positions and vacancies * * *.' No mention is made there of a corresponding duty to do so. Moreover, to induce employees to make that election, it offered substantial financial incentives to successful applicant,s and it was entirely separate from the implementing agreement under which claimants receive their New York Dock benefits. New York Dock requires the exercise of seniority rights under the terms of a protected employee's working agreement. As required by Article I, Section 5 of New York Dock, claimants have fully exercised their seniority under the applicable working agreement. CSXT may not construct an additional barrier by turning the strictly voluntary 5-Party Agreement into a mandatory working agreement governed by New York Dock terms and conditions.* (ICC decision attached also see Award No. 273)

AWD252
Referee: LaRocco
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): TCU
Award Date: 5-27-93
NYD Articles: Art. I, § 5(b)

Claimant transferred to the Centralized Crew Management Center (CMC) and was given a TPA under the provisions of the implementing agreement. Claimant's TPA was predicated upon a substantial amount of overtime. After certain rosters were opened up for the exercise of seniority, claimant bid to a lower rated position as a yard clerk. Carrier subsequently charged against the TPA of the claimant the higher rated position of crew caller along with all overtime that he would have been entitled had he remained in the CMC. The right of the carrier to charge overtime in the CMC against the claimant was challenged by the Organization as he did not, under the rules application, stand for such. In examining §

5(b) the Arbitrator reasoned that whether or not the employee was eligible for the overtime was irrelevant as he had placed himself in a position of ineligibility, and the "*express language of Section 5(b) demonstrates that the offset against the employee's displacement allowance includes not only straight time earning determined by the basic rate of pay but also other compensation. If the offset consisted solely of straight time earnings, the words `and compensation' would not appear after `rate of pay' in Section 5(b). Indeed, a protected employee's test period average earnings and test period average hours are calculated based on earnings, including overtime pay, in excess of straight time hourly wages and so, it is consistent to offset the employee's displacement allowance with overtime earnings.*" The Arbitrator did find that only overtime attached to the position that claimant was treated as occupying could be held against his TPA.

AWD253
Referee: LaRocco
Fin. Docket: 30000
Carrier(s): UP
Union(s): UTU
Award Date: 8-27-93
NYD Articles: Art. I, § 4; Art. I, § 9, Art. I, § 11

The three (3) claimants herein all contended they were affected by a "transaction" and submitted claims for home removal loss in 1988. The denial of the claims by the carrier in 1988 was answered with a lengthy dissertation about the three claims by the General Chairman in 1989, however, without appeal. In February, 1992, three (3) years and three (3) months after the carrier's declination they were appealed by the current General Chairman; the carrier responded by invoking the equitable **doctrine of laches**. The claims were submitted to the arbitrator for a ruling based upon the Organization's contention that the slight delay in progressing the claims was not long enough to invoke the doctrine of laches; and, the carrier had failed to timely advise the claimants they were entitled to benefits. The carrier contended it was prejudiced by the delay because it could no longer find documentation outlining the circumstance surrounding the reduction in manpower which resulted in the claimants' displacement. Citing prior indexed **Award Nos. 200 and 246** the arbitrator barred the claims in stating that, although the time limits in applicable CBAs are not binding on claims progressed under § 11 of NYD, "*either party may invoke the equitable doctrine of laches where one party fails to assert a right for a unreasonable length of time and the delay prejudices the opposing party. ...Because of the unreasonable delay, the Carrier rightly concluded that Claimants had abandoned their claims. Litigating their claims at this late date would be unfair to the Carrier because it no longer has possession of documentary evidence which, in its view, would show the real reason why Claimants were cut from the Oroville extra board.*"

AWD254
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): ATDA
Award Date: 10-4-93 (Award No. 1)
NYD Articles: Art. I, § 4; Art. I, § 12

Carrier transferred and coordinated train dispatching functions performed at various locations throughout the property to Jacksonville, Florida, in 1989. A side letter to the Implementing Agreement provided optional relocation allowances to employees transferring to Jacksonville, included was a 15% fair market value of residence paid to transferring employees electing not to sell their residence. Claimant transferred to Jacksonville, Florida, and elected the 15% value on his home. Carrier subsequently denied the request on the grounds that in a prior transfer from Rocky Mount to Raleigh, NC, the claimant had

received 15% of the appraised value of the same residence and released the carrier from further obligation regarding that residence. In receiving the 15% value in the prior transaction the claimant had signed a release that stated: "*said Employee hereby releases, relinquishes and discharges any and all claims, demands or causes of action which the Employee had, has or may have against the Seaboard System Railroad [part of present day CSX], Inc., its predecessors, successors or assigns, by reason of any loss which the Employee may suffer in connection therewith, or otherwise.*" In focusing on the language of the signed release the arbitrator found the original payment of that 15% fair market value eliminated any further recompense by the carrier for the same residence.

AWD255
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): ATDA
Award Date: 10-4-93 (Award No. 2)
NYD Articles: Art. I, § 1; Art. I, § 11 (e)

Involving the same transfer of dispatchers to Jacksonville, Florida, the claimant, formerly a Train Dispatcher at Akron, Ohio, secured a non-agreement supervisory position with carrier's **Chessie Computer Services** in Baltimore, MD. On April 27, 1990, the carrier terminated claimant as an Applications Consultant. Claimant immediately informed the carrier of his intention to exercise his existing dispatcher seniority to a position in the Centralized Train Dispatching Office (**CTDO**) in Jacksonville, Florida, under a side letter to the Implementing Agreement pertaining to the transaction. That side letter enable dispatchers holding official and excepted positions, on leave of absence, and on disability retirement to elect to transfer to the **CTDO** or remain on their pre-existing roster at the time they returned from their status of promoted on leave, etc. The dispute arose when claimant requested benefits applicable to the agreement transferring dispatching to Jacksonville. Carrier denied benefits because at the time of the transfer claimant occupied a non-agreement position and was not involved in the transfer and the applicable side letter merely gave claimant reconstruction rights and did not carry the benefits that affected employees were entitled. The arbitrator, citing indexed **Award Nos. 51 and 87**, denied the claim in: "*Both cases stand for the proposition that where at the time of a transaction an employee does not occupy a position directly affected by the transaction, in this case a dispatcher's position in Akron, Ohio the work of which was transferred to Jacksonville, Florida, such employee cannot show or establish a rational or causal nexus sufficient to sustain a claim under Article I, Section 11 of the New York Dock Conditions. ...Claimant lost his nonagreement position apparently as a result of unsatisfactory performance. The loss of that position in no way was related to the centralization of train dispatching work in Jacksonville, Florida. The situation in which claimant found himself with respect to the unavailability of dispatching work at Akron, Ohio on April 27, 1990 is analogous to the position of the furloughed employees in the N&W arbitration decision noted above.*"

AWD256
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): ATDA
Award Date: 10-4-93 (Award No. 3)
NYD Articles: Art. I, § 1 (d); Art. I, § 11 (e)

As a result of carrier's transfer of dispatching work to Jacksonville, Florida, from Mobile, Al, claimant's job with a rate of $147.99 per day was abolished. Claimant exercised his seniority to second trick Train Dispatcher's position with a rate of $146.52 per day on December 6, 1988; three days later

the parties reached agreement formally allowing the abolishment of the claimant's original position and the transfer of its work to Jacksonville. The remaining positions in Mobile, Al. were given a rate of $165.00 per day effective December 15, 1988. Claimant remained on the second trick dispatcher's position until June 6, 1989, when that position and all others were abolished and the work transferred to Jacksonville, Florida. Claimant subsequently exercise seniority to a clerical position at Flomaton, Al. at a lower rate of pay than the second trick dispatcher's position at Mobile. Claimant was notified by carrier of his entitlement to NYD benefits and the protective period would commence on December 14, 1988 and expire on December 13, 1994. Claimant disagreed contending that his period should begin in June 1989, the date his second trick dispatcher's position was abolished. The arbitrator disagreed with the claimant in stating: "*The record in this case established that at the time Claimant's position as Mobile Assistant Chief Dispatcher was abolished in December 1988 that position carried a rate of pay of $147.99 per day. The position of Second Trick Train Dispatcher to which Claimant exercised his seniority on December 6, 1988 carried a rate of pay of $146.52 per day. Clearly, Claimant became a displaced employee on December 6, 1988 because he was placed in a worse position with respect to his compensation as a result of the transaction. The fact that a few days later the Second Trick Train Dispatcher's position at Mobile received a rate increase to $165.00 per day is irrelevant. The fact remains that as a result of the transaction Claimant exercised his seniority to a position carrying a lower rate of pay than Claimant's abolished position. Accordingly, it was at the time that Claimant became a displaced employee which began his protective period. All allowances are determined from that point in time.*"

AWD257
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): ATDA
Award Date: 10-4-93 (Award No. 4)
NYD Articles: Art. I, § 5; Art. I, § 11 (e)

In this final case involving the Centralized Train Dispatcher's Office in Jacksonville, Florida, the claimant was affect by "Phase I" of the transaction in 1988 and relocated, his protective period began on April 27, 1988. As a result of "Phase II" of the centralization carrier issued notice on October 19, 1989, to Train Dispatchers that certain positions would have their rest days changed, or territory added to their current positions--Dispatchers affected by those changes were entitled to an exercise of seniority. As a result of a chain of displacements the claimant exercise his seniority on February 1, 1990, from the Corbin Division Dispatchers to a position in the Florence Division. On February 6, 1990, claimant asked for his TPA and protection under the provisions of NYD from Feb. 1, 1990 through Feb. 1, 1996. On Feb. 11, 1990, the carrier declined that request stating that claimant had been affected by "Phase I", but not "Phase II" of the transaction. The Organization contended that the claimant was entitled to a new TPA as he was affected by "Phase II" and the position from which he was displaced produced more income in the form of overtime than the position to which he displaced even though the position carried a higher rate of pay. The carrier maintained that claimant exercised his seniority by election and such was not the result of the transaction. The arbitrator found that claimant was affected by Phase II and entitled to a new protective period beginning with his displacement on February 1, 1990. However, the arbitrator found: "*the Carrier's point is well taken that Claimant is not entitled to a displacement allowance as a result of his displacement on February 1, 1990 because Claimant did not secure a position in the Corbin Division which would have entitled him to the same opportunities for overtime work he had in connection with the position from which he was displaced. While it may be true that Claimant exercised his seniority to a higher rated position after his displacement, the fact remains that such position produced less compensation which is the basis for his claim for a displacement allowance. Claimant cannot base his claim upon a set of facts and then deny the consequence of those facts with respect to other pertinent matters, in this case the actual compensation produced by the position to which he exercised his seniority.*

Here Claimant failed to place himself on a position where his opportunity for overtime would have been equal to that he had in the position from which he was displaced. Article I, Section 5 of the New York Dock Conditions clearly bars the displacement allowance Claimant seeks in this case."

AWD258
Referee: Peterson
Fin. Docket: 30000
Carrier(s): UP
Union(s): IBEW
Award Date: 3-26-94
NYD Articles: Art. I, § 6

Pursuant to the October 16, 1988 Implementing Agreement covering the merger of the UP, MP and WP, eight-two (82) electricians' positions were established at North Little Rock and six (6) positions at Omaha, NE, one in connection with Power House work. The six positions remaining in Omaha were for approximately eighteen months with the Power House position requiring a qualified, licensed electrician. the Implementing Agreement also provided that "*Employees assigned to positions that elect not to transfer... will be furloughed from service at Omaha and the employee's name will remain on the applicable seniority roster subject to recall under the current Collective Bargaining Agreement in effect at Omaha. However, such employees will not be eligible for any New York Dock conditions benefits.*" Claimant elected to remain at Omaha and go furlough. A junior electrician with the requisite qualifications and license was assigned to the Power House. When the Power House was closed the junior employee continued working as an electrician and as a temporary foreman until subsequently assigned as a foreman. The Organization contended that the Implementing Agreement was violated when the Power House was closed and claimant was not recalled. Further, claimant, unable to hold the Power House position account the licensing requirements, was placed in a worse position and only exercised options in accordance with NYD. The arbitrator refused to decide the matter relating to violations of the CBA as referable to a different forum and not a matter for a § 11 Committee. The claim was declined as: "*claimant was not deprived of employment and did not suffer a loss of earnings as a direct result of a transaction. He had opportunity of an exercise of seniority to available positions, but elected to take a furlough at the time of the transaction. ...In electing not to exercise seniority to available work and instead take furlough, the Claimant removed himself from the protective umbrella of the NY Dock Conditions*."

AWD259
Referee: Suntrup
Fin. Docket: 32000
Carrier(s): DRGW/SP
Union(s): ATDA
Award Date: 5-25-94
NYD Articles: Art. I, § 2; Art. I, § 4 (with implementing agreement)

Carrier served notice to consolidate Train Dispatching functions of the SP, DRGW, and St. Louis Southwestern to Denver, Colorado. Due to a number of problems the parties were unable to negotiate an Implementing Agreement pursuant to § 4 and the matter was arbitrated. The arbitrator rejected the Organization's request for economic factors which promoted the carrier's decision to consolidate. One issue that existed was the contract that would cover the dispatchers at Denver. In a preliminary ruling prior to the hearing the arbitrator ruled that he had no authority under § 4 to resolve the issue of which CBA would apply at the consolidated Denver center. With a subsequent **NMB** ruling on representation of dispatchers on the SP, he was again requested to settle the issue. The **NMB** ruled that the ATDA would be the system-wide representative of dispatchers on the SP Lines, thereby a labor organization that previously represented DRGW dispatchers, the Dispatchers Steering Committee (DSC), no longer was a

part of the representation picture. However, the SPL wanted all the consolidated dispatchers to be covered by the DRGW/DSC contract. The SPL contended that the existing ATDA contracts on the SP-W[est] and SP-E[ast] would not cease to exist--they would still exist albeit without any employees working under them. As a consequence, the application of CBAs became an issue of § 2 vs. § 4 of NYD. In support the SPL, citing indexed **Award No. 121 and 157**, argued that existing agreements are not portable under a § 4 Notice and the arbitrator was not empowered to so prescribe. The Organization argued that existing agreements should remain in effect and cover the same employees as they transfer to Denver or, as the Denver facility was newly purchased after the Notice of consolidation, it was logical to either negotiate a new agreement or place the dispatchers under the SP-W Agreement. The arbitrator found that to accept the SPL's arguments would be tantamount to nullifying labor agreements negotiated with 85% of the dispatchers in favor of the DRGW/DSC agreement for 15%--with an Organization that had subsequently lost all representation rights. Reasoning that: "*being informed by arbitral precedent after 1985 that the ICC does not specifically state that inconsistencies between Article I, Section (2.) and (4.) are to be resolved in favor of Section (4.), as the company here would argue, we are nevertheless advised by some arbitral precedent that such `...conclusion is inescapable...'. Even if such were so, strong arguments could be made here that any inconsistences which may exist between Sections (2.) and (4.) of Article I, applicable to the vast majority of dispatchers involved in the instant case, are less than obvious*" the arbitrator fashioned an Implementing Agreement which applied the SP-E, SP-W and DRGW CBAs in the Denver Dispatching Center until a single CBA was reached. *Noteworthy*, the arbitrated Implementing Agreement provided that ATDA representatives' absences to attend meetings or perform union related functions would be considered as having performed service on such days and included in their respective TPAs--such absences would also be considered as qualifying time for other benefits such as vacations.

AWD260
Referee: Fletcher
Fin. Docket: 28905
Carrier(s): CSX
Union(s): IBEW
Award Date: 10-3-90
NYD Articles: Art. I, § 5

This dispute involved the proper calculation of a TPA when earnings were in both agreement and non-agreement positions. In applying the literal language of § 5 the Committee stated: "*The language 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 Protective 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) [§ 11347) of the Interstate Commerce Act. From time to time negotiators in drafting employee protective and implementing agreements have altered the formula established by WJPA Section 5 and/or sections of I.C.C. employees 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.*

* * *

"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." (also see Award Nos. 173, 241 and 272)

AWD261
Referee: Fletcher
Fin. Docket: 28676
Carrier(s): GTW control DTI/DTSL
Union(s): UTU
Award Date: 5-24-93
NYD Articles: Art. I, § 4; Art. I, § 11

In fashioning the 1979 NYD Implementing Agreement to provide for the GTW's control of the DTI and DTSL a particular clause contained therein stated that protection was "*effective upon the date of acquisition or the date upon which the labor organization and GTW come to agreement on a single working agreement for all employees they represent on the GTW and DT&I, whichever is later...*" Subsequently, the dispute was joined when the UTU gained representation rights to all Yardmaster on the merged system in 1985; the Carrier denied protection based upon the fact that the DTI CBA was retained on the lines of that former property. The Committee affirmed the Organization's position (protection is extended to all Yardmaster no matter what agreement was in effect) based upon a clear reading of the I/A.

The Committee held that: "*...it is evident Carrier offered identical agreements to each organization without regard to individual circumstances, such as those present in the case with DTI yardmasters being unrepresented by Organization. It does not appear that the terms of this agreement were the result of negotiations, but, rather, were drafted unilaterally by Carrier. Thus the principle of contract law that a contract will be interpreted against the party selecting the language is applicable. ...While for some organizations, this may have broadened the group of employees covered, in this case it narrowed it by excluding yardmasters on the DTI because they were unrepresented.*

"The choice of language Carrier used in the Agreement must be given meaning. It is very specific and the group identified is readily ascertainable. By specifically referring to 'employees they represent,' instead of all members of the craft and class, or some other appropriate terminology, Carrier obviously intended to define a specific group, which, in this case, turns out to be only the yardmasters on the former GTW." [see Award No. 266]

AWD262
Referee: LaRocco
Fin. Docket: 32000
Carrier(s): DRGW/SP
Union(s): Individual
Award Date: 11-15-94
NYD Articles: Art. I, § 6; Art. IV

Claimant, a non-agreement employee, initiated a claim for NYD benefits under Article IV due to the fact that his position in SP's Distribution Services Department at San Francisco was abolished effective September 15, 1993. After refusing Carriers' offer of a non-agreement severance plan Claimant elected to pursue a claim for NYD entitlement. Carriers contended that Claimant was not entitled to protection based upon three points: *1) Claimant was hired after filing of Carriers' merger application; 2) Claimant*

is not type of non-agreement employee covered by NYD; and, 3) Claimant is unable to show a causal connection between the merger and his layoff.

The Committee's decision turned on the fact that the Claimant was hired after ICC merger approval. Based upon this fact alone the Committee held: "*Expanding the protective benefits to include post-merger employees would substantially and impermissibly increase the level of protective benefits. Id. Therefore, unless the ICC states otherwise, the ICC's imposition of employee conditions protect only present employees, that is, those employed on the date of approval. Absent an express finding by the ICC to include after hired employees, these employees have no prior rights equities to consider.*

* * *

"Since the Arbitrator finds that Claimant, an after hired employee, does not have access to the New York Dock Conditions imposed as a condition of the DRGW's acquisition of the SP, the Arbitrator need not consider whether Claimant is an employee within the meaning of the New York Dock Conditions or whether Claimant was affected by a merger related transaction."

AWD263
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): CSX
Union(s): TCU
Award Date: 12-7-94
NYD Articles: Art. I, § 3 and § 5

In this dispute involving an employee affected by the same transaction a second time and requesting a new TPA the Committee framed the dispute as: *"The Question at Issue in this case requires 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 Committee found that: *"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 12, 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 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 Committee found the Carrier's position more persuasive and denied entitlement to the second TPA based upon the fact that the Claimant was affected by the same transaction albeit in two separate and distinct phases. The Committee did, however, make a delineation between two transactions based solely upon whether the parties initiated two separate Implementing Agreements providing for same. Dissent attached. [also see Award Nos. 256 & 257]

AWD0264
Referee: Eischen
Fin. Docket: 30000
Carrier(s): UP
Union(s): BRS
Award Date: 12-9-94
NYD Articles: Art. I, § 4

The dispute was over the Carrier's notice to consolidate two seniority districts under the aegis of NYD and the crafting of a § 4 Agreement.

One of the districts was on the UP the other on the MP with separate and distinct CBAs operating for over 11 years since the initial merger of the UP/MP. With the Carrier's establishment of a Midwest Service Unit it serve notice on the Organization to consolidate the two rosters either under the MP or UP contract. The Organization throughout contended that the matter was not a proper subject under § 4 procedures because a "*transaction*" had not taken place prompting such a consolidation. Carrier contended that a NYD § 4 Committee had the authority to modify CBAs and such consolidation was an efficiency upon which the ICC had approved the merger in the first place. The arbitrator citing precedent found in Award No. 138 (LaRocco) and Award No. 5 (Zumas) held that he had no jurisdiction under § 4 and the proceeding was dismissed for lack thereof in:

> *Merger of the two seniority districts in question obviously is desirable to Carrier, and for sake of argument one may even assume that efficiency and economy would be byproducts of such seniority district consolidation. However, there is no showing on this record that the merger of these seniority districts is either pursuant to or a necessary consequence of the ICC authorization granted in 1982. In short, Carrier's notice of May 13, 1993, does not propose a 'transaction' within the meaning of that quoted term under NYDC. Based upon all of the foregoing, therefore, the issue presented in Stage I must be answered in the negative*. [companion to Award No. 267]

Subsequently, this award was reviewed by the STB and set aside --in vacating the decision the STB encouraged the parties to negotiate and come to an agreement. Also contained in the STB's dicta when vacating the award was its guidance to the Organization should the dispute again be arbitrated--the STB said the Organization should argue that: "*The merger of seniority districts is due to a supervening cause other than the original New York Dock conditioned consolidation*".

AWD0265
Referee: Richter
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): IAM
Award Date: 1-31-95
NYD Articles: Art. I, § 6; Art. I, § 11

In this dispute involving a CBA rule provision giving Machinists a preferential transfer to other seniority points if needed at that location. Because of this right the Carrier required two dismissed employees to transfer to New Orleans or forfeit § 6 allowances. The employees transferred under protest with the Organization making the argument that dismissed employees are not required to accept employment at a location where they hold no seniority and are not required by the CBA to obtain such employment or forfeit their dismissal allowance (citing therein Award No. 115). Further, if required to move a new notice must be served and a § 4 I/A negotiated. Carrier on the other hand argued that

dismissed employees must seek employment available to them under the CBA and the rule provision, albeit permissive, is such an opportunity--failure to obtain such employment causes imposition of § 6(d) forfeiture. Carrier cited an Oregon Short Line III (MofW v. CNW - Kasher, 9-27-82) decision and NYD § 11 Decision (see Award No. 250) in support of its position.

The Committee finding the Carrier's decision more persuasive denied the claim. In regard to the § 4 contention of the Organization the Committee held that:

> *...a new implementing agreement is necessary to move the employees to New Orleans is without foundation. Both parties agree that work was not transferred from Mobile to New Orleans. Therefore, there is no basis to seek an implementing agreement under Section 4. The same conclusion is reached when the Organization's position on Section 9 is analyzed. Section 9 provides for moving expenses. It does not define a dismissal allowance, and has no bearing on when such allowance ceases.*
>
> *We agree with the Organization that Rule 27 does not require that a furloughed employee has to request employment at other locations. However, we also agree with the Carrier that failure to accept machinist work available under the provisions of the Collective Bargaining Agreement meets the criteria to cease paying a dismissal allowance.*

AWD0266
Referee: Simon
Fin. Docket: 28676 (Sub. No. 1)
Carrier(s): GTW
Union(s): UTU-Yardmasters
Award Date: 3-14-95
NYD Articles: Art. I, §§ 5, 6

This dispute involved separate and distinct issues: 1) application of a prior award by Arbitrator Fletcher [Award No. 261] and the Carrier's attempt to overturn that decision; 2) the explicit language of §§ 5 and 6 and inclusion of all earnings in the TPA without regard to class or craft; 3) the meaning of an **attrition agreement** between the parties; and, 4) whether the **doctrine of laches** applied. The Committee fist held that: "*At the outset, we must address the Carrier's attempt to overturn or modify the decisions of the Fletcher Board. As both parties are aware, the procedures for review of an arbitration decision concerning ICC imposed protective conditions is the ICC. The Commission has primary jurisdiction over such matters, with further appeal being to the U.S. Court of Appeals. The presumption that the ICC might not choose to review an appeal does not give the Carrier license to seek review of the Award of the Fletcher Board by this Board. As far as this Board is concerned, the issues presented and decided by the Fletcher Board are* **res judicata**." In regard to TPA earnings the Committee (citing the Fletcher decision in Award No. 260) that: "*...test period earnings are to take into consideration all earnings paid by the Carrier during the test period, without regard to class and craft for which those earnings were paid*." Relative to the attrition agreement dispute the Committee found that the ICC's final determination was applicable and that: "*...it is clear that the ICC does not consider an attrition agreement to be one that prohibits Carrier from reducing the number of jobs it has in any class or craft. The ICC drew a distinction between the two, calling the latter a 'job freeze,' a term the ICC has not used in connection with this merger. We find, as did the ICC in the above decision, that under an attrition agreement the Carrier is obligated to a specific level of compensation to a protected employee until he or she leaves the work force through normal attrition, i.e., as a result of death, retirement, discharge for cause or resignation. ...we conclude that it meant that the number of protected employees, rather than the number of jobs or positions, shall not be reduced*." As to the final issue, that of laches, the Committee denied the claims of two of the three claimants. [see companion Award No. 261]

The UTU petitioned the STB to review the decision and on Feb. 13, 1996, the Board in affirming the decision over attrition agreements, exercise of seniority to other crafts, etc. found that: "*Application of laches to these facts was reasonable. The three claims at issue were filed in 1993. Wohlfeil's claim involved an injury that arose only 6 months before the claim was filed, and the arbitral board held that this claim was timely. But the basis for the other two claims arose in 1986, more than 7 years before the two yardmasters filed their claims. It is not persuasive to say, as the Union argued, that the claimants had not unreasonably delayed in asserting their rights because they were not certain of their rights until the Fletcher Board found on May 24, 1993, that the Agreement applied to the yardmasters. As the arbitral board noted, some yardmasters did protect their rights by promptly filing claims under the Agreement. It held that it was incumbent on Vandendreis and Miller to do likewise. We do not find this conclusion to be egregious error under the Lace Curtain standards and we uphold the Board*."

AWD0267
Referee: Moore
Fin. Docket: 30800
Carrier(s): UP
Union(s): BMWE/IAM
Award Date: 4-03-95
NYD Articles: Art. I, § 4

This particular dispute involved the parties arguments over the scope of authority under § 11341 of the ICC as well as the decision of PEB No. 219 and prior NYD arbitral awards applicable to combining and realigning of Seniority Districts. The dispute boiled down to a question over whether the Carrier's consolidated operations were an appropriate subject for a NYD § 4 Committee. The Committee followed the reasoning found in one Award cited by the Union (see Award No. 264), by stating:

> *The award by Arbitrator Eischen (12-9-94) between the Union Pacific Railroad Company and the Brotherhood of Railroad Signalmen appears to be squarely in point [sic] with this case. Therein Arbitrator Eischen stated: 'This dispute concerns Carrier's attempt to incorporate an existing Union Pacific seniority into existing Missouri Pacific seniority districts.' The same circumstances exist in this case, with the addition that the Union Pacific is attempting to require some employees who are represented by the IAM to merge with employees of another carrier and then be represented by the BMWE.*
>
> *The arbitrator recognizes that the decision by Arbitrator Eischen is on appeal to the ICC. This arbitrator has a practice of not overruling a decision by another arbitrator who has a distinguished record and demonstrated qualifications. The only exception to this practice would be if the award is, on its face, palpably erroneous.*
>
> *On the foregoing basis the arbitrator finds that the Union Pacific has failed to establish a causal nexus between the proposed actions and the ICC's merger authorization*." [companion to Award No. 264]

As in Award No. 264 (Eischen) the STB was petitioned by the UP for a review. On July 31, 1996, the STB overrode Moore's decision because it was not based upon factual considerations but predicated upon Eischen's previous decision (which the STB also vacated).

AWD0268
Referee: Peterson
Fin. Docket: 31875
Carrier(s): CR
Union(s): IAM
Award Date: 4-17-95
NYD Articles: Art. I, § 5; § 11

In this dispute the Union argued that each Claimant should be certified as displaced employees because of "*the complexity of the different transactions/coordinations of the consolidation.*" And, because of the variables (new schedule rules, size of workforce, volume of work, etc) and a "*host of other factors*" a drop in average compensation and being placed in a worse position is inferentially caused by the transaction. The Committee did not view the record evidence as support this board brush approach and stated:

> *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 or 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 or 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.* [dissent attached]

AWD269
Referee: Simon
Fin. Docket: 28676
Carrier(s): GTW/DTI
Union(s): UTU-Yardmasters
Award Date: 4-28-95
NYD Articles: Article I, § 8

In a follow-up to Award No. 266 [also see No. 261 & 275] this Committee was faced with the question of fringe benefits under NYD and how they applied to the Claimants. The Carrier's position was

that such benefits only accrue to an employee's *"craft in which he is working or from which he was furloughed. An employee who is able to continue employment by virtue of secondary seniority is paid the benefits under the collective bargaining agreements of his current employment..."* any other entitlement would be a windfall to the employee [see Award No. 64]. The Committee, noting that neither party was able to produce a single arbitration award dealing with entitlement to fringe benefits when working in a secondary craft, found that a historical perspective was necessary to give § 8 its proper application. Citing the ICC decision in *Southern Control II;* reviewing WJPA; and, the rules of contract construction in regard to "*benefits attached to his pervious employment, such as free transportation, hospitalization, pensions, reliefs, et cetera*" the Committee found that: "*The Commission, we believe, did not wish to interfere with the parties' process of negotiating fringe benefits for employees covered by collective bargaining agreements. What it intended to preserve, however, were those benefits attaching to employment with the carrier, regardless of craft. The Commission carefully draws the line between the protections it affords and those which must be negotiated, such as allocation and utilization of forces and the application of seniority... It is the Board's determination, therefore, that Claimants' fringe benefits in the nature of time off with pay, such as holidays, sick time and personal leave days, are to be determined by the collective bargaining agreement or personnel policies applicable to the positions they are holding. Insurance benefits, on the other hand, must be afforded to Claimants in the same manner as if they were presently employed as Yardmasters.*"

As a result, **the UTU petitioned the STB for review** of the decision (attached). The Board held on May 28, 1996, that: "*The UTU based its appeal on the argument that section 8 embraces all fringe benefits, which was their only argument that compensated leave fits within the ambit of section 8. In denying the appeal, we are not holding that fringe benefits under section 8 are limited to the four kinds listing in the WJPA and specified in section 8. In concluding that the ICC envisioned that some fringe benefits lay outside section 8 protection and must be bargained rather than mandated, the panel cited Southern Railway Company -- Control --Central of Georgia Railway Company, Finance Docket No. 21400, 331 I.C.C. 151 (Nov. 15, 1967) (Southern Control II). In addition to expressing that principle, the ICC there held that* 'insurance' *was a protected fringe benefit, even though it was not one of the 4 benefits listed in section 8. The ICC paired insurance with hospitalization in Southern Control II. Future claims that a particular fringe benefit fall within the scope of section 8--because it is a fringe benefit of the type mentioned above--can be determined by arbitrators on a case-by-case basis, with appeal to us as necessary*." [also see Sparling v. Amtrak DEP Case No. 76-C2-3 (Jan. 20, 1976)]

AWD270
Referee: Seidenberg
Fin. Docket: 28905
Carrier(s): CSX
Union(s): TCU
Award Date: 8-15-95
NYD Articles: Art. I, § 1; § 4

With the coordination of Terminal Service Center (TSC) facilities into the Centralized Service Center (CSC) in Jacksonville, Florida, from line-of-road (B&O, L&N, SCL) a 1991 agreement was consummate which established 20 Customer Service Specialists. The Specialists were to relieve employees transferring from various TSC locations on the subject roads into the CSC and perform their work on line-of-road while said employees were in training at Jacksonville--transition of TSC to CSC was scheduled to take 36 months. After accomplishment of the transition the Specialists' positions were abolished. The Claimant filed for entitlement to new (second) NYD test period due to the fact that transferring C&O employees were assigned to newly established Specialist positions (under a 1993 agreement) to effectuate the C&O TSC transfer which established the causal nexus in abolishing his prior position.

In denying the claim the Committee stated:

> *The Claimant derived his protection as long as there was work to be done under the 1991 Agreement in consolidating Customer Service Department work on the SCL, L&N and B&O locations to the Customer Service Center in Jacksonville. The 1993 Implementing Agreement pertained to the same kind of work but only on C&O locations. The Claimant could derive his rights only from the 1991 Agreement. He obtained nothing from the 1993 Agreement. Coverage under one Agreement was not automatically transferred to the other.*
>
> * * *
>
> *...The Carrier negotiated separate and distinct agreements, each of which covenant clearly delineated properties and localities to be covered, but each of these separate Agreements granted separate contractual rights and privileges and one does not invade the other's territory. In short, it was the making of these separate and discrete contractual agreements that caused the Claimant to believe that his rights under the 1991 Agreement carried over to the 1993 Agreement. He was in error and therefore he was not entitled to the benefits claimed.*

AWD271
Referee: Fredenberger
Fin. Docket: 32000
Carrier(s): SP
Union(s): TCU
Award Date: 10-2-95
NYD Articles: Art. I, § 5

This decision involved the proper elements to be included in the TPA of an affected employee when the employee worked in both agreement and non-agreement positions during the test period. The Organization cited three previous § 11 Committee decisions wherein a literal reading of § 5 was applied (see Award Nos. 173, 241, 260). The Committee in this instance shared those views and stated: "*We disagree with the Carrier that we are free to disregard the authorities cited by the Organization without doing serious harm to the principle that consistency and predictability in labor relations is fundamentally desirable. The three awards cited by the Organization apparently are the only authorities dealing with the underlying question in this case. The awards are unanimous in their finding and strikingly similar in their rationale. Again, although we may not be bound by the awards, we find them highly persuasive and determinative of the questions in this case.*"

The SP subsequently petitioned the STB for review of the award; attached also is the April 15, 1996, decision denying that appeal which stated in part: "*Here, we are faced with the typical sort of changes in employment that may occur during any New York Dock test period. McAvoy's displacement to her position as a crew caller was not caused by the transaction itself, unlike the transaction-caused overtime in American Train Dispatchers. Rather, her displacement was a result of normal fluctuations in employment in the railroad industry. It did not create any windfall for the employer and hence should not be considered in calculating the test period average.*"

AWD272
Referee: Fredenberger
Fin. Docket: 32000
Carrier(s): SP
Union(s): TCU
Award Date: 10-2-95
NYD Articles: Art. I, § 5

This particular dispute was summed up by the Committee as: "*The Carrier deducts from any monthly dismissal allowance due an employee under Article I, Section 5 any compensation the employee could have earned from overtime offered to the employee by the Carrier but rejected by the employee even before the employee has worked his average monthly time. Once the employee has worked his average monthly time, the Carrier makes no such deduction. The Carrier also credits the employee with one and one-half hours towards his average monthly time for each hour of overtime worked by the employee*." This calculation was challenged based upon the contention that as long as within the monthly period a displaced employee works his average monthly time the Carrier may make no deductions from that employee's monthly displacement allowance--allowing the employee the full month to work his average monthly time before making any deduction. The Carrier cited the reference manual of the Feb. 7, 1965 National Employment Stabilization Agreement interpreting Article IV, §2 which provides for deductions if time is lost before attainment of the test period hours [also see WJPA § 13 Docket Nos. 62 and 65 relative to first hours available in the monthly period]. Thereby, the Committee denied the claim upholding long-standing interpretations involving test period hours and voluntary absence deductions made to protection displacement/dismissal stipends.

AWD273
Referee: Fredenberger
Fin. Docket: 28905
Carrier(s): CSX
Union(s): TCU
Award Date: 7-11-96
NYD Articles: Art. I, § 6

The dispute arose when the Carrier posted a notice to all employees that furloughed protected employees were obligated to apply for vacancies on other seniority districts or forfeit protection. At issue was the application of the CBA (Rule 6) whereby employees had a preference to non-employees in the awarding of positions on other seniority districts. The Carrier cited Award Nos. 3 and 251, as well as an Oregon Short Line III (Kasher, 9-27-82) award as supportive. The Organization contended that the issue was no more than a rehash of an issue previously decided in Award No. 251 and that decision, along with the subsequent ICC refusal to review it, was controlling. **The Committee agreed with the Organization in stating**: "*In the instant case Rule 6(d) of the clerical agreement is voluntary in that it provides furloughed employees the opportunity to secure positions on other seniority districts but does not require them to do so. Inasmuch as this Committee is bound to follow pronouncements of the ICC, it must reject the Carrier's position in this case that under Article I, Section 6(d) it may terminate the New York Dock benefits of employees who decline to do so.*

"Moreover, this Committee questions whether what has occurred in this case is a true exercise of seniority as contemplated by the New York Dock Conditions. Rule 6(d) of the clerical agreement gives preference to furloughed employees to jobs on seniority districts other than their own only with respect to new hires and/or employees not covered by the agreement. Furloughed employees taking jobs in other seniority districts establish seniority only after they transfer to the other districts. Thus, an employee taking

such a position does not engage in the traditional exercise of bidding and bumping, a factor noted by the ICC in its Decision in Finance Docket No. 28905 (Sub-No 25).

"...Both the Dennis Decision and the ICC Decision stress the voluntary rather than mandatory nature of the agreement governing transfers to seniority districts other than the one on which a New York Dock furloughed employee holds seniority. We believe that is the decisional significant factor in the view of the ICC. Since that factor is present in the instant case we believe it is governed by the Dennis Decision and the ICC's Decision in Finance Docket No. 28905 (Sub-No 25).

"The Carrier also attacks the Dennis Decision as palpably erroneous. We find that argument hard to accept in light of the fact that the ICC, despite the fact that it refused to review the Decision, found its interpretation of Article I, Section 6(d) of the New York Dock Conditions correct."

The STB was subsequently petitioned by CSX for review of the decision. On September 3, 1997, the STB upheld the arbitrator's decision in:

> *The requirements for initially granting dismissal allowances are not at issue here. There is no dispute that the dismissal allowance initially granted to Mr. Ebrens was valid. Rather, the controversy is over the circumstances under which previously granted dismissal allowances may be withdrawn. The withdrawal of dismissal allowances after they are granted is governed by section 6(d) of New York Dock, 360 I.C.C. at 87. Because the specific provisions of section 6(d) govern, the result, contrary to CSXT claims, does not turn on the definition of a "dismissed employee" in section 1(c) of New York Dock.*
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> * * *
>
> *"Working Agreement," as used in this section [6(d)], plainly refers to existing CBAs. Here, as in Dennis [see Award No. 251 which CSXT also petitioned the STB for review], it is undisputed that the existing CBA would not permit management to require the employee to accept the proposed transfer. Hence an employee recalled in accordance with the agreement cannot be required to accept such a transfer or forfeit his or her dismissal allowance. The aforementioned change of residence proviso establishes the circumstances under which an employee can be recalled and required to accept a transfer to a comparable position under the labor conditions (i.e, other than as provided for in existing CBAs). That proviso clearly limits the right of transfer of recalled employees, other than as provided by existing CBAs, to locations that do not require a change of residence. An employee may of course elect to be recalled and voluntarily accept a transfer that does not infringe upon the employment rights of others.*
>
> * * *
>
> *As the ICC noted in the above-quoted portion of Dennis, upon which the arbitrator relied, New York Dock "requires the exercise of seniority rights under the terms of a protected employee's working agreement." The ICC's discussion of collective bargaining rights and their relationship to New York Dock labor protection in Dennis may have been dicta, but the ICC's reasoning was correct and will apply in this case. Here, it is undisputed that the applicable provisions of the CBA do not allow management to reassign employees like Ebrens across seniority districts without their consent. Thus, where notice of available comparable positions is given to dismissed employees in accordance with the CBA that does not permit management to require employees to change seniority districts, management may not force employees to do so or lose entitlement to a dismissal allowance under Article I, section 6 of the New York Dock conditions.* [See 2/13009; 13010]

AWD274
Referee: O'Brien
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): UTU/BLE
Award Date: 4-24-95
NYD Articles: Art. I, §§ 2, 4

This dispute dealt with the consolidating of operating crafts (UTU & BLE) seniority rosters on CSX. The carrier had served four § 4 notices on the UTU and three on the BLE pursuant to seven ICC individual Finance Dockets regarding the consolidation of rosters (C&O, WM, RF&P) into one Eastern B&O Consolidated District under the B&O CBA. The unions argued that carrier's proposal was not a transaction related to the cited Finance Dockets. Further, the arbitrator lacked the authority to modify existing CBAs because of the preservation guarantee of § 2. Citing § 11341(a) of the ICA the arbitrator found authority to modify/override existing CBAs and that carrier could coordinate all or part of properties previously subject to implementing agreements. In his **Conclusion** the arbitrator found: "*As observed heretofore, the ICC must decide whether changes in the B&O, C&O, WM and RF&P collective bargaining agreements that are necessary to implement the transaction proposed by the Carrier involve 'rights, privileges and benefits' of train and engine employees affected by the transaction which must be preserved. If the ICC determines that their 'rights, privileges and benefits' have been preserved, an issue on which this Arbitrator makes no finding, then the implementing agreement proposed by CSXT on February 25, 1994, meets the requirements of Article I, Section 4, of the New York Dock Conditions. Any employee adversely affected by this transaction will be entitled to New York Dock labor protective benefits*."

The STB was subsequently petitioned by the Unions involved on June 9, 1995 (FD 28905 Sub-No. 27) for review of the NYD Award which favored CSXT by finding that the operational changes were "*directly related to and flowed from*" the merger authorizations by which CSXT was created. On November 27, 1995 (service date Dec. 7, 1995) the STB found that: [page 15]

> *Seniority provisions have also been historically modified with regularity by arbitrators in connection with consolidations. See Carmen II, 6 I.C.C. 2d at 721, 736-737, 742, and 746 n.22. Thus, both scope rules and seniority provisions have historically been changed without RLA bargaining and, accordingly, are not eligible for protection as "rights, privileges, and benefits."*
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> * * *
>
> *As noted, the parties dispute whether section 2 of New York Dock is merely a savings clause that preserves the collective bargaining agreement provisions that are required to be modified in order to effectuate Commission-authorized transactions. We need not resolve that issue here. The decisions upholding our authority to change collective bargaining agreements are not premised on section 2 being merely a saving clause.*
>
> *The unions have not even alleged that the consolidation of agreements in any way impairs the ability of CSXT employees to bargain collectively with the railroad. Nor are the rights, benefits, and privileges granted by past negotiations impaired. CSXT is proposing action that is made possible by transactions that we have authorized. Employees affected by those transactions are entitled to the benefits of New York Dock conditions, which have been imposed.*

On July 1, 1997 the STB rendered another decision relative to the "*O'Brien Award*" and the UTU/BLE's petition for a supplemental order to its decision served on December 7, 1995 (above). As noted therein:

> *...The Unions urge us to being a separate proceeding to reexamine the issue of whether the public benefits of the transaction are actually being realized: they argue that the benefits found by the arbitrator were "presumed" and based on unsupported assumptions. In essence, they are arguing that the ICC committed material error by adopting the arbitrator's finding that there would be public benefit from the proposed consolidation of seniority rosters.*
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> * * *
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> *The Unions also argue that we must reconsider the issue of whether the efficiency benefits of the transaction (assuming arguendo that they exist) will likely be passed through to the public. But the ICC's final decision thoroughly explained when the efficiency gains would benefit the general public as well as the railroad (slip op. at 13):*
>
> > *...Where the transportation market for particular commodities is not competitive, regulation is available to ensure that cost decreases are reflected in rate decreases. Moreover, increased efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower cost, so does the public.*

AWD275
Referee: Twomey
Fin. Docket: 32000
Carrier(s): SP
Union(s): ATDA/BLE
Award Date: 10-23-95
NYD Articles: Art. I, §§ 2, 8,

The issue in this dispute was found by the arbitrator to be limited to the question: "*Does the Carrier have an obligation under Article I, Section 2 of New York Dock to provide cost-free parking to dispatchers at its new centralized dispatching facility in Denver, Colorado?*" The Committee was also faced with a prior § 4 decision by Arbitrator Suntrup between these same parties. Briefly, when Dispatchers were transferred to Denver (DRGW) they were required to pay for parking their automobiles at the work location, the dispute centered over rights and privileges negotiated under SP CBAs which provided cost-free parking for dispatchers. Citing the prior decision of Arbitrator Suntrup the Committee found that:

> *In the instant case, where the Organization had full opportunity to argue its case about cost-free parking and in fact so argued this position before an Article I (4.) arbitrator, including arguing the position that cost-free parking is a privilege under Article I, Section 2 of New York Dock, and the Article I (4.) arbitrator classified the issue as one for some other forum, rather than a New York Dock issue not subject to Article I, (4.), then the Organization is estopped from again asserting before an Arbitrator under Article I, Section 11 that cost-free parking is required under Article I, Section 2 of New York Dock. In the interest of fairness, efficiency and economy, the parties must be bound by the disposition of the Article I (4.) arbitrator.*

The Organization shall have the right to pursue the issue of cost-free parking in a forum under the RLA to the extent that such is supported by one or more of the three agreements in effect at the new dispatching facility in Denver.

AWD276
Referee: VerPloeg
Fin. Docket: 32549
Carrier(s): BNSF
Union(s): Individual
Award Date: 12-06-96
NYD Articles: Art. IV

The individual in this dispute was working as a Quality Coordinator (non agreement) after being promoted from a dispatcher's position. This position was abolished due to the merger of BN/ATSF by the Carrier in November 1995 and he returned to a dispatcher's position. However, that return required Claimant to re-located to Texas after living and working his entire life in Minnesota and Claimant filed for NYD benefits. The carrier argued that Article IV did not apply as Claimant was a manager and not entitled to any entitlement under NYD. The arbitrator found that:

First, it is undisputed, and highly relevant, that [claimant] had no authority to supervise, evaluate, hire or fire any other employees. Rather, he appears to have worked largely under the direction of a higher level manager, serving as a liaison between the scheduled and the management employees to identify and facilitate way in which to improve the Carrier's overall level of performance. Simply serving as a liaison to management, and to the Carrier' shippers, did not make [claimant] a manager.

Second, not only did [claimant] have no supervisory authority over other employees, he had no authority to order changes in policy to implement the methods he identified for improving quality. He was not even invited nor did he attend Division meetings.

All of this evidence suggests that [claimant's] job responsibilities as a Quality Coordinator did not rise to the level of a management position.

* * *

For all the above reasons I find that [claimant's] position as a Quality Coordinator was more clearly a labor than a management position. Thus, he fell within the coverage of the New York Dock Conditions and should be given the appropriate benefits under its terms.

AWD277
Referee: Fletcher
Fin. Docket: 28676
Carrier(s): GTW
Union(s): BRC (TCU)
Award Date: 1-10-97
NYD Articles: Art. I, § 11

This dispute rested on the Organizations contention that carrier did not transfer work from Port Huron to Battle Creek or Flint, Michigan, and therefore the dovetail of four employees' seniority was improper. Additionally, it asserts that carrier failed to serve a proper notice before the transfer. Carrier

on the other hand contended that it transferred the work in accordance with applicable agreements (Sept. 25, 1964; and September 23, 1981 Agreements) and that NYD did not apply. The Board held:

> *...this Board may only consider dispute or controversies with respect to the interpretation, application or enforcement of protective conditions. This Board is not established pursuant to the Railway Labor Act, and may not consider disputes over the application of any other agreements, in particular the September 25, 1964 Agreement.*
>
> * * *
>
> *One of the basic principles of labor relations is that negotiators must be prepared to stand behind their statements. Had the Carrier, at some point told the Organization that no work was being transferred, this Board is certain the Organization would ask us to hold that statement against the Carrier, and we would. Here, Thornton's statement constitutes an admission that work was transferred. He would not have consented to having on carman's seniority dovetailed at either location unless work was transferred. Under the Agreement, the transfer of work is a necessary prerequisite to dovetailing of seniority. The only question that might have then arisen would be whether there was sufficient work being transferred to each point to warrant the dovetailing of the second carman. This question, however, was not raised before this Board, and we will not consider it.*
>
> *Based upon the record presented to the Board, we find that inspection and rip track work was transferred from Port Huron to Flint and Battle Creek. Accordingly, the seniority of the named employees were properly dovetailed into the respective rosters.*

AWD278
Referee: Simon
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): IBEW/TCU
Award Date: 4-11-97
NYD Articles: Art. I, §§ 2, 4

This dispute involves CSXT's notice upon IBEW, TCU, and BRS over the consolidation of radio repair functions throughout the system and establishment of 17 positions at Louisville, Kentucky, a location under a TCU CBA. Positions existing at Louisville would be abolished under the carrier's plan and "*new positions*" established to accommodate the transferred work. IBEW argued that the plan to place all employees under the TCU CBA was based solely on geography and that work of IBEW and BRS employees was never performed under the TCU CBA. Arguing that § 2 requires existing CBAs be applied at the new facility IBEW asserted that § 11347 of the ICA mandates that right, privileges, and benefits under existing CBAs be preserved. On the other hand, TCU agreed with CSX that the "*controlling carrier*" principle applied and that the ICC and courts have long held that the Carrier is contractually obligated to assign work to the class and craft performing such work by virtue of the scope of the CBA. After discussing the implications of § 2 vs. § 4 of NYD and the necessity to accommodate the consolidation the arbitrator found that:

> *In this case, as well, Carrier avers there would be no way to distinguish what work belonged to a particular agreement. It also notes there are significant differences in some of the basic rules of the agreements. The Referee concurs that it would hamper the efficiency and economy of the consolidation if Carrier were to be required to manage 17 employees under four (ore even two) difference collective bargaining agreements. This is one of the objectives of the consolidation. The Referee finds it significant that IBEW was*

unable to cite a single case, other than the Suntrup Award [see Award No. 259], discussed below, under New York Dock or any other protective condition where a Referee has imposed more than one collective bargaining agreement upon a consolidated work force. Thus, it is the Referee's conclusion that the adoption of a single collective bargaining agreement at the consolidated facility is necessary to effectuate the transaction.

* * *

It is apparent that the generally accepted practice among referees is to adopt the "controlling carrier" principle. In this case, the L&N is the controlling carrier as the consolidated facility is an expansion of an existing facility already subject to the L&N/TCU Agreement. This is not a new facility, as argued by the IBEW. While Carrier might have to perform substantial work to make it ready, the fact remains that radio repair has long been performed at this site. Carrier may have been inartful in its choice of words in some of its notices, but this does not change the fact that there already is a radio repair facility at Louisville and Carrier is transferring more jobs there.

AWD279
Referee: Yost
Fin. Docket: 32760
Carrier(s): UP - control - SP
Union(s): UTU
Award Date: 4-14-97
NYD Articles: Art. I, §§ 2, 4

In this dispute the UP served notice of its intent to combine rosters at two locations (Salt Lake Hub & Denver Hub) and place all employees under one CBA. The UTU argued that such combining was unnecessary and that the carrier had not lived up to its commitment letter with the employees. The commitment letter provided that the UTU support the merger and that employees would be automatically certified under NYD. The Committee held that carriers' coordination of rosters was "*necessary*" as contemplated and stated in the "*commitment letter*" signed by both parties prior to the STB approval of the UP/SP merger.

The UTU's commitment letter obtained for the employees automatic certification under NYD; the carriers received the UTU endorsement of the merger and its recognition that some changes of the CBA were made necessary by the merger -- one of which was a seniority system that was not illegal, administratively burdensome, or costly. After the § 4 Committee combined rosters the UTU petitioned the STB for review because of the modifications made to the CBA -- which it viewed as not necessary for realization of public benefit. The UTU also questioned whether the arbitrator had authority to approve an implementing agreement which merged seniority districts and changed employee health care benefits by its application.

The STB in reviewing the award held on June 26, 1997, that:

It is now firmly established that the Board, or arbitrators acting pursuant to authority delegated to them under New York Dock, may override provisions of collective bargaining agreements when an override is necessary for realization of the public benefits of approved transactions. Where modification has been necessary, it has been approved under either former sections 11341(a) or 11347.

* * *

Regarding UP's argument that the change in health benefits is merely incidental, and that the harms alleged by UTU from the change in health care providers are "entirely speculative," there may be circumstances in which a "change" in a right, privilege, or

benefits would be so inconsequential or nonsubstantive that is it really not a change at all and may thus be made without contravening the requirement in New York Dock that rights, privileges, and benefits under pre-existing collective bargaining agreements must be preserved. However, on the record before us, we conclude that the arbitrator exceeded his authority in imposing provisions requiring employee to change to the UP Hospital Association health plan against their will instead of preserving their right to continue to be covered by the DRGW Hospital Association plan. [see Southern Ry. Co. -- Control -- Central of Georgia Ry. Co. 317 I.C.C. 557, 556 (1962)]

AWD280
Referee: Meyers
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): ATDA/BLE
Award Date: 5-21-97
NYD Articles: Art. I, §§ 5, 11

By a July 1991 notice CSX informed the ATDA/BLE of its intent to transfer train dispatching functions at Rainelle, WV, to its Centralized Train Dispatching Center at Jacksonville, FL. Claimant transferred under the § 4 Agreement and in 1994 after a absence due to medical problems he was disqualified from working as a dispatcher and returned to Rainelle, WV as a general clerk. Carrier thereby denied Claimant's displacement allowance by applying the earnings of a dispatcher's position in Jacksonville, which he stood to work, against his guarantee--that rate exceeded his guarantee. The Committee held that:

The Organization apparently asserts that the Claimant's move to the position of general clerk constitutes a second "transaction," one that affected only the Claimant. There is no support, however, for the proposition that the Claimant was moved to the clerk position as a result of a "transaction," as that term is used in the New York Dock Conditions. Instead, the record in this matter conclusively demonstrates that the Claimant's transfer from the dispatcher position to the Clerk position was not a "transaction." The sole reason for the Claimant's transfer was that his medical condition made it impossible for him to continue working as a train dispatcher. Although it is true that the Claimant did not make his move voluntarily, the Carrier is correct in its assertion that the Claimant's medical inability to perform the duties of train dispatcher was not the result of any action by the Carrier or any transaction, whether the 1991 transaction involving the Centralized Train Dispatching Center in Jacksonville or some other transaction.

The Claimant simply cannot be considered a "displaced employee," as defined in the New York Dock Conditions. The Claimant's transfer from a dispatcher position to a clerk position, although it did have an adverse effect upon the Claimant, was not the result of any affirmative action by the Carrier; rather, the transfer occurred solely in response to the fact that the Claimant was medically disqualified, by both his own and the Carrier's physicians, from performing the duties of a dispatcher. Nor can the adverse effect on the Claimant's position be considered as the effect of any transaction; the adverse effect was caused by the Claimant's medical condition, and nothing else.

AWD281
Referee: Fletcher
Fin. Docket: 31363
Carrier(s): B&LE/DMIR/EJE
Union(s): TCU
Award Date: 7-28-97
NYD Articles: Art. I, §§ 6, 11 vs Feb. 7th Protection

This particular dispute entailed the obligations of NYD vs. the employees' ability to retain Feb. 7th protection if declining to accept a position requiring a change-in-residence under a § 4 Implementing Agreement. The Carrier's and Organization's "*Question at Issue*", although stated differently, asked if an employee affected by a NYD transaction could refuse transfer thereby becoming furloughed and retain entitlement to Feb. 7th protection. Carrier cited NYD awards of Fredenberger, O'Brien and Zack (this synopsis 15, 110, 113, 125) to support its position that employees refusing NYD protection and opting to become furloughed also suspend Feb. 7th protection under Article II, Section 1 (**failure to retain or obtain position available ...in accordance with existing rules or agreements**).

Attempting to drawing a line between NYD and the Feb. 7th Agreement the Organization held that §§ 2 & 3 of NYD mandate the continuation and independent nature of existing job security arrangements. Moreover, citing a LaRocco decision on when Feb. 7th protection may be terminated, the Organization held that a § 4 transaction did not operate to change existing protection.

In denying the Organization's position the Committee held that:

> *As a result of the NYD conditions, Carriers' employees will have work available to them at Monroeville. Whatever rights they would have to take the Monroeville positions would arise through an implementing agreement made pursuant to NYD. In this regard, it is important to note that the implementing agreement is not an agreement made pursuant to Article III of the JSA. For this reason, Article II, Section 2 of the JSA does not apply. Further, Article V, which includes a provision for separation pay, does not apply because it anticipates the relocation of employees under an implementing agreement pursuant to the JSA. Instead, Section 1 of Article II applies.*
>
> * * *
>
> *An implementing agreement made pursuant to NYD would entitled the Carriers' employees to transfer to Monroeville by virtue of their seniority on their individual properties... Thus, the Carrier is correct that an employee who fails to accept a transfer and cannot work in his own seniority district would cease to be a protected employee under the JSA. Accordingly, he would be entitled to neither a wage guarantee nor separation pay.* [see 605 Award No. 485 and NYD Award Nos. 2, 75, 44, 184, 258]

AWD282
Referee: Benn
Fin. Docket: 32760
Carrier(s): UP/SP
Union(s): BRS (ARTE)
Award Date: 8-20-97
NYD Articles: Art. I, § 4

In this dispute the Carriers served notice on the Organizations that the work accruing to ARTE (*Assoc. of Railway Technical Employees*) on SP would be transferred to various locations on the UP system and those electing transfer would assume the representational status of UP employees performing

comparable work. After the parties consummated an implementing agreement the question of how to treat Field Engineers, Chief Draftsman, Draftsman, Asst. Engineers, Detector Car and Asst. Detector Car Engineers still existed. The Carriers stressed that the transfer and abrogation of the CBA was for the "*public benefit*" through "*efficiency gains such as cost reductions, cost saving, and service improvements*". In accepting the Carriers' argument the Committee held that the burden to show a transportation benefit in furtherance of a merger was "*not a heavy one*", it therein provided for the transfer and eliminated the SP bargaining unit.

AWD283
Referee: Meyers
Fin. Docket: 32760
Carrier(s): UP/SP
Union(s): BMWE
Award Date: 10-15-97
NYD Articles: Art. I, § 4

This § 4 dispute involved the creation of system gangs covering the combined lines of the SP, WP, DRGW and UP by the Carrier. The Organization contended that if this was indeed a NYD transaction it did not require the override of existing CBAs, the individual system gang agreements, as well as Article XVI of the 1996 National Agreement. As a fall-back position the Organization argued that if the override was necessary the Carrier had to apply the system gang rules of PEB 219 and 229. The Committee held for the Carrier and placed the gangs under one CBA--it did however include the stay bonus found in Article XVI of the 1996 National Agreement. The Committee held:

> *It is not possible to properly implement a system operation, and achieve the economies and efficiencies associate with such a consolidation, if a carrier and organization attempt to continue to operate under several collective bargaining agreements. Conflicting contractual provisions, differences in work rules, and basic problems of coordination between and across several collective bargaining agreements inevitably will cut into, and perhaps completely destroy, any possibility of achieving the efficient, coordinated, economical operation promised by a rail consolidation. If the Carrier's maintenance of way work is to be consolidated into a more efficient, economical system operation, as is necessary to achieve the purposes of the approved merger, then it is necessary for the parties to operate under a single collective bargaining agreement.* [see Award Nos. 264, 274, 279] -- [STB was petitioned for review of the award -- the parties have submitted an agreement over the issue to the membership for ratification -- the outcome is pending]

AWD284
Referee: Meyers
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): BMWE
Award Date: 11-12-97
NYD Articles: Art. I, § 11 vs. Section 3 RLA

The issue in this case involved the Carrier's obligation to use welded rail from the BMWE-represented Nashville plant for use on the former LN/SCL portion of CSX rather than using rail from a non-union facility. The case is unique in that it involved a dispute under both NYD § 11 (1988 Implementing Agreement) and Section 3 of the RLA (scope). As the issue was under the dispute resolution procedures of NYD and RLA the matter was heard simultaneously before a three-member panel sitting

jointly as a Special Board of Adjustment and as a § 11 NYD Committee. Although the parties "*Questions at Issue*" were different, the basic dispute was whether the Carrier had the right to use continuous welded-rail from a facility after a consolidation just had it done prior and whether a § 11 Committee has exclusive jurisdiction or can some aspects of the dispute be heard by an arbitration panel created under the **RLA**.

In deciding that the Carrier could continue using the non-union welded rail the Committee discussed the issue of jurisdiction in:

> *The Carrier has argued that this entire dispute should be decided under the Section 11 dispute procedures of the New York Dock conditions, while the Organization has asserted that some aspects of its claim should be heard pursuant to the Railway Labor Act's arbitration procedures. Because the parties could not agree on a jurisdictional basis for this proceeding, they reserved the matter for decision by the Neutral; they also agreed to proceed with simultaneous arbitrations under each of these two procedural systems...*
>
> *Which type of panel, then, holds jurisdictional authority to resolve this dispute? Or are certain aspect of this matter decided by one type of panel, with the remaining aspects within the jurisdiction of the other? ...various decisions in the federal courts, culminating in the United States Supreme Court's decision in Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991) [Dispatchers see NYD Award No. 121], expressly hold that a fundamental part of the process through which a rail consolidation is effectuated is represented by the authority, granted by Sections 11341(a) and 11347 of the Interstate Commerce Act to the STB and arbitration panels deriving authority from the STB, to override the Railway Labor Act and collective bargaining agreement as necessary...*
>
> *...Although certain portions of one or more collective bargaining agreements may be relevant to the resolution of this matter, a Section 11 New York Dock arbitration panel is competent to analyze such provisions as necessary, and it has the jurisdiction to do so. Accordingly, the Special Board of Adjustment under the Railway Labor Act shall defer to the jurisdictional authority of the Section 11 New York Dock Arbitration Panel*. [also see PLB 6072, Award No. 1 - IAM/CR (5/28/98) for jurisdictional discussion RLA v. NYD]

AWD285
Referee: Fredenberger
Fin. Docket: 32760
Carrier(s): UP/SP
Union(s): TCU
Award Date: 06-16-98
NYD Articles: Art. I, §§ 3, 5, 11

In this dispute Claimants were "*displaced employees*" when the DRGW merged with the SP (FD 32000). Consequently, when the SP merged with the UP (FD 32760) Claimants were again affected and Carrier extended to each the option of retaining their entitlement under FD 32000, a new entitlement under FD 32760, or their Feb. 7th protection. The Carrier made it clear that election of one set of benefits constituted a **waiver of any entitlement or retention** of protection under the other two which could not "*...be reverted to upon expiration of the protective benefits selected*". Claimants protested the Carrier's interpretation and argued that retention of existing job security or other protective benefits was mandatory under § 3. In holding that Claimants could revert to their Feb. 7th protection upon expiration of NYD the § 11 Committee held that:

Clearly, the Organization's attack upon the Carrier's option form is valid to the extent that the form seeks to deny employees affected by the SP/UP merger the right guaranteed by Article I, Section 3 to revert to preexisting protective agreements or arrangements for the unexpired term of such agreements or arrangements where to do so does not constitute pyramiding. In this regard we note that the Carrier's attempt to stop employees from reverting to the benefits of the February 7, 1965 protective agreement upon expiration of the New York Dock protection would violate the Roukis award [see # 286] upon which the Carrier relies so heavily. However, in light of the Second Circuit's interpretation of the pyramiding prohibition in Article I, Section 3 [NYD Ry. v U.S., 609 F.2d 83 (2 cir 1979)], that applicable implementing agreements coupled with the historic elective application on this property, the Carrier may prevent employees who elect the New York Dock Conditions of the SPL [FD 32000] merger from receiving the benefits of the New York Dock conditions arising from the SP/UP [FD 32760] merger upon expiration of the SPL merger benefits.

AWD286
Referee: Roukis
Fin. Docket: 29455
Carrier(s): NW/ITR
Union(s): TCU
Award Date: 10-16-91
NYD Articles: Art. I, §§ 3, 11

The two Claimants involved were affected by the NW purchase of the Illinois Terminal Railroad Company in 1981. After expiration of their NYD benefits each claimed entitlement under their Feb. 7th protection. Carrier denied the claims based upon the premise that reversion would be tantamount to pyramiding and was impermissible under § 3 of NYD--Carrier also cited the Second Circuit's interpretation of the pyramiding prohibition in Article I, Section 3 [NYD Ry. v U.S., 609 F.2d 83 (2 cir 1979)] as supportive. Examining the historic evolution of protection from Appendix C-1 to NYD the § 11 Committee held:

Essentially, what is before this Board is the proper definition and appropriate application of Article I, Section 3 of the New York Dock Conditions, particularly the last proviso thereof, beginning with the words "provided further,". The New York Dock Conditions did not adopt the precise language of Appendix C-1, specifically the explicit language barring duplication or pyramiding of benefits, but it did include a specific prohibition against duplication and an inferential prohibition against pyramiding. It is that latter proviso that is at issue herein.

On its face, this proviso would basically support the Organization's position. It does not specifically mention the word "pyramiding" as such, though the language, "he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement" clearly convey this concept. The 2nd Circuit pointed this out in its decision and we are thus compelled to respect its analysis and explication...

* * *

...the 2nd Circuit Court's interpretation of benefit pyramiding differs significantly from the interpretation of the Weston Arbitration Panel's [Appendix C-1 decision of 1/6/72] dissenting member and provides a distinction among benefit entitlements. In other words, when component benefits are provided under different sets of employee protective

conditions, and these benefits differ only as to duration and amount, not type or kind, then an employee selecting coverage under one set of protective conditions, receives such component benefits to the exclusion of similar component benefits provided under the other sets. Conversely, when different sets of employees protective conditions contain component benefits that differ as to type or kind between the sets, the employee in electing coverage under one set of component benefits is not precluded from receiving benefits contained in the other set that have no counterpart in the set initially selected.

In the dispute at issue, and consistent with the unambiguous interpretation of the 2nd Circuit Court, Claimants are not barred from obtaining the protective entitlements of the February 7, 1965 Mediation Agreement, as long as the benefits are not of the same type or kind, previously granted under Article I, Section 3, of the New York Dock Conditions. [this decision cited in Award No. 285]

AWD287
Referee: Twomey
Fin. Docket: 28905
Carrier(s): CSXT
Union(s): UTU
Award Date: 9-05-97
NYD Articles: Art. I, §§ 5, 11

The dispute in this case involved the Claimants' entitlement to excessive dismissal allowances which the Carrier asserted were obtained in error and sought recovery. During the period under review one Claimant was overpaid $6,377; the other $1,718; which were paid without review by a Carrier examiner. Further, although it may have taken 2 years to discover the error the Carrier contended it was not negligent and the Claimants cannot be enriched at its expense. The Committee considered and distinguished the Carrier's cited decisions dealing with time limits under CBAs and NYD by Referees Rohman (Appendix C-1 UP v. UTU 7/21/71 - Amtrak No. 23); Marx (Award No. 94 this synopsis); and LaRocco (Award No. 200 this synopsis) and limited recovery of the overpayment in:

...No Carrier payroll employee reviewed the initial claims of the two employees to see if the employees correctly understood their entitlements under New York Dock Conditions. Indeed not a single claim was researched and validated by a payroll expert for nearly two years. Such is simply not right, and the assertion of a computer glitch cannot relieve the Carrier of its responsibilities to establish reasonable procedures (including backup procedures) for the timely detection and correction of payroll errors.

Where there is no specifically agreed upon time limit with respect to the matters now before this board, the board must apply a reasonable time limitation period in the context of the narrow facts and circumstances of this particular record. We find that the time period for recoupment shall be limited to the net overpayments paid to Mr. Bass and Mr. Matthews in the first six claims actually submitted by Mr. Bass and the first six claims actually submitted by Mr. Matthews. Recoupment of overpayments for periods after these periods of time is barred as unreasonable. Recoupment shall be deducted from guarantee payments owed by the Carrier to Mr. Bass and Mr. Matthews.

AWD288
Referee: Simon
Fin. Docket: 32838 [ICA § 10901]
Carrier(s): CR
Union(s): IAM
Award Date: 5-28-98
NYD Articles: **Procedural** PLB 6072, Award No. 1, pursuant to -- Art. I, §§ 4, 11 v. RLA § 3, Second [45 U.S.C. §153]

In 1996 CR sold the "Clearfield Cluster" rail lines and trackage rights to R. J. Corman Railroad Company approved by the STB under non-carrier § 10901 pursuant to FD 32838 -- employee protection was not applied. Simultaneously, the STB approved a request for continuance in control from Richard J. Corman (under FD 32829), for the Corman RR Company, after its purchase of the CR lines -- NYD was applied. As a result of CR line sale the Claimant was affected and displaced thereby requesting protection. CR refused arbitration under § 11 averring that the Claimant was not entitled to labor protection as a result of the § 10901 transaction--a procedural board was established by the NMB. Although the Board found it had no jurisdiction over the dispute, the decision is interesting in its treatment of RLA v NYD [also see NRAB decision 1/24804 pursuant to Award No. 274 this synopsis]:

> *At the outset, this Board, on its own initiative, must raise a jurisdictional question. Although the parties have averred to the Board that they have agreed to put this issue to it, such concurrence does not establish the Board's jurisdiction. This is not a private arbitration panel, such as those established through collective bargaining agreements in other industries. Such panels derive their authority from the agreement establishing them. This Board, on the other hand, is a creation of the Railway Labor Act, and derives its jurisdiction therefrom. The parties, despite their agreement, have no power to expand the statutory jurisdiction of a Public Law Board.*
>
> *The mere fact that this Board was established by action of the National Mediation Board is not sufficient to confer jurisdiction upon it. The National Mediation Board has on numerous occasions explained that its creation of Public Law Boards is strictly a ministerial function and in doing so it makes no judgment or determination as to the appropriateness of the Board's jurisdiction to the particular dispute. Instead, the National Mediation Board leaves it to the Public Law Board to determine on its own whether it has jurisdiction over a particular matter.*
>
> *Under Section 3, Second of the Railway Labor Act, a Procedural Public Law Board is created when the partisans are unable to agree upon any of the matters with respect to the establishment and jurisdiction of the merits board. As noted by Jacob Seidenberg in The Railway Labor Act at Fifty, the Procedural Board typically will address "such problems as jurisdiction, time limits, place of hearings, exchange of submissions in advance of board session, interpretation of agreements for establishing the board, and the like." (p.231)*
>
> * * *
>
> *It is evident from the statute, the National Mediation Board's regulations and the history that Procedural Public Law Boards are ancillary only to Public Law Boards established pursuant to Section 3, Second of the Railway Labor Act. There is, significantly, no comparable procedure for the Divisions of the National Railroad Adjustment Board under Section 3, First of the Act. In the case before this Board, the parties have not entered into an agreement to establish a Public Law Board, nor is either*

party seeking to do so. Rather, the Organization is seeking to bring its dispute to arbitration under procedures totally separate and apart from the Railway Labor Act.

Public Law Boards have long recognized that they do not have jurisdiction over disputes arising from agreements that establish their own exclusive arbitration procedures. Public Law Board No. 2925 (BRS v. SP, Richard R. Kasher) for instance, held that a dispute under the Washington Job Protection Agreement cannot be resolved pursuant to the dispute adjudication procedures of the Railway Labor Act, and must be handled pursuant to a Section 12 [sic 13] WJPA Arbitration Committee.

Further, the National Mediation Board has an interest in separating disputes that are referable to Public Law Boards under Section 3, Second, from those arising under agreements or conditions that have their own adjudicatory machinery. The expenses and compensation of neutrals deciding disputes under the Railway Labor Act are paid by the federal government through the National Mediation Board, while the expenses and compensation of neutral operating under other arbitration provisions are paid by the parties. It would be contrary to the National Mediation Board's budgetary responsibility to allow parties to bring disputes within the aegis of the Railway Labor Act when they have already agreed, or have been directed by the Interstate Commerce Commission, to have their disputes resolved at their own expense.

The distinction between the two arbitration fora is further evidenced by the avenues of appeal. Under the Railway Labor Act, a party may appeal an award of a Public Law Board to federal district court. A New York Dock arbitration award, however, is first appealed to the Surface Transportation Board, and may then be appealed directly to the Court of Appeals. The requirement of appealing to the agency first is an indication that the New York Dock arbitration committee serves as an adjunct to the Surface Transportation Board rather than as a private arbitration panel of the parties.

AWD289
Referee: Stallworth
Fin. Docket: 32760
Carrier(s): UP/SP
Union(s): TCU
Award Date: 7-16-98
NYD Articles: Art. I, § 11; Art. IV

The instant case was the first in a trilogy dealing with the issue of what constitutes an "employee" and entitlement under Article IV of NYD. In the first of the trilogy, the Claimant was employed as Regional Account Manager; in the second the Claimant was Manager-Contracts & Administration; and the third case involved Manager - Senior Tax Representative. Cited to the Committee for consideration was a plethora of prior decisions dealing with Article IV -- see Award Nos. 124; 130; 154; 276 [270] this synopsis. After reviewing each the Committee found that in all three cases the Claimants were not "employees" under basically the same criteria and denied entitlement in:

Under a close examination of the record, the New York Dock Conditions and the related Implementing Agreement, it is the Committee's opinion that the instant grievance must be denied on procedural grounds. Accordingly, the Committee must dismiss the Organization's claim as stated above and deny the instant claim in its entirely. The Committee's findings, conclusions and reasoning are set forth below.

The Committee is first required to address the threshold procedural issue of whether Mr. Povirk is an "employee" as envisioned by the express terms of the New York Dock Conditions, and in light of recent interpretations of the New York Dock Conditions, through reliable case law, and the facts presented in the instant dispute.

The term "employee" for New York Dock Conditions consideration is defined in the Railway Labor Act as provided by the Carrier.

* * *

In the instant dispute, the record provides evidence as to Mr. Povirk's position as Regional Account Manager and raises the issue of whether this position is more labor-related than managerial. The Committee notes that Mr. Povirk's position duties were primarily those of an independent salesman. The record demonstrates that Mr. Povirk's position involved:

1. Considerable contact with customers of the Carrier.

2. Responsibility for all commodities in the region except for automotive and intermodal.

3. Full authority and latitude in dealing with his customers, except for pricing and servicing customers.

4. Collaborating with the operating side of the railroad to create pricing and service commitments.

5. Accountability for a $24.3 million dollar revenue plan.

6. Development of any business opportunities he deemed profitable.

These job characteristics for the position held by Mr. Povirk were supplied by the Carrier and were not disputed by the Organization.

The Committee notes that Mr. Povirk's managerial sales position was substantially similar to the position held by the claimants in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) wherein claimants as District Sales Managers were found ineligible for New York Dock benefits because there were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.

2. Not under daily supervision.

3. Given an automobile allowance for personal used.

4. In possession of skills that were easily transferable.

* * *

The Committee is mindful of the purpose behind the protective conditions set forth in the New York Dock Conditions and the Great Depression era genesis of legislative history which created railway employee job protection. However, the Committee must also note that New York Dock Conditions benefits were designed to protect a certain type

of employee, simply put, those employees who would find it most difficult to secure a position outside of the railway industry.

Furthermore, it is the Committee's opinion that New York Dock Conditions protection cannot be construed as a guarantee of continuing job benefits after an ICC sanctioned transaction for every railway employee. Rather, these special benefits must be reserved as the legislative history intended, i.e., to aid and protect those rank and file employees and subordinate officials who to their detriment are economically affected by the merger of railway systems. In the instant case, the Committee concludes that the position of Regional Account Manager is clearly not a rank and file position, or even a subordinate official position. As such, the Committee must conclude that Mr. Povirk is not an "employee" as envisioned by the New York Dock Conditions and is not eligible for New Dock benefits.

AWD290
Referee: Muessig
Fin. Docket: 32167
Carrier(s): KCS
Union(s): TCU
Award Date: 11-30-98
NYD Articles: Art. I, §§ 1, 11

In this case the Organization contended that on February 11, 1997 (by instructions issued on September 4, 1996), customer service work performed at the MidSouth Rail Corporation's Bossier Operations Center was transferred to the KCS at Shreveport, LA -- KCS had previously acquired the MidSouth pursuant to FD 32167 in June 1993. Accordingly, because the KCS was handling customer service work of the MidSouth a NYD transaction had occurred without proper notice (an ancillary Scope Rule violation was also argued). The Committee denied the claim in:

Turning then to the question and claim before the Board, we find that the Organization has not met its burden of proof. Indeed, the Claimant failed during the presentation of his initial claim and, continued to fail as the claim was progressed on the property, to provide the key document on which he has relied, namely the September 4, 1996 "Instructions." Moreover, the statements provided by the Organization in its letter of July 28, 1998 are inconclusive as to what work was taken away, time involved, etc.

The Organization bears the burden of proof to establish by probative evidence the validity of its claim. It has failed to meet its burden in this instance.

AWD291
Referee: Muessig
Fin. Docket: 32167
Carrier(s): KCS
Union(s): TCU
Award Date: 11-30-98
NYD Articles: Art. I, §§ 5(a), 11

The dispute arose when the Carrier applied a 3-year average to calculate the Claimant's TPA. First, the Carrier contended the claim must fail because it was held in abeyance to a similar issue to be

adjudicated by the BRC and since that claim was withdrawn the instant claim is barred by the **doctrine of laches**. Secondly, the Carrier contended that Claimant had unusually high earnings during the test period in anticipation of the merger. In response, the Organization provided data, along with a statement from the Claimant's former immediate supervisor, that overtime during the test period was attributable to a prior job abolishment and a change in AAR reporting of car hires which required compliance with industry standards. In sustaining the claim the Committee held:

> *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.*

AWD292
Referee: Fredenberger
Fin. Docket: 33388
Carrier(s): NS/CSX/CR
Union(s): BMWE/IBB/BRC/IBEW/IAM/SMW/F&O
Award Date: 1-14-99
NYD Articles: Art. I, § 4 v. § 2

Carriers served notice pursuant to FD 33388 on BMWE and 6 shopcraft unions that it would coordinate MofW operations along with centralized rail welding and equipment repair performed by CR. As a result, the Shared Assets Areas (SAAs) would have a greatly reduced MofW operation and some work was to be contracted out. The decision is metered by the dicta in Carmen III (see No. 109 this synopsis

and 9/25/98 decision of STB - FD 28905) which held the arbitrator's authority should be limited to the "practice of arbitrators during the period 1940 - 1980" under WJPA and ICC labor protective conditions. The decision is interesting in that "rights, privileges, or benefits" are addressed in consideration of each aspect of the transaction including the contracting out issue. [**STB was petitioned by BMWE/IAM to review this award**--subsequently both Organizations withdrew their appeals and requests for stay]

...Restriction on contracting out, either through the scope clause of a CBA or a specific prohibition therein, is a common provision in railroad CBAs. As BMWE points out, it is entitled to respect and observance under the STB's decision in Carmen III. However, the application of such restrictions in the instant case would serious delay to implementation of the transaction insofar as capital improvements are concerned and would unduly burden CRC with an employee complement it could not keep working efficiently. Accordingly, elimination of those restrictions meets the necessity test set forth by the STB in Carmen III. Moreover, it is not a right, privilege or benefit guaranteed maintenance under Article I, Section 2 of the New York Dock Conditions.

However, BMWE maintains that there are several rights, privileges and benefits in this transaction protected from abrogation or modification by Article I, Section 2 of the New York Dock Conditions. First among these, urges the Organization, is the CRC/BMWE Supplemental Unemployment Benefit, (SUB) Plan. The Carriers contend that the plan falls within the category of wages, hours and working conditions under Article I, Section 2 which are not immutable but which may be eradicated or modified under the necessity test. Moreover, the Carriers urge the plan is in the nature of alternative protective arrangement to the New York Dock Conditions to be accepted or rejected by employees as an exclusive source of protection.

The undersigned believes the Organization has the stronger position on this prompt. As the Organization points out, the STB in Carmen III specifically identified unemployment compensation as a protected right, privilege or benefit. Supplemental unemployment benefits are so closely related as to attain the same status. Accordingly, the arbitrated implementing arrangement or arrangements resulting from this proceeding are deemed to include the CRC/BMWE Supplemental Unemployment Benefit plan.

* * *

The IAMAW has CBAs with CRC covering approximately thirty-eight employees performing nonshop maintenance of way work. As a result of the transaction in this case those employees will be allocated to NS, CSXT and CRC as operator of the SAAs. Under the Carriers' proposal those employees would be placed under the applicable BMWE CBA with each Carrier. As a result IAMAW no longer would represent those employees.

The IAMAW challenges the jurisdiction of this Neutral Referee to impose the BMWE agreements upon the thirty-eight employees transferred to the three Carriers as violative of the representational rights of those employees, a matter within the exclusive jurisdiction of the NMB to resolve. IAMAW urges retention of the CRC BMWE agreement for application to those employees because that agreement protects the representation status of the IAMAW and the rights of the employees it represents. Alternatively, the Organization seeks application of its agreements with the three Carriers which would preserve its status as representative of those employees when they come to work for the three Carriers.

The Organization's point is well taken that questions of employee representation are within the exclusive jurisdiction of the NMB to resolve under the Railway Labor Act.

However, the STB has long held, with judicial approval, that rights under the Railway Labor Act must yield to considerations of the effective implementation of an approved transaction. The most recent statement of that doctrine came in a case involving this transaction. See Norfolk & Western Ry. Co., et al & Bro. of RR. Signalmen, et al, Case No. 98-1808, USCA 4th Cir, Dec. 29, 1998. Accordingly, the Organization's jurisdictional argument is without merit.

AWD293
Referee: Kasher
Fin. Docket: 33388
Carrier(s): NS/CSX/CR
Union(s): BRC/TWU
Award Date: 2-27-99
NYD Articles: Art. I, § 4

In this case, dealing with the split representation of the Carmen craft or class on CR, the Carriers served notice to coordinate rail lines and facilities to CSXT, NS, and SAA. After an implementing agreement was reached the TWU advised that it would have to be ratified by its membership -- it ultimately failed ratification and the § 4 arbitration process began. Before the Committee, the Carriers argued that arbitrators defer to the judgment of the negotiators and adopt the negotiated agreement when not ratified by the union's leadership or membership. Moreover, the decision found in Carmen III and cited in No. 292 is controlling. The Committee accepted and imposed the negotiated agreement--**TWU petitioned the STB for review**. Such review has since been deferred until September 1, 1999, as remaining issues have been settled and, again, put out for ratification by the TWU membership.

The Transaction in this case, to this Arbitrator's knowledge, is reasonably unique. Two profitable railroads were given the right to acquire the majority of another profitable railroad, for the stated purpose of increasing competition in a geographic region of the country. Conrail, the railroad being acquired, retained certain limited geographic locations known as the SAAs, and at those points the Conrail collective bargaining agreements are to remain in force and effect.

* * *

A foundation principle which has been uniformly applied by arbitrators/referees in cases involving the integration of union-represented employees when corporate entities are involved in consolidations, mergers and/or acquisitions is to ensure, in light of all of the factual circumstances, that the selection and allocation of workforces and the integration of employees' seniority is "fair and equitable". The preponderant evidence of record in this case satisfies this Arbitrator that the Carriers' proposal, imposition of the Negotiated Agreement, is a fair and equitable manner for such selection and allocation of workforces...

The only issue is whether the Carriers have presented sufficient evidence to persuade the Arbitrator that the application of the NSR and CSXT collective bargaining agreements at the non-common points and non-SAA areas constitute an operational necessity, consistent with the underlying purposes of the Transaction authorized and ordered by the STB in Finance Docket No. 33388.

* * *

...The Carriers have also relied upon a decision by Arbitrator William Fredenberger issued on January 14, 1999 in a New York Dock Article 1, Section 4 arbitration involving the Carriers and the Brotherhood of Maintenance of Way Employees and arising out of the same STB Finance Docket as here under consideration. In that proceeding Arbitrator

Fredenberger was faced with the issue of his authority to "override or extinguish, in whole or in part, the terms of pre-transaction" collective bargaining agreements. While Arbitrator Fredenberger concluded, among other issues he considered, that the Carriers' proposal regarding seniority for maintenance of way employees met the tests set forth by the STB in Carmen III and that a jurisdictional position taken by the International Association of Machinists and Aerospace Workers (hereinafter the "IAM&AW") regarding the representation of thirty-eight IAM&AW-represented Conrail employees was not sustainable, this Arbitrator is not prepared to consider the Fredenberger Award controlling in view of the TWU's assertion in its rebuttal submission that the Fredenberger Award is "to be appealed", and is allegedly "inconsistent with D.C. Circuit and STB precedent".

* * *

What "tips the balance" in favor of the Carriers' proposal, in this Arbitrator's opinion, is the Negotiated Agreement and the virtually identical implementing agreements entered into voluntarily by all of the other shopcraft labor organizations. The Carriers' proposal is favored by this Arbitrator, not necessarily because those other implementing agreements establish a "pattern", but because they constitute reliable evidence that many experienced, well-schooled union negotiators, thoroughly familiar with the needs to protect the interests of the employees they represent and the sanctity of the collective bargaining agreements they previously administered, were persuaded that the NSR's and CSXT's operations would be more efficient and meet the purposes of the STB's order in Finance Docket No. 33388...

AWD294
Referee: Sickles
Fin. Docket: 32549
Carrier(s): BNSF
Union(s): TCU
Award Date: 5-1-99
NYD Articles: Art. I, §§ 5, 11

In this case the Carrier denied protection because each of the Claimants displaced to positions with the same daily rate of pay as their former positions. Additionally, the Carrier attempted to insulate itself based upon arguments that overtime in the Claimants' department increased after the transaction and it was only their failure to qualify for the overtime and lack of seniority that led to a decline in compensation. Citing Docket No. 62 of WJPA along with examination of Award Nos. 144 & 180 of this synopsis, the Committee held that the decline in compensation clearly entitled Claimants to TPAs and Carrier was to pay each their displacement allowance when their compensation fell below that figure.

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.

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 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 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 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.

AWD295
Referee: Fredenberger
Fin. Docket: 32760
Carrier(s): UP/SP
Union(s): TCU
Award Date: 5-24-99
NYD Articles: Art. I, §§ 1(b), 11

When the Carrier transferred the Chief Clerk's position from the SP Locomotive Plant to another location in Denver, CO (Lincoln Street) the residual work was assigned to the remaining Clerk/Steno position. The Clerk/Steno was compensated at the Chief Clerk's rate and began to work substantial overtime. With the UP/SP merger officials at Lincoln Street were transferred elsewhere on the merged system and the Chief Clerk's position was transferred back to the Locomotive Plant. As a result, the Steno/Clerk ceased performing the duties that remained when the Chief Clerk's position was transferred, the rate of pay was reduced, and overtime ceased to exist. The Committee (citing Award No. 180) found the language of § 1(b) "*does not mean literally that an employee must be displaced*" as a condition of meeting the definition of a displaced employee in:

...the relocation of the Mechanical Department officials for whom the Chief Clerk performed secretarial services at the Lincoln Street building was part of the rearrangement of forces. The conclusion is inescapable that such removal was part of the transaction in this case...

On the basis of the foregoing we believe the Organization has established a causal nexus between the transaction and the diminution in compensation suffered by Claimant. It follows that Claimant meets the definition of a displaced employee under Article I, Section 1(b) of the New York Dock Conditions. It also follows that Claimant is eligible for a displacement allowance under Article I, Section 5 of the New York Dock Conditions. It follows further that Claimant is entitled to a TPA provided in Article I, Section 5 to determine whether Claimant is due a displacement allowance.

We also cannot agree with the Carrier's position that the overtime Claimant worked for the period the Chief Clerk was at the Lincoln Street building and which he lost upon her return... is not properly part of the TPA. The rule is that overtime which is regular, recurring or casual, but which is not generated by the transaction itself, is to be included in an employee's TPA calculated under Article I, Section 5.

AWD296
Referee: Fredenberger
Fin. Docket: 29430
Carrier(s): NS
Union(s): TCU
Award Date: 8-10-99
NYD Articles: Art. I, §§ 5, 11 – **vacated by the STB**

In this dispute the Carrier denied the Claimants their protection based upon the fact that each did not follow transferring work to the Crew Management Center (CMC) at Atlanta, Ga., but instead exercised seniority rights to locations not requiring a change in residence. The Carrier argued that since the jobs established at Atlanta paid a higher daily rate than the line-of-road assignments, it was the Claimants' fault that their compensation declined which was not attributable to the transaction. In rendering his decision, the Arbitrator held that employees that exercised existing seniority under the CBA and chose not to follow work to a new location were not considered "displaced" under NYD. Holding that a footnote attached to a prior STB review petition (see Award No. 273 of this synopsis) was controlling the Committee held:

> *The Organization's position is that inasmuch as Claimants exercised their seniority as provided in the CBA, which did not require Claimants to exercise seniority to positions requiring a change in residence, Claimants complied with all conditions precedent to receiving a displacement allowance under Article I, Section 5. Conversely, the Carrier argues that Claimants do not meet the definition of a displaced employee under Article I, Section 1(b) because they voluntarily chose to exercise seniority to positions paying less than the positions offered them at the CMC in Atlanta which carried the same rate of pay as the positions they hd held on the Tennessee and Kentucky Divisions which were abolished.*
>
> * * *
>
> *The STB's Decision [8/21/97 appended to Award No. 273] noted that the case before it did not involve any issue as to the initial entitlement of a dismissed employee to a dismissal allowance under Article I, Section 6. By contrast, the Carrier has raised that issue in this case by challenging Claimants' status as displaced employees under Article I, Section 1(b) of the New York Dock Conditions. The first sentence of Note 10 specifically states that under ICC precedent "...an employee must accept any comparable position for which he or she is qualified regardless of location to be entitled to a displacement allowance." (Emphasis added) That statement clearly supports the Carrier's argument on this issue and renders the arbitral authority cited by the Carrier with respect to the issue, although distinguishable factually from the instant case, highly persuasive.*
>
> * * *
>
> *...Claimants do not meet the definition of a displaced employee in Article I, Section 1(b) of the New York Dock Conditions. They were placed in a worse position with respect to their compensation not by abolishment of their positions... but by their voluntary action in exercising seniority...*
>
> * * *
>
> *Moreover, even if Claimants meet the definition of a displaced employee, their actions in this case also would disqualify them form entitlement to a displacement allowance under Article I, Section 5 of the Conditions. The clear language of the first sentence of Note 10 of the STB's decision so dictates.*

By action of the STB this decision was vacated on June 21, 2001 and it was ordered:

*1. The August 10, 1999 award that is the subject of this proceeding **is vacated and may not be cited as precedent**, TCU's petition to review the vacated award is dismissed, and this proceeding is discontinue.*

2. This decision is effective on its date of service.

AWD297
Referee: Muessig
Fin. Docket: 32167
Carrier(s): KCS
Union(s): TCU
Award Date: 11-30-98
NYD Articles: Art. I, §§ 5 & 11

In this case there was no dispute that Claimant was affected by a transaction and entitled to NYD. However, the Carrier claimed that overtime prior to the merger were unusual and that its TPA calculation using a **3-year average** was appropriate. The Organization objected under application of § 5(a) and provided evidence the Claimant's overtime was due to the abolishment of a position; AAR requirements for a new method of reporting car hires; and, assuring accurate reporting of car recoveries on contract movements under reduced or no mileage allowance provisions – all of which required 35 to 40-hours of overtime per month. The Committee rejected the Carrier's 3-year average TPA as insupportable as well as its assertion the overtime was merger related.

AWD298
Referee: Sickles
Fin. Docket: 32549
Carrier(s): BNSF
Union(s): BMWE
Award Date: 3-25-99
NYD Articles: Art. I, § 4 [Art. XII PEB 219]

The Carrier served notice of its intent to consolidate 47 existing seniority districts over 34,000 miles of track into 9 districts under § 4. Unable to agree upon 8 common-point locations the Carrier invoked arbitration. Noteworthy, Referee Sickles outlines the history of merger protection cumulating with a discussion of the necessity standard vs. rights, privileges, and benefits as found in the **Carmen III** decision in:

*Under the standards established in Carmen III, an arbitrator may modify CBA provisions only when **necessary** to achieve a transportation benefit. The Carrier failed to demonstrate how it is necessary that all headquartered employees in the consolidated zones must work under a single CBA. That proposal falls squarely under the category of "convenient, but not necessary." Therefore, the BMWE's proposal that all headquartered employees... would continue to work under their respective CBAs shall be adopted.*

AWD299
Referee: O'Brien
Fin. Docket: 32760
Carrier(s): UP/SP
Union(s): TCU
Award Date: 3-26-99
NYD Articles: Art. I, §§ 2, 11

This case involved interpretation of the parties' Master Implementing Agreement and the Carriers' coordination of work between Neff and Armourdale yards -- located some 10 miles apart. Under the Carriers' notice all positions at Armourdale, under the SP CBA, would be eliminated and transferred to Neff yard, under the UP CBA. It was the Organization's argument that no bona fide transaction was taking place -- except for crew hauling. Further, work would remain at Armourdale thus making the transaction only a means to abrogate the SP CBA. Other issues involved were subcontracting, rates of pay, and extra board manning levels. Finding the **Carmen III** decision equally applicable to the § 11 process the Committee found no "necessity" to override the SP CBA in [cited is Award No. 283 this synopsis]:

> *There is not a scintilla of evidence in the record before this Committee that this subject was discussed during the negotiations preceding adoption of NYD-217. Nor is there any persuasive evidence in the record that the TCU granted the UP the unrestricted right to override collective bargaining agreements and select which agreement will apply to a transaction under NYD-217 when it entered into this Implementing agreement.*
>
> * * *
>
> *If anything, Letter of Understanding No. 5 contemplates that both the UP and SP collective bargaining agreements will remain in effect... Letter of Understanding No. 5 does not imply that the Carrier shall have the unrestricted right to determine what agreement will apply to a transaction under NYD-217 when more than one agreement applies to positions being rearranged and consolidated.*
>
> *Nor does Letter of Understanding No. 18 expressly or implicitly provide that the Carrier has the unrestricted right to place employees under the UPCBA when their positions and/or work are being rearranged or coordinated pursuant to NYD-217. Rather, Letter of Understanding No. 18 merely preserves certain enumerated rates of pay when SP employees transfer to the UP or when UP employees transfer to the SP as was done at Denver.*
>
> * * *
>
> *For the reasons expressed above, this Committee concludes that NYD-217 does not grant the Carrier the unqualified right to place clerical positions under the UPCBA when these positions are rearranged and/or consolidated in a transaction under Article II of that Implementing Agreement...*
>
> *As noted heretofore, the STB has sanctioned the override of collective bargaining agreements only if this is <u>necessary</u> to effectuate the transaction. Moreover, there must be a public transportation benefit from the transaction before a collective bargaining agreement may be overridden. The Board has instructed New York Dock arbitrators to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Additionally, the STB has ruled that rail carriers bear the burden of establishing that the proposed change is necessary to effectuate a transaction. In the instant case, the Carrier has not sustained that burden, in the opinion of this Committee.*

The Carrier proposal would reduce the wage rates of the SP clerical positions being eliminated and rebulletined as Utility Clerk positions by between 34% and 36% of the current SP rates. The prohibition against subcontracting in the SPCBA would also be eliminated. And the SP guaranteed extra bard at Armourdale Yard would be reduced from 15% of the permanent clerical positions to 10% of the permanent positions.

In this Committee's opinion, the aforementioned changes in the SP rates of pay, rules and working conditions are not necessary to effectuate the consolidation and rearrangement of crew hauling at the Kansas City Terminal. No public transportation benefit will be achieved by overriding the SPCBA, in our judgment.

The efficiencies of operation that will result from coordinating the crew hauling functions at the Kansas City Terminal can just as easily be attained by placing these positions under the UPCBA with the SP rates of pay, prohibition against subcontracting and guaranteed extra board rules incorporated into the UPCBA. This will result in only one collective bargaining agreement governing the positions performing crew hauling while avoiding overriding the SP Agreement. This is what Arbitrator Peter Meyers did in an Article I, Section 4, New York Dock arbitration involving maintenance of way employees on the Union Pacific.

As explained above, the STB requires New York Dock arbitrators to reconcile the need to preserve pre-transaction labor arrangements with the operational needs of the transaction. The Carrier has not persuaded this Committee that it is necessary to override SP rates of pay, rules and working conditions to achieve the operational efficiency attendant the consolidation of crew hauling at the Kansas City Terminal... Therefore, the Carrier has not demonstrated the "necessity" to override the SP Agreement to effectuate the rearrangement and coordination of crew hauling work and positions at the Kansas City Terminal.

NOTE: Because the Carrier reserved the right to cancel the § 4 Notice if it lost in arbitration, it argued the decision was moot. However, since the Carrier reserved the right to issue a new notice the Committee held that the issues could recur and therefore the award would offer guidance in resolving any subsequent dispute. TCU petitioned the STB for enforcement of the award and its decision of February 24, 2000, FD 32760 (Sub-No.36), the Board held that:

Although the O'Brien Award is not moot and not without future precedential value, the award itself does not require UP to take any actions that are subject to the award. UP must "comply" with the award only if it adopts the implementation plan that was at issue in the award...

The ability of carriers in this situation to change implementation plans is not without constraint, however... Carriers seek to implement merger-related employment changes must first give notice, enter into negotiations, and submit to arbitration if the negotiations are unfruitful. Thus, UP... will have to serve a new notice and proceed under New York Dock if there are objections to the notice.

AWD300
Referee: Muessig
Fin. Docket: 32167
Carrier(s): KCS
Union(s): TCU
Award Date: 1-26-00
NYD Articles: Art. I, §§ 9 & 12 [see SBA 1126/16]

This dispute involved the Carrier's refusal to pay lump sum moving benefits under the parties' § 4 Implementing Agreement to 8 affected employees. Holding to the accepted premise that "*home is where the heart is*" the Committee discussed the modern day implications of a two-income family and what constituted a bona fide move in:

> *The Organization argues that in many families both husband and wife work, and it is not illogical for the one to remain a the original residence... as a general rule of thumb, the chief characteristic of a "primary residence" is the presence of the family and its possessions, including the pots, pans, clothing, recreational and sports paraphernalia, household tools and other goods all to numerous to specifically identify here. Good evidence of a change of "primary residence," therefore, ordinarily would include a bill of lading form a moving company to show that an employee's household chattel had been removed from one place and taken to another.*
>
> *Depending on circumstances... other kinds of satisfactory evidence might include evidence that children followed their parents (rather than, perhaps, staying in the former home under the care of a relative), changed schools and had new pediatricians; that an employee became a registered voter in the new community (rather than voting by absentee ballot from the old place of voting); that the family dog had a new license and new veterinarian; that the automobile registrations and insurance were changed; that the Postal Service was advised of a change in residence and forwarded the employee's mail to the new location; that the employee had the new address on his or her driver's license, library card, check cashing card, credit cards and other financial records; that the family boat had new registration, and, or example, that life, dental, health and other insurance used the new address. These examples are not intended to be exhaustive. They are intended merely to illustrate the kinds of evidence that a reasonable mind would accept as proof of a change in employee's "primary residence."*

AWD301
Referee: Sickles
Fin. Docket: 32549
Carrier(s): BNSF
Union(s): TCU
Award Date: 4-10-00
NYD Articles: Art. I, § 6(d)

\This is another example of a Carrier's attempted use of § 6(d) to transfer dismissed employees from one seniority district to another or forfeit their protective entitlements. [See Award No. 273] In this case, the Carrier used the comparable position argument to force dismissed employees in the Customer Support district to transfer to the Crew Support Center and augment the workforce to alleviate overtime. The employees were not assigned to vacate positions, as none existed, instead they were placed in training with dovetailed seniority which placed them first in line for recall above non-protected employees.

In discussing the term "position" as it appears in NYD the Committee held for the employees in:

> *To this Committee, the context in which the word "position" is used in Article I, Section 1(b), of the New York Dock Conditions differs significantly from how the same word is used in Article I, Section 6(d), of New York Dock. We wholeheartedly agree with Arbitrator Roukis [Award No. 181] that the phrase "worse position" in Article I, Section 1(b), connotes "status, situation or posture" rather a specific job or assignment. But we do not believe that the drafters of the New York Dock Conditions intended a "comparable position" in Article I, Section 6(d), to have the same import.*
>
> * * *
>
> *Transferring the Claimants from an off-in-force status on one seniority district to an off-in-force status on a different seniority district was not offering them a "position" under Article I, Section 6(d), of the New York Dock Conditions, in the opinion of this Committee. They were not requested to accept a job or assignment in the Crew Support Center. At the time they were involuntarily transferred to the crew Support Center there were no vacant clerical jobs in that office. Accordingly, the Claimants did not fail to accept comparable positions that did not require a change in their place of residence.*

AWD302
Referee: Benn
Fin. Docket: 32133
Carrier(s): UP/CNW
Union(s): BMWE
Award Date: 2-15-00
NYD Articles: Art. I, § 1 Powder River Subdivision

This cases involves the "*but for*" argument versus what the arbitrator defines as the standard of proof under NYD of adverse effect – a "*direct result*", "*coherent connection*", "*a reasonably direct causal connection*", or a "*reasonably direct proximate cause*" flowing from a merger. The carrier's arguments centered upon actions portrayed as "*sound business decisions*" whereby the former CNW became part of the larger whole that "*must now vie for projects throughout the entire system*." After discussing all facets of affect the arbitrator held that claimants were entitled to NYD. However, in forging the remedy the Award recognizes that some arguments contending employees are due protection because of circumstances after a merger will effectively boot strap the "*but for*" standard to an acceptable level of proof. In the arbitrator's view, speculation would be required if he held that discontinuation of proposed projects beyond 1996 were also triggering events. Importantly, the Award holds that some business decisions are driven by options only available after a merger.

AWD303
Referee: Suntrup
Fin. Docket: 32760
Carrier(s): UPSP
Union(s): TCU
Award Date: 2-24-00
NYD Articles: Art. I, §§ 9/12 Implementing Agreement (NYD-217)

The seven claimants in this case were affected and opted under provisions of the Implementing Agreement (NYD-217) to exercise seniority to Hearne, TX which was outside a 30-mile radius from their previous work location. Relocation benefits became the issue as carrier contended they did not make bona fide moves to Hearne only remaining there for a short period of time. As claimants' tenure at Hearne was brief -- some subsequently elected separations; some became dismissed; while others were instructed to use

their moving benefits for a secondary move to St. Louis, Mo. after displaced at Hearne – the arbitrator concluded that each must be considered separately to determine if move benefits were appropriate. Finding that each claimant did not establish a residence in Hearne the decision gives insight into what is considered in determining when a bona fide move is made. [see PLB 4561/17, PLB 3096/6 and PLB 1186/219]

AWD304
Referee: O'Brien
Fin. Docket: 28250
Carrier(s): BNSF
Union(s): TCU
Award Date: 4-10-00
NYD Articles: Art. I, § 6(d)

The dispute arose when carrier transferred two dismissed employees from the Customer Support seniority district to the same status in the Crew Support Center seniority district. Both seniority districts are located in the same building in Topeka, KS. Dealing with carrier rights under § 6(d) to offer comparable employment to dismissed employees not requiring a change-in-residence the arbitrator held that the term "*position*" as used in §6 (d) means a *"job or assignment*" and not "*status, situation, or posture*" as argued by the carrier. The arbitrator held that: "*Transferring the Claimants from off-in-force-status on one seniority district to an off-in-force-status on a different seniority district was not offering them a 'position' under Article I, Section 6(d) of the New York Dock Conditions...*" [see 271 and 273 this index and STB discussions therein]

AWD305
Referee: Suntrup
Fin. Docket: 32760
Carrier(s): UPSP
Union(s): TCU
Award Date: 4-30-00
NYD Articles: Art. I, § 6(d) Implementing Agreement (NYD-217)

A companion claim to #303; after claimant became dismissed at Hearne, Tx., carrier advised him on September 26, 1998, of a vacant assignment available to him on October 5, 1998, located at St. Louis, Mo. Claimant failed to report and carrier considered him arbitrarily dismissed under the provisions of § 6(d). The issue presented for arbitration was whether carrier violated the parties' Implementing Agreement when claimant was recalled to a training position on a seniority district where he held no seniority. Anchoring his decision on the terms of parties' Implementing Agreement it was held that:

> *The fundamental bargain struck here between the union and the company was that an employee would be protected in his seniority, given his choice of options available under NYD-217, and that the employer would have positions filled in accordance with needs emanating from transactions. In view of this the grievant cannot now hide behind the seniority provisions of the SP collective bargaining agreement – by attempting to substitute it for the NYD-217, Article III (3)(C) relocation obligation which he chose – while collecting New York Dock dismissal benefits. Under Article III (3) of NYD-217 an employee with New York Dock protection must work, in accordance with his seniority and the choices made, rather than avoid the consequences of those choices and collect a dismissal allowance for not working just because he does not want to relocate... This conclusion is also consistent with on Q&A addressed by the parties after negotiating NYD-217 which the arbitrator believes hits the nail squarely on the head.*

AWD306
Referee: Simon
Fin. Docket: 33388
Carrier(s): NS
Union(s): Longshoremen (ILA)
Award Date: 6-14-00
NYD Articles: Art. I, § 4 Ashtabula Docks – **new CBA under RLA**

This dispute involves the application of a new collective bargaining agreement (CBA) negotiated under the terms of the Railway Labor Act (RLA)which was prompted by the carrier's acquisition of Conrail. Although **grandfathered** and **red circled** by its terms, the Organization asserted rights under NYD for 51 members affected by new rates of pay; added duties; reduction in holiday; shift differentials; and, a decline in overtime. In denying the Organization's claim, the referee discusses the various aspects of each parties' argument and observes:

> *While it is true that a transaction occurred when the Carrier consummated its acquisition of certain assets of Conrail, including the Ashtabula Coal Dock, it was not this event that the Union contends adversely affected the claimants. A change in ownership without any further action would not be sufficient in any case to entire employees to the protective benefits of New York Dock. Virtually all arbitration decisions involving claims for protective benefits arise out of a merger, an abandonment in the case of Oregon Short Line Conditions, or a trackage rights agreement in the case of Mendocino Coast Conditions. The existence of that initial transaction, however, is generally insufficient to demonstrate the necessary causal nexus to the adverse effect suffered by the employees. Clearly, if the Carrier had acquired the Coal Dock and had retained the extant collective bargaining agreement, any loss of earnings by the employees would have to be attributed to some external cause not within the purview of the New York Dock Conditions. For instance, if the new owner introduced work methods or equipment that required fewer employees or resulted in less overtime, any adverse effect would not be attributable to the transaction.*
>
> *Thus, some other transaction must have occurred to provide that causal nexus. In this case, the Union points to the abolishment of the positions that existed under the Conrail agreement on May 31, 1999, and the establishment of the new jobs under the NSR agreement on June 1, 1999. It was this event, according to the Union, that resulted in a reduction in earnings as well as more onerous working conditions, as reflected in the employees job descriptions with expanded duties. To prevail in its case, therefore, the Union must first establish that this event meets the definition of "transaction."*
>
> *While the Carrier entered into a new collective bargaining agreement with the Union, and its purpose for doing so was to harmonize the agreement with its other maritime facilities, the longshoremen at Ashtabula remain a separate and distinct bargaining unit. Ashtabula is the only facility where employees are represented by the Union, and the new collective bargaining agreement covers only this facility. There has been no merger of seniority rosters nor a consolidation of seniority districts. Similarly, there is no allegation work has been consolidated with other facilities, or transferred to or from other facilities.*
>
> *The test uniformly applied by arbitrators is whether the action taken by the Carrier required approval of the Interstate Commerce Commission or the Surface Transportation Board...*

* * *

The creation of the new jobs, as well as any other changes introduced by the Carrier in this case stemmed from the adoption of a new collective bargaining agreement. From all outward appearances this agreement was reached in accordance with the provisions of the Railway Labor Act. It was neither required by the Surface Transportation Board nor subject to their review and approval. To be sure, no action was sought or taken by the STB in connection with this agreement. It was a change that Conrail could have made had the transaction with CSX and NSR not occurred. This was, therefore, not a transaction as defined in the New York Dock Conditions. We reach this conclusion notwithstanding the fact the agreement was made concurrently with an implementing agreement.

AWD307
Referee: O'Brien
Fin. Docket: 28905
Carrier(s): CSXT (C&O)
Union(s): TCU
Award Date: 9-10-01
NYD Articles: Art. I, §§ 2 & 8 vs **Feb. 7th JSA vacation guarantee**

Under the terms of the C&O Feb. 7th Agreement, furloughed protected employees were considered in compensated service for the purposes of vacation eligibility and entitlement. Claimants who were Feb. 7th protected subsequently chose NYD under the terms of an implementing agreement. However, during their NYD protected period the Carrier would not credit each with earned vacation entitlements – subsequently when returning to Feb. 7th protection each would have a gap in their respective weeks of vacation entitlement depending upon the amount of time spent in NYD dismissed status. TCU argued that since each was simultaneously protected by Feb. 7th when dismissed and it provided for protective payments to be considered compensated service for vacations, the Carrier's interpretation placed the claimants in a worse posture than other employees in like status and not protected by NYD. Prefacing his denial the neutral member observed that "*this Arbitration Committee wishes to make it clear that we have no authority to interpret or apply the Vacation Agreement*" he then held:

Section 8 of New York Dock is entitled Fringe Benefits. It provides that employees who are affected by a transaction shall not be deprived of benefits attached to their previous employment during their protected period under the same conditions and so long as such benefits continue to be accorded other employees of the railroad in active service or furloughed.

Section 8 delineates samples of the benefits that must be continued during the protected employee's protective period...it has been determined that these are only examples of the benefits enjoyed by other employees of a railroad that are to be afforded employees who are affected by a New York Dock transaction during an employee's protective period.

The STB...has definitively ruled that compensation does not constitute a benefit under Section 8...(see FD 28676, GTW - control - DTI May 28, 1996.) As an extension of the STB, New York Dock Arbitration Committees are required to follow STB decision.

In the GTW case the UTU requested the STB to review a New York Dock panel's award which held that compensated leave, such as holidays, sick time and personal leave, are not compensable benefits under Section 8. The UTU requested the STB to reverse the

panel's exclusion of compensated leave as a benefit under Section 8 of New York Dock. The STB ruled that "...[T]he panel's decision that compensated leave is not a 'benefit' within the meaning of section 8 is a reasonable one, not egregious error, and we will not disturb it..."

Paid vacations fall within the rubric of "compensated service," in this Committee's opinion. Therefore, the STB's decision in GTW must be applied to paid vacation. Inasmuch as paid vacations are not one of the fringe benefits embodied in Section 8 of New York Dock that section is inapposite to the claims before this Arbitration Committee and lends no support to the claims. Accordingly, the numerous decisions cited by the Organization where fringe benefits were granted to furloughed protected employees are not applicable to this dispute.

Section 2 of New York Dock Conditions

The Organization argues that since the Claimants are Addendum No. 5 employees [JSA] that "rights, privileges and benefits" granted protected employees under Addendum No. 5 are also preserved for the Claimants...

At the outset, it must be noted that the Claimants were not furloughed pursuant to the modified February 7, 1965 Mediation Agreement between BRAC and the C&O Railway Company, Therefore, the terms and conditions in that Agreement did not apply to them.

Under the Organization's reasoning, employees would be entitled to benefits provided by the modified February 7, 1965 Mediation Agreement even though they were granted dismissal allowance under New York Dock. It seems unlikely that the drafters of the New York Dock Conditions wold design such an extensive labor protective arrangement if other protective agreements were intended to be incorporated into this arrangement by virtue of Section 2 of the New York Dock Conditions.

AWD308
Referee: Fletcher
Fin. Docket: 31363
Carrier(s): TTMS [Blackstone]
Union(s): TCU
Award Date: 9-28-01
NYD Articles: Art. I, § 12 Real Estate benefits under Implementing Agt.

Under the terms of the parties Implementing Agreement an employee transferring who "*owns his own home*" could select a lump sum payment of $20,000 "*provided he owned or was under contract to purchase his present home* ***prior to December 1, 1996.*****"** Claimant transferred under the terms of the implementing agreement in 1997 and requested the $20,000 lump sum on the basis that he had, in fact, owned the home recently relinquished to his ex-wife on the date stipulated – 12/1/96. In denying the claim the Board held:

Upon the whole of the record, the Board agrees with Carrier. Clearly, relocation and real estate benefits provided for under the auspices of New York Dock Conditions were foundationally designed to protect employees from, or at least significantly mitigate, financial hardship due to a bona fide transfer of work. In this case, however, it appears that Claimant is attempting to convert Carrier's legitimate commitment to that end into

a windfall. According to clear direction provided by Article IV, Claimant must have owned (or been under contract to purchase) his present home prior to December 1, 1996. Whatever circumstances prompted Claimant to relinquish legal ownership of his home to his ex-wife prior to his transfer, even though he may have continued to make mortgage payments on it subsequent to his divorce, is not Carrier's problem. The fact remains that as soon as Claimant signed the November 24, 1997 Quitclaim Deed, he could no longer legally consider his former home an authentic asset directly (if not adversely) impacted by Carrier's transfer of his work to Monroeville. Consequently, the Board find that the property, as a former real estate asset, does not merit protection under Article IV (d) of the August 1, 1997 Implementing Agreement. [see 281]

AWD309
Referee: Fletcher
Fin. Docket: 33942
Carrier(s): TTMS [Blackstone/Transtar]
Union(s): TCU
Award Date: 2-28-02
NYD Articles: Art. I, §§ 1, 5 & 6 **STB Review & US Court of Appeals action**

When US Steel (USX) sold 8 rail carriers to the Blackstone Group, which in turn formed a holding company called Transtar, the holding company consolidated railroad accounting departments to Monroeville, PA under the parties Implementing Agreement [see #281]. Subsequently, Blackstone relinquished ownership of Transtar and transferred 4 rail subsidiaries, including B&LE back to USX. 112 positions with Transtar were affected and work/employees were transferred to TTMS – a new company of USX. A dispute arose regarding the second Implementing Agreement that provided for the work/employees transfer to TTMS over what constituted an affected employee and entitlement to NYD. In sustaining the Organization's argument the Committee held:

As to the first question, chasing one's tail would be somewhat understandable were it not for prior thoughtful and credible guidance on this very issue. Essentially, the Chairman is asked to determine whether or not an "affected employee" under the December 22, 2000 Implementing Agreement is also a "displaced employee within the intent and meaning of New York Dock conditions (and therefore entitled to displacement benefits under Article I, Section 5 thereof). At the outset, the Chairman is convinced that it was the stated intent of the Organization's negotiators that any employee whose position was abolished as a result of the Transtar reorganization on March 23, 2001 was to be considered "affected" by that transaction. Why else would the Organization insist in the negotiations that all employees be given a TPA, which the Carrier agreed to do.

Upon the whole of the record, Carrier appears to concede this point, as it only argues that they must also have been adversely affected in order to also be considered "displaced". True enough, according to the pertinent definition provided in New York Dock, displaced employees are those who, as a result of a transaction, are placed in a worse position with respect to compensation and/or rules governing working conditions. However (and this is where the tail chasing comes in), the only road leading to a definitive determination on that question, is in the calculation of test period averages. In this case, as required by Article VII of the Implementing Agreement, Carrier did so. Now however, Carrier insists that the entire exercise was essentially meaningless (regardless of actual subsequent compensation relative to their TPA's) because Claimants were awarded positions similar if not identical in rate of pay to those they held prior to the transaction. The Chairman is not persuaded that Carrier's contentions accurately reflect the result of

the bargain it made with the Organization. As if it did accurately reflect its bargain with the Organization it would render a negotiated condition meaningless.

The Chairman confirms Referee Sickles' conclusion that Carrier was indeed obligated to compute test period averages (upon request) under Article VII, and moreover be governed by those findings. After all, under the December 22, 2000 Implementing Agreement, TPA's represented the only means by which Claimants, whom the Chairman already determined were "affected" by the March 23, 2001 transaction, could also determine whether or not they were harmed (or "placed in a worse position with respect to compensation") by it. Careful review of the Implementing Agreement language persuades the Chairman to conclude that the parties indeed anticipated that at least some (if not all) transferring employees would be "displaced" under Article I, Section 5 of New York Dock and therefore entitled to occasional displacement allowances. Otherwise, in the view of the Chairman, the authors of the applicable Implementing Agreement would have found it unnecessary to stipulate any means by which "affected" employees could obtain TPA's in the first place. Moreover, Article II of that Agreement specifically identifies "affected" employees who are not considered "displaced" or "dismissed", supporting a reasonable inference that remaining employees "placed in a worse position with respect to compensation" are.

Having determined that the Claimants in this case were both "affected" and "displaced" under New York Dock conditions by the March 23, 2001 transaction, the question remaining before the Chairman goes to how their TPA's should properly be applied. The Chairman affirms the findings of Referees La Rocco and Sickles on this point. Indeed, as Referee Sickles pointed out, if the ICC had intended "comparable rates of pay" to be the standard for determining whether or not an employee was "placed in a worse position" as a result of a transaction, it would have so stated. Instead, "compensation" is the only criteria expressed, and as such, all components thereof are applicable when computing and applying TPA's. The reality that this typical 12-month average occasionally results in a "windfall" during "short months" is actually irrelevant. For better or worse, that is how the system works, and as Referee Sickles astutely observed, the knife does cut both ways. Should an employee assigned to a lower rated position receive overtime or other arbitraries warranting compensation in excess of his TPA in any given month, he is not entitled to additional displacement allowance solely on the basis of his reduced rate of pay.

Consequently, **TTMS petitioned the STB for review** of the Award asserting the arbitrator misconstrued § 5 "*by concluding that an employee who transfers to a position performing the same work, at the same location, and under the same (or higher) compensation and benefits package and labor agreement, qualifies as a 'displaced employee' if his actual monthly earnings occasionally fall below his TPA.*" In its decision of September 24, 2002 (service date) the STB held:

Examining the language of the implementing agreement and other indicia of intent, the Arbitrator determined that the parties themselves intended to precertify affected employees so as to eliminate the need to show causation in this case, and that the carrier's arguments did not accurately reflect the bargain that it made with TCU. We do not find that the Arbitrator's decision in this regard was egregious error, or that petitioner has demonstrated any other basis under our Lace Curtain standards that would warrant our review.

Unhappy with the STB's decision, **TTMS instituted a court action** on October 24, 2002 in the US Court of Appeals for the District of Columbia Circuit. Such action is **still pending**.

AWD310
Referee: Ver Ploeg
Fin. Docket: 32549
Carrier(s): BNSF
Union(s): Individuals
Award Date: 4/19/2002
NYD Articles: Art. IV **STB review and denial of carrier appeal**

This decision is interesting for a number of reasons. First, it addresses the rights of non-union employees affected by a merger; second, it deals with the timeliness of filing; and, finally, it and the STB discuss the doctrine of laches and *"speculative prejudice.*" In finding for one of the two claimants the Committee held:

> *The apparent intent of the New York Dock Conditions has been to cushion the harsh impact of railroad mergers by providing special benefits to railroad employees who for some unique reason are not represented by a union. These protections have been designed to protect, at least partially, employees whose skills are narrowly specialized within the railroad industry. This rationale has been expressed as follows:*
>
> > *The rationale and history of the benefits are that they were to be extended only to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. In the Matter of Arbitration Between B. J. Maeser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).*
>
> *Despite the literal language of the New York Dock Conditions - language that could be read to mean that all railroad employees not in a union are eligible for the same benefits as the unionized employees - subsequent decisions have established, and the parties agree, that the term "employee" is a term of art that:*
>
> > *...was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather...to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as being other that administrative, managerial, professional or supervisory in nature. In the Matter of Arbitration Between B. J. Maeser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).*
>
> > *It is against this backdrop that in November of 1995 the Carrier wrote to the Claimants advising them that it had eliminated their positions. In response, each Claimant exercised her seniority to return to a clerical position in the union. Those bids resulted in both Claimants moving from Fort Worth, Texas, to Minnesota in 1996, and they have remained in those clerical positions since that time.*
>
> *The issue currently in dispute is whether the Claimants occupied positions in 1995 that fell within the terms of the New York Dock Conditions, so that the Carrier was obliged*

to grant them the benefits under those Conditions. The Carrier submits that the Claimants do not meet the New York Dock tests; the Claimants submit that they do. In addition, the Carrier challenges the timeliness of both Claimants' claims for these benefits.

***

Although New York Dock could be read literally to extend benefits to all non-union employees, subsequent decisions interpreting its terms have persuasively explained that its coverage is not so unlimited. Rather, the key distinction has been whether the unrepresented railroad employee seeking benefits under its terms has occupied a "labor" as opposed to a "management" position. The former would qualify for benefits; the latter would not. It is also noteworthy that a "subordinate official" has been deemed to fall on the "labor" end of the spectrum.

Thus, "rank and file/subordinate official" positions qualify under the New York Dock Conditions, while "official"/"management" positions do not. This case requires determining into which category the Claimants' former positions most clearly fit. That determination in turn determines their eligibility for coverage under New York Dock.

Although the above distinctions are self evident with respect to many positions, that is not always true. In such cases as this, "It has left to arbitration the exact line to be drawn between these categories." In the Matter of the Arbitration Between Gerald J. Huggins et. al. v. Norfolk & Western Ry. Co. (1985), Harris). A review of prior arbitration decisions that have undertaken this task reveals that there is no single test for making this determination. Instead each case has been decided based upon its unique facts. Nevertheless, from those cases a number of factors have emerged that have consistently been found to be relevant. Guided by those factors, I have found the following evidence to be the most relevant in drawing that line in these two cases.

* * *

Skills transferability has become a well-accepted factor in evaluating the nature of a position under the New York Dock conditions, and in this case it is a factor that weighs against Ms. Ellingson.

In conclusion, these are the most significant bases upon which I have concluded that Ms. Ellingson's position of Manager, Asset Disposition was more clearly a management than a rank and file/subordinate official position.

3. Were Claimant Diane Suchy's job responsibilities as Manager of Administration more clearly rank and file or management responsibilities?

In arguing that Ms. Suchy's job responsibilities as Manager of Administration were more clearly management than labor/subordinate-official responsibilities, the Carrier has identified Ms. Suchy's own resume as the "best evidence" of her responsibilities. In response, Ms. Suchy took the opportunity to "clarify" those items at the hearing in this matter. Because this resume has become central to decision in this matter, I have weighed each item set forth in it:

* * *

The Carrier's other "best evidence" of Ms. Suchy's responsibilities is the affidavit of the had of her department, who spoke quite highly of Ms. Suchy's abilities and referred to her as his "right-hand" and as "very instrumental in the operation of the office." He describes her as occupying a "decision-making role." However, Ms. Suchy's direct supervisor, the former Director of Financial Planning and Administrative services, has

submitted an affidavit in which he states, "I find (Ms. Suchy's) statement to be an accurate description of her responsibilities as Manager, Administrative Services."

Weighing all of the above, I find that Ms. Suchy's position appears most clearly to have been that of a highly responsible administrative assistant rather than that of a manager. Absent some form of concrete evidence, I am unable to assume that Ms. Suchy had decision-making authority with respect to personnel, budgetary and other managerial matters.

These are the most significant bases upon which I have concluded that Ms. Suchy's position of Manager of Administration was more clearly a subordinate official/administrative assistant/liaison position than a management position.

4. Timeliness

With the above findings, it is unnecessary to determine whether Ms. Ellingson's claim was timely filed. However, I do find that Ms. Suchy's claim was timely.

It is undisputed that on November 21, 1995, Ms. Suchy wrote to the Vice President for the Staffing and Development Department - the same person who had notified her that her position had been eliminated and that she was not being placed in any other exempt position - asking whether she was entitled to receive a displacement allowance under the New York Dock conditions. I find this to be timely notice of her claim.

However, it remains disturbing that Ms. Suchy did not further press this claim until 1998. If the Company had shown more than speculative prejudice as a result of this two and one-half year delay, decision on this question may well have gone the other way.

AWARD

For the above reasons I find that Claimant Margaret Ellingson's position as a Manager, Asset Disposition was more clearly a management than a labor position. Thus, she does not fall within the coverage of the New York Dock Conditions.

For the above reasons I find that Claimant Diane Suchy's position as a Manager of Administration was more clearly an administrative assistant rather than a management position. Thus, she fell within the coverage of the New York Dock Conditions and should be given the appropriate benefits under its terms. I will retain jurisdiction of this matter in the event that the parties cannot agree concerning the implementation of this award.

BNSF **petitioned the STB seeking review** of the benefits granted claimant Suchy in the above award. On September 25, 2002 (service date) the STB denied the petition stating that:

BNSF does not challenge the arbitrator's conclusion that Ms. Suchy was a clerical employee eligible for New York Dock protection. Rather, the carrier limits its arguments to two issues dealing with timeliness of claim... BNSF asks us to review the arbitrator's determination that Ms. Suchy's claim was timely filed. The Carrier acknowledges that neither the BNSF merger decision nor the New York Dock conditions set a time limit for filing claims for benefits. BNSF contends, however, that the general 2-year statute of limitations for filing complaints in 49 U.S.C. 11075 (c) should apply to claims for New York Dock benefits....having found no basis for overturning the arbitrator's determination

that Ms. Suchy's 1995 letter was a claim, we need not address (1) BNSF's assertion that the 2-year limitation in section 11705(c) should be applied to the filing of claims or the request for arbitration under New York Dock or (2) the applicability of Modin.

* * *

BNSF further contends that the claimant's delay in processing her claim amounts to laches... We have recognized that arbitrators can dismiss claims for laches. In Grand Trunk Western Railroad Company - Merger - Detroit and Toledo Shore Line Railroad Company - Arbitration Review, Finance Docket No. 29676 (Sub-No.2) (STB served Feb. 26, 1996) (GTW), we affirmed an arbitrator's decision that dismissed claims for New York Dock benefits because the claims were delayed for almost 7 years. In the decision, we noted that an arbitrator acting under delegated authority could bar stale claims when the delays could make it difficult or impossible to determine whether claims are valid. We indicated further that: "[i]n the absence of any particular statutory deadlines for filling, or of any agency rule concerning the subject, we think that it is appropriate for the arbitral board to make determinations concerning timeliness, as necessary to protect the integrity of the arbitral process. ...we will not disturb the arbitrator's determine on the issue or laches.

AWD311
Referee: Benn
Fin. Docket: 33388
Carrier(s): NS
Union(s): BMWE
Award Date: 6/27/2002
NYD Articles: Art. I, § 5 (a)

In the continuing saga of carrier misinterpretation of test period averages (TPA), the NS argued that the hours attached to the TPA were not an important part of the calculation in determining the amount of displacement allowance due the claimant at the end of each month. Citing elemental historic arbitral precedence dealing with test periods in his footnotes that supported the Union's position the arbitrator takes a circular route and comes to the correct decision in:

"The initial question in any contract interpretation dispute is whether clear contract language exists to resolve the matter. Because the burden is on the Organization, the Organization is therefore obligated to demonstrate clear language to support its claim ..." Award 34207, supra.

***

However, looking at only the opening clause in Article I, Section 5(a) yields a different result. The opening clause provides for compensation "...in any month..." It therefore follows, as the Carrier asserts, that only the entire "month" is to be examined. Thus, consistent with the Carrier's position, because Claimant earned $4,434.32 in December, 1999, which was in excess of his $3,842.80 average monthly compensation, he should be entitled to nothing further from the Carrier. That also makes sense.

"Where language yields conflicting but plausible interpretations, the language is ambiguous." Award 34207, supra. The above discussion shows that there are conflicting but plausible interpretations for the disputed language. The language therefore does not clearly support the Organization's interpretation.

* * *

First, a fundamental rule of contract construction is that interpretations which render language meaningless or redundant should be avoided and that language should

be interpreted to give meaning to all clauses. If the Carrier's interpretation of Article I, Section 5(a) is correct and the only relevant comparison is how much the displaced employee earned in the given month, then there was no need to include the final clause of that section. The Carrier's interpretation is accomplished by the opening clause "[i]f 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..." Under the Carrier's interpretation, there is no need for the clause "...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."

But the last clause is in this portion of Article I, Section 5(a). Under this rule of contract construction, that last clause therefore must have meaning and cannot be redundant. The Organization's interpretation - i.e., that the displaced employee's earnings after he achieves his average monthly hours are to be considered as 'additionally compensated" which places to focus of the computation for displacement purposes upon what the employee earns up to the point the employee works his average monthly hours - gives that last clause meaning. This rule of construction favors the Organization's interpretation.

Second, another fundamental rule of construction is that specific language governs general language. In the last clause, the parties specifically addressed what happens when a displaced employee such as Claimant "works in any month in excess of the aforesaid average monthly time paid for during the test period" and specifically provides that "he shall be additionally compensated for such excess time at the rate of pay of the retained position." The references in the opening clause to compensation "in any month" is more general. This rule of construction also favors the Organization's interpretation.

Third, another rule of construction is that the intent of ambiguous language comes from considering the document as a whole. The purpose of New York Dock is to afford protection to employees who are "displaced" as a result of a transaction such as the one involving Conrail, CSX and the Carrier. The parties defined "displaced" in their definitions 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." The concept of "displacement allowances" was then structured in Article I, Section 5(a) protecting the employee who is unable "to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced".

As a result of the Conrail transaction, Claimant was displaced to a position with the Carrier which paid him less per hour than he earned with Conrail. As a result of the transaction and the lower hourly rate, in December, 1999, Claimant had to work more hours to earn his former average monthly compensation. From reading New York Dock as a whole which seeks to protect the displaced employee from being adversely affected by a transaction, it follows that Claimant, who because he was considered a displaced employee, was "placed in a worse position with respect to his compensation", should not be penalized because he had to work more hours to earn his average monthly compensation. But that is precisely what the Carrier's interpretation does. This rule therefore also supports the Organization's position.

Because the Carrier raises past practice as an affirmative defense, the burden is on the Carrier to demonstrate the existence of that past practice. "To be a past practice, the conditions in dispute must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Third Division Award 34207, supra. The above showing by the Carrier through Edwards' statement does not measure up to a demonstration of a past practice between the parties.

* * *

Further, this was an interpretation the Carrier reached with the UTU - an operating craft - whose method of compensation often differs from how employees represented by the Organization are paid. And, this interpretation was reached between the Carrier and another Organization. Without more and given the discussion concerning the rules of contract construction which favor the Organization's position, the interpretation reached between the Carrier and the UTU cannot change the result.