NEW YORK DOCK PROTECTIVE CONDITIONS

Finance Docket No. 28250 Appendix III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

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

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules
governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statues.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately
thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employes or rearrangement of forces, shall provide for the selection of forces from all employes involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

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

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation

and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

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

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of

the Washington Job Protection Agreement of May, 1936.

8. Fringe benefits.- No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses.- Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not exceeding 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purviews of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claims for reimbursement shall be paid under the provision of this section unless such claim is presented to the railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employe of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.- (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint

additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identity the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.- (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefor required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement, within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser

whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the Article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLES III, IV, AND V NOT REPRODUCED

INTRODUCTION

In the early 1930s the railroad industry had a work force of about 1.6 million employees. From the early 1930s to the mid-1990s, the railroads have gone through a long process of mergers, abandonments, coordination of services and facilities, as well as major technological changes. As a result, the railroad work force has been reduced to about 250,000.

In response to the drastic reduction in employment during this turbulent time, rail labor has fought to provide protection for employees adversely affected by railroad transactions, seeking recognition of the employees' equity in the railroads and the tendency railroads have to seek greater efficiency at the expense of their employees.

Rail labor has secured employee protection both under collective bargaining agreements and the authority granted to the Interstate Commerce Commission. Initially, protection was derived from the ICC's authority to protect the public interest in matters involving railroads and interstate transportation. Rail labor contended that protecting the public's interest included providing protection for employees, a position that was ultimately upheld by the courts and then recognized through federal legislation and collective bargaining agreements.

The various forms of employee protection in effect today are derived largely from authority established under the Emergency Railroad Transportation Act of 1933, which was passed to save certain railroads from bankruptcy and provide for the continuation of rail service during the Depression. One of the purposes of the Act was to maintain employment levels and to keep railroad employees from being placed in a worse position with respect to their compensation.

Shortly before that Act expired in 1936, the railroads and unions agreed to establish protection for employees affected by railroad consolidations. The Washington Job Protection Agreement of 1936 (WJPA) laid the foundation for providing protection for employees adversely affected by the changes that the industry was experiencing. The WJPA provided basic protections for employees who lost their jobs or suffered a loss in pay as a result of coordinations between railroads.

One of the basic provisions of WJPA was that an employee who was retained in service, but was placed in a worse position with respect to his compensation, would be afforded a displacement allowance to make up for the loss in pay. The WJPA also established the formula for calculating the displacement allowance, determining that it would be based on the employee's total earnings and total time worked during the 12 months preceding the date of his displacement. Those two totals are to be divided by 12 to establish a test period average (TPA).

Although labor and management agreed to establish employee protection under WJPA, the ICC's authority to impose protective conditions was challenged in the courts. After the Supreme Court upheld the ICC's authority in 1939, however, the railroads relented to a degree and acknowledged that employee interests should be protected in mergers and consolidations. The agreement between the parties on the basic principle of providing employee protection led to federal legislation in 1940 that mandated imposition of employee protection in railroad transactions.

It was customary, under the 1940 law, for the ICC to impose protective conditions which basically paralleled the WJPA. For about 30 years, the ICC imposed various forms of protective conditions that provided affected employees with up to four years of benefits. Continued court battles and arbitration decisions resulted in minor modifications in the protective conditions, but the WJPA continued as the foundation of employee protective conditions.

A significant change came with the Rail Passenger Service Act of 1970, which established protective conditions for employees affected by the government takeover of passenger service, and the 1976 Railroad Revitalization and Regulatory Reform Act (4R Act). Those laws changed the employee protection equation, extending employee protection to six years in railroad transactions and leading to the ICC's adoption of the New York Dock Conditions in 1979.

New York Dock Conditions are the standard employee protective conditions imposed in railroad mergers. The ICC has adopted the Oregon Short Line Conditions for certain abandonment proceedings, Norfolk & Western Conditions for trackage rights transactions and Mendocino Coast Conditions for lease transactions. Labor, management and the ICC continue to battle over the requirements for imposing protective conditions. [The ICC was eliminated by Congress in 1995 and the functions of the Commission have been delegated to the Department of Transportation's new Surface Transportation Board.] The proper application of the standard conditions is the subject of continuing litigation and arbitration disputes. The following is an outline of the New York Dock Conditions, with references to decisions reflecting some of the common issues that have been referred to boards of arbitration.

SECTION 1 - DEFINITIONS:

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

Displaced employee - "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."

Dismissed employee - "an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction."

Protective period - "the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936."

1. Transaction - The term "transaction" under the New York Dock Conditions has been given broad application, but it has been held that the term cannot be applied universally to any action by a carrier subsequent to a merger. It has been held that a proposed action would be considered a "transaction" under New York Dock only if the action involved some coordination of operations between the entities involved in the merger.

In making determinations on whether an action constituted a "transaction" under New York Dock, previous boards of arbitration have relied upon the provisions of Section 2(a) of the Washington Job Protection Agreement, basing New York Dock's definition of "transaction" on the WJPA term "coordination." Section 2(a) of the WJPA defines coordination as follows:

"The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

In a 1987 New York Dock arbitration case involving the Transportation-Communications International Union and the Union Pacific Railroad, Arbitrator John B. LaRocco relied on the above-referenced provision of WJPA in his decision, stating in his Opinion and Award:

"The definition of a New York Dock transaction is so broad that any coordination within the meaning of WJPA Section 2(a) is a subset of Section 1(a) of the New York Dock Conditions. Any manipulation of inter-Carrier operations, facilities or services which is a coordination under the WJPA is absolutely and automatically a transaction under the New York Dock Conditions. In summary, a New York Dock transaction is any activity which is a coordination under the WJPA or any other action taken pursuant to the ICC's authorization."

Other arbitration awards have indicated that protective conditions are intended to apply in connection with actions by a railroad for which ICC approval is required. "Transaction" should not be misconstrued as a reference only to the initial merger, abandonment or other proceeding, however. Awards have held that actions by the carrier can be considered "transactions" if they result directly from the merger, abandonment, etc., for which New York Dock Conditions were imposed. It is not necessary that the specific action by the carrier be subject to ICC approval - only that the action resulted from a transaction requiring ICC authority.

Transactions most frequently involve matters such as consolidation or elimination of signal shops, equipment repair shops, dispatching facilities, terminal facilities and other consolidations. In general terms, the consolidation of facilities or other action would be considered a "transaction" under New York Dock if the carrier would have been unable to take such action without ICC authority for the merger or other proceeding which led to the consolidation.

Referees have repeatedly cautioned against considering every action by the carrier following a merger as a "transaction" under New York Dock. In a 1981 arbitration case involving the Dispatchers and the Missouri Pacific Railroad, Referee Nicholas H. Zumas held that there must be a connection between the merger and the alleged transaction, stating succinctly:

"Every action initiated subsequent to a merger cannot be considered, ipso facto, to be 'pursuant to' the merger. There must be a causal connection. As it relates to the applicability of New York Dock II to a merger, such nexus is implicit in the term 'pursuant to.'...It is the absence of any such causal nexus in this case that defeats the application of the term transaction."

(Emphasis added)

As Referee Zumas indicated, the "causal nexus" is the key to establishing the carrier's action as a New York Dock transaction. Under Section 11, when there is a dispute regarding an employee's eligibility for benefits, the employee has the obligation to first identify the transaction as meeting the definition of that term under New York Dock. Arbitrators have held consistently and repeatedly that the employees must establish a "causal nexus," or connection, between the alleged transaction and the merger.

Referee LaRocco, in a 1986 case involving the Brotherhood of Railway Carmen and the Norfolk & Western Railway, held that the Organization, as the moving party, was required to identify a Section 1(a) transaction and specify pertinent facts of that transaction relied upon. He also pointed out that the carrier's burden of proof is conditional. Only if the Organization first fulfills its burden of proof and establishes that there was a "transaction" does the carrier assume the burden of proving that factors other than the transaction affected the employee. 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.

LaRocco went on to state:

"To satisfy its initial burden under Section 11(e), the Organization must demonstrate a discernible link between the identified transaction and Claimants' loss of employment...Broad, unsubstantiated allegations are insufficient to fulfill its threshold burden under Section 11(e)."

Referee Zumas, in a 1986 arbitration case involving the Brotherhood of Maintenance of Way Employes and the Burlington Northern Railroad, reiterated his earlier findings on the concept of the "causal nexus," stating as follows:

"The New York Dock Conditions define a 'transaction' as any action taken pursuant to authorizations of this Commission on which these provisions have been imposed...In order for any action to be a transaction, there must be some nexus between the merger and the action taken by the Carrier....(I)t must be shown that a) it is related to the merger and b) it is the proximate cause of the dismissal of the Claimants."

In a 1992 arbitration case involving the United Transportation Union and CSX, Referee Lamont E. Stallworth again outlined the requirement for establishing the causal nexus, stating as follows:

"...under the New York Dock Conditions, there must be a link between the Carrier's actions and Employee(s)' dismissal or displacement...there must also be a connection or nexus between the Carrier's action and the merger or coordination which triggered the protections sought by the Employees."

It should be noted that the requirement for showing a causal nexus applies to either party asserting that certain actions would constitute a "transaction" under New York Dock. For instance, railroads have at times tried to extend the meaning of "transaction" to include the combining of seniority districts. Arbitrators have rejected the railroads' assertions, however, holding that consolidation of seniority districts is not a transaction under New York Dock. This issue was addressed in 1983 by Referee Zumas in a case involving BMWE and Seaboard System and he held as follows:

"The Carrier's notice of February 2, 1983 sets forth proposed changes that it views as necessary for improved efficiency. The Carrier asserts that the changes in question could not have been accomplished without the merger and acquisition that took place in 1982. Since those actions were themselves authorized by the I.C.C., the Carrier reasons that the I.C.C. authorization extends to the changes now contemplated. As the Carrier points out, the I.C.C. anticipated changes in labor by imposing the New York Dock conditions.

The Carrier's reasoning commences by establishing the goal: improvement in efficiency through consolidation of seniority districts - and concludes by finding that I.C.C. permits the accomplishment of the goal through its imposition of New York Dock conditions. The Arbitrator, however, cannot start with, or follow, the same analysis. Although the ultimate goal may have tremendous merit, an Arbitrator must begin by asserting his jurisdiction. This is particularly true where, as here, the jurisdiction has been challenged by one of the parties. Thus, this Arbitrator must first determine the extent of his authority and what he is and is not permitted to do. This necessarily requires a careful reading of the basic grant of jurisdiction, i.e., Article I, Section 4 of the New York Dock conditions.

Section 4 permits an Arbitrator to decide certain disputes that the parties have been unable to resolve through negotiations. The negotiations, which may ultimately give rise to an arbitration, are invoked whenever a Carrier, on which the New York Dock conditions have been imposed, contemplates a transaction that may cause the dismissal or displacement of any employees, or the rearrangement of forces.

The Carrier argues that since (1) New York Dock conditions have been imposed on it and (2) the Carrier contemplates a rearrangement of forces, then (3) the Arbitrator is authorized to impose an accord after unsuccessful negotiations. Section 4, however, clearly requires the presence of an additional element, viz., a transaction that triggers the rearrangement of forces. In the absence of that element, an Arbitrator has no authority to resolve any dispute under Section 4.

'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. A rearrangement of forces itself cannot be a transaction; it is the necessary and inevitable consequence of the transaction.

* * *

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.

* * *

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."

The Zumas decision was confirmed in a recent case involving the Brotherhood and the Union Pacific Railroad (Referee Dana E. Eischen - 1994), which held:

"UP Management cannot be faulted for seeking to improve efficiency and effectuate economy by combining two seniority districts into one. But the terms and conditions of those separate seniority districts are established by solemnly negotiated collective bargaining agreements with the BRS. It is black letter law that Carrier is not free to abrogate collective bargaining agreement conditions once deemed acceptable simply because they have now become inconvenient or onerous. The ICC, courts and arbitrators have recognized that Carriers may, under carefully circumscribed conditions, obtain relief through NYDC compulsory interest arbitration from collectively negotiated terms and conditions which would prevent effectuation of an ICC-approved transaction...This limited conditional right to disregard collective bargaining agreements is not a license to unilaterally implement change merely for convenience or to improve efficiency...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."

2. Displaced employee - the key to establishing that an employee qualifies as a displaced employee is determining whether the employee was "placed in a worse position with respect to his compensation and rules governing his working conditions." Determining whether an employee was placed in a worse position with respect to his compensation usually involves calculation of a test period average in accordance with Section 5. It should be noted again, however, that simply showing that an employee had a reduction in earnings is not sufficient to establish that the employee was displaced.

Arbitrator Eckehard Muessig, in a 1987 case involving the International Brotherhood of Electrical Workers and the Southern Railway, noted the established precedent on this question, stating as follows:

"It has been held in decisions of earlier Boards of Arbitration that the aggrieved party must show a direct causal nexus between the transaction and an adverse impact upon their employment relationship...loss or reduction in earnings per se does not render or place an employee in the status of a displaced employee." (Emphasis added)

Referee Robert E. Peterson, in a case involving the Machinists and Conrail, confirmed this basic principle, stating:

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

'It may be argued that New York Dock benefits are applicable in any month where

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

Therefore, it is important to bear in mind that it is not sufficient to establish that an employee suffered a reduction in earnings after a merger transaction. It must also be shown that the reduction was caused by the transaction.

It should be noted that the employee initially displaced in a transaction is not necessarily the only employee entitled to New York Dock benefits. Any other employees affected by subsequent displacements would also be considered displaced employees under New York Dock. Referee LaRocco, in a 1988 dispute involving the Transportation-Communications Union and the UP-MP, confirmed the eligibility of all affected employees, stating:

"The Carrier is concerned about the chain of displacements which, in the long run, steadily expands the pool of employees receiving New York Dock protective benefits. Nothing in the New York Dock Conditions places a cap on the number of employees who might receive displacement allowances. The employee need only trace his displacement to a Section 1(a) transaction."

3. Dismissed employee - the distinction between displaced and dismissed is straightforward: employees in both categories are entitled to be made whole with respect to their compensation, but the displaced employee continues to work while the dismissed employee is essentially furloughed.

4. Protective period - under New York Dock, this period extends for up to six years from the date the employee is displaced or dismissed. The protective period for an employee who has worked for less than six years prior to the date of his displacement or dismissal is determined as follows under the provisions of Section 7(b) of WJPA: the employee is given one month's credit for every month in which the employee performed any work.

Under some earlier forms of protection, the date of the transaction controlled the beginning of the protective period. Under New York Dock, however, the protective period begins when the employee is first affected, which could be long after the initial transaction. This principle was confirmed by Referee LaRocco in a 1988 case involving the BRS and the UP. He held as follows:

"Section 1(b) of the New York Dock Conditions clearly provides that the protective period '...extends from the date on which an employee is displaced or dismissed...' up to a maximum of six years, provided the protective period may not be longer than Claimant's total length of service as defined in Section 7(b) of the Washington Job Protection Agreement.

The effects of a transaction need not coincide with implementation of the transaction. A displacement could arise before, simultaneously with, or after the Carrier actually engages in the transaction. If the adverse effect occurs in anticipation of a transaction, the worker is covered by Section 10 of the New York Dock Conditions. Frequently, the effect occurs at the time of the transaction. However, the adverse effect may not materialize until long after the transaction has been completed."

SECTION 2 - AGREEMENTS PRESERVED:

The issue of preserving agreements has been the subject of ongoing arbitration disputes and court battles addressing the issue of the carrier's right to change or eliminate collective bargaining agreements. It has been labor's position that existing agreements must be preserved under Section 2. Earlier arbitration cases confirmed that position, but the ICC, in a landmark decision in 1983, determined that it had the authority to override collective bargaining agreements in approving mergers and other transactions. In recent arbitration decisions, referees have conformed to the ICC's ruling. Referee Jacob Seidenberg, for instance, in a case involving the UP-MP merger and the Brotherhood of Locomotive Engineers, outlined the change in direction on this issue as follows:

"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...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."

Labor challenged the ICC's ruling in court, arguing that the ICC did not have authority to supersede the Railway Labor Act, but the Supreme Court upheld the ICC decision. The ICC decision should not be seen as giving the railroads a free ticket to change agreements, however. There remains significant precedent establishing that the railroad must show that a proposed change is necessary to effectuate the transaction. A 1987 arbitration decision by Referee LaRocco, involving the Carmen and CSX, recognized the ICC's decision, but held that changes were still subject to a showing of necessity. LaRocco stated:

"Transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining. Consolidations upset stable collective bargaining relationships. Thus there is not just tension between the Railway Labor Act and the Interstate Commerce Act but a classic clash of two important Federal Statutes.

As a quasi-judicial extension of the ICC, this Committee
must strictly follow the ICC's interpretation of its own authority. In the DRGW case, the ICC decided that 49 U.S.C. 11341 (a), the source of the exemption, granted the Commission expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction.

However, the exemption is only triggered when necessary. The ICC has never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements. To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved.

If feasible, the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights." (Emphasis added)

As noted earlier, Referee Zumas, in the case involving BMWE and Seaboard System, reached the same conclusion, stating as follows:

"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." (Emphasis added)

Referee Eischen, in the 1994 decision in the BRS v. UP dispute, made the same distinction on this issue, stating:

"The ICC, courts and arbitrators have recognized that Carriers may, under carefully circumscribed conditions, obtain relief through NYDC compulsory interest arbitration from collectively negotiated terms and conditions which would prevent effectuation of an ICC-approved transaction...This limited conditional right to disregard collective bargaining agreements is not a license to unilaterally implement change merely for convenience or to improve efficiency...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." (Emphasis added)

Therefore, even though the ICC has reversed the earlier arbitral precedent on the issue of superseding agreements, it is clear that the railroad has the burden of proving that a proposed change is necessary to carry out the transaction.

SECTION 3 - BENEFITS PRESERVED:

With the 1991 amendments to the February 7, 1965 Agreement, this provision takes on added significance. Section 3 establishes that employees can retain their rights under other protective agreements such as the Feb. 7 Agreement and elect to receive benefits under that agreement instead of New York Dock. As noted earlier, New York Dock is limited to a six year protective period. It should be noted that an employee could be entitled to benefits for a longer period under another agreement. Section 3 also provides that when an employee's protective period under one agreement expires, the employee may be eligible for further benefits under another agreement. It should also be noted, however, that Section 3 provides that an employee cannot receive duplicate benefits.

SECTION 4 - NOTICE AND AGREEMENT OR DECISION:

This section establishes that the railroad is required to provide at least 90 days' notice of any transaction that may cause the dismissal or displacement of employees or the rearrangement

of forces. After the railroad issues such notice, the parties are obligated to engage in negotiations on an agreement for implementing the proposed change. Section 4 notices often result in dispute regarding the proper application of New York Dock Conditions in the matter addressed in the carrier's notice. For instance, in the previously cited dispute regarding the Union Pacific's proposal to consolidate seniority districts, the Brotherhood contended that the proposal did not involve a New York Dock transaction subject to negotiation under Section 4. The arbitrator upheld the Brotherhood's position.

If the parties are unable to reach agreement, Section 4 provides for the matter to be referred to binding arbitration. Changes cannot be implemented until the parties reach agreement or an agreement is imposed through arbitration. In order to prevent obstruction of the process, Section 4 provides for expedited resolution of such disputes. In negotiating implementing agreements, the employees typically seek improvements over the basic New York Dock provisions and the carriers pursue more restrictive conditions. This often results in arbitrators determining the terms of an implementing agreement which is imposed on the parties.

It should be noted that arbitration costs incurred under Section 4 are shared equally by the parties.

SECTION 5 - DISPLACEMENT ALLOWANCES:

The displacement allowance provided for under Section 5 is based on an employee's test period average (TPA). New York Dock follows the basic formula established under WJPA for calculating the TPA: total the employee's compensation and time for which the employee was paid during the 12 months preceding his displacement and divide both totals by 12 to obtain the average monthly compensation and average monthly time. Overtime is included in the calculation, but it has been held that overtime can be excluded if the railroad can show that it was extraordinary overtime which resulted from the transaction.

Section 5 provides that the displaced employee will then be paid an allowance for any month in which his compensation is less than the TPA, with the allowance making up the difference between his compensation and the TPA. Any time that the employee works in excess of the average hours calculated in the TPA is to be paid at the rate of the employee's current position - in addition to his allowance.

It should be noted that the allowance is to be adjusted for subsequent wage increases. It should also be noted that the allowance may be reduced or removed if the employee fails to exercise his seniority to take a higher rated position that does not require a change in residence. Referees have declined to establish a firm guideline for determining whether a change in positions would require a change in residence, electing to review this question on a case by case basis.

SECTION 6 - DISMISSAL ALLOWANCES:

Section 6 provides for payment of a monthly allowance to a dismissed employee equal to the monthly average of his total compensation for the 12 months preceding his dismissal. The dismissal allowance is also to be adjusted for subsequent wage increases. The dismissal allowance may be reduced to reflect unemployment benefits or earnings in other employment. If a dismissed employee returns to work, he may be eligible for a displacement allowance.

It is important to note that an employee will not be considered eligible for a dismissal allowance if the employee declines another position, even when it would require a change in residence. Arbitrators have rejected the contention that an employee can refuse to relocate and still retain the dismissal allowance under Section 6. Referee William E. Fredenberger Jr. held in a 1983 case involving the Carmen and CSX that the dismissal allowance did not protect employees from having to relocate, stating:

"The Organization's reliance upon Article I, Section 6(d) of the New York Dock Conditions is misplaced. That Section provides, inter alia, that a dismissed employee may not be compelled to take a position requiring a change of residence as a condition of continuing to receive a dismissal allowance. However, Section 6(d) does not define a dismissed employee. That definition appears in Article I, Section 1(c). As the Carrier points out, in its decision in Finance Docket No. 28905 the ICC was requested by labor organizations to expand the definition of a dismissed employee so as to protect employees from having to relocate. The ICC specifically refused to modify the definition of a dismissed employee urged by the Organizations. The ICC has spoken authoritatively on the matter, and this Neutral must follow the ICC's pronouncement."

The result of that decision was that the carrier was allowed to require two employees to transfer to new positions. The employees could not refuse the transfer and be considered dismissed employees. This finding was confirmed by Referee T. Page Sharp in a 1986 decision involving the Clerks and the UP. He held as follows:

"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."

Referee Robert M. O'Brien reached the same conclusion in a 1987 case involving the Machinists and Guilford Transportation, stating:

"In imposing the New York Dock labor protective benefits, the ICC clearly recognized that an employee may have to change his residence as a result of a transaction. This is precisely why the ICC imposed the moving expenses set forth in Section 9 and the loss of home benefits found in Section 12 of the New York Dock Conditions. It is instructive to note that on several occasions, the ICC has been asked to expand the New York Dock labor protective benefits to provide a 'dismissal allowance' for any employees involved in a transaction who decline to relocate as a result thereof. In each case, the ICC has rejected these requests...the ICC struck a balance between the rights of employees and the necessity for railroads to consolidate facilities in order to avoid inefficiency and duplication. Extensive protection was afforded employees who were adversely affected by such consolidations. Conversely, the ICC also imposed some obligations on employees. One such obligation was that employees must transfer with available work even if this requires a change of residence in order to be entitled to the protection prescribed by the New York Dock Conditions." (Emphasis added)

In another 1987 case involving the same parties, Referee Arnold M. Zack confirmed the previous decisions on this issue, stating as follows:

"The New York Dock Labor Protective Benefits provide that an employee may have to change his residence as a result of a transaction. The ICC recognized this in providing for moving

expenses and for the loss of home benefits. Employees with such transfer options have their employment prospects protected.

"If under those circumstances they decline the offer of positions at new locations, they do so voluntarily and exclude themselves from the protections prescribed by the New York Dock Conditions. In the circumstances of such offers of continued employment with available work they cannot be considered as dismissed employees or entitled to either a dismissal allowance or a separation allowance."

Section 6 refers to an employee being offered "comparable employment," and it should be noted that arbitrators again have declined to establish clear guidelines for determining what constitutes comparable employment. A recent award held that several former clerks did not have to accept positions as brakemen, holding that such work was not comparable to the clerks' former jobs. It was held, however, that such determinations would have to be made on a case by case basis.

SECTION 7 - SEPARATION ALLOWANCE:

A dismissed employee has the option under Section 7 to resign and accept a lump sum payment in lieu of other benefits. The lump sum is to be calculated under Section 9 of WJPA, which provides for a maximum 12 months' pay for an employee with five or more years of service. Reduced payments are available for employees with less than five years of service.

SECTION 8 - FRINGE BENEFITS:

Section 8 has generally been held to preserve fringe benefits for dismissed employees. Referee Zumas, in a 1987 case involving the BMWE and the UP, outlined the application of this section as follows:

"...employees affected by an abandonment are to be protected in such a way that their economic situation would be no different than what it was before the transaction. The Board finds that the fringe benefits here at issue are one element of that equation. If an employee was entitled to such benefits before the transaction, then that employee continues to be entitled to them following the transaction...A Carrier should not be permitted to defeat the rights of an affected employee to his fringe benefits for the term of his protection period simply by placing him on furlough early in the abandonment process." (Emphasis added)

An earlier decision by Referee Arthur W. Sempliner in a 1984 dispute between the UTU and the Detroit, Toledo & Ironton Railroad reached the same conclusion, holding as follows:

"The Board finds that the intent of Section 8. Fringe Benefits was intended to afford the protected employee the same rights and benefits he would have had if he continued in uninterrupted service."

SECTION 9 - MOVING EXPENSES:

This section provides for the carrier to reimburse the employee for moving expenses when

the employee transfers to a new location because of a transaction. In general, New York Dock transactions that involve the transfer of employees include provisions covering moving expenses. This reflects the requirement under Section 9 for the parties to agree in advance on the moving arrangements. It is important to note that Section 9 requires the employee to submit claims for reimbursement of moving expenses within 90 days.

When the parties negotiate implementing agreements under Section 4, the employees typically seek moving expense provisions more generous than those available under Section 9. Some recent agreements have provided affected employees with the option of payment of moving expenses under Article XII of the National Agreement or payment of a lump sum in lieu of specific expenses.

It should also be noted that Section 9 provides that if the railroad furloughs an employee transferred under a New York Dock transaction within three years, the employee may elect to move back to his previous location and again be reimbursed for moving expenses.

SECTION 10 - ANTICIPATION OF TRANSACTION:

This section provides that employees will not be deprived of benefits or protection by changes the railroad makes in anticipation of a transaction. The most common application of this section involves the railroad placing employees on furlough prior to a transaction. Arbitrators have held, when the employees establish that changes were implemented in anticipation of a merger, that the affected employees cannot be deprived of benefits under New York Dock.

SECTION 11 - ARBITRATION OF DISPUTES:

This section provides for either party to submit New York Dock disputes to arbitration. It is important to note that the time limits for handling other claims do not apply to New York Dock disputes. Although there are not specific time limits for New York Dock claims, referees have indicated that such claims could be denied if they are not progressed within a reasonable time.

The most important question under Section 11 involves the burden of proof. Section 11(d) indicates that the employees have the obligation to identify the transaction and "specify the pertinent facts of that transaction relied upon." Most New York Dock disputes involve claims that an employee was placed in a worse position with respect to his compensation, and in accordance with Section 11 the employees have the burden of first identifying that there was a New York Dock transaction that affected the employee and then showing that there was an adverse effect on the employee's compensation or working conditions.

Referee LaRocco, in a 1988 dispute involving the Transportation-Communications Union and the UP-MP, outlined the employee's burden of proof as follows:

"Section 1(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 critical words 'worse position' contemplate that an employee must some suffer some detriment to his employment status."

A fundamental question in determining an employee's eligibility for a displacement allowance is whether the employee's compensation was reduced. The fact that an employee was able to obtain a position with the same pay rate as his previous job does not preclude payment of a displacement allowance, since it is compensation, not the rate of pay, that determines if the employee was adversely affected.

Railroads have frequently attempted to frustrate determinations of adverse effect by refusing to calculate TPAs. In an early WJPA dispute, Referee Merton Bernstein appropriately pointed out that it was necessary for the railroad to provide a test period average for the employee so he could determine if he was adversely affected. He held as follows:

"If a comparison with the test period average is an essential element in determining eligibility, he must have that information to make a claim; In sum, in order to determine whether he is adversely affected the employee continued in service must know his test period earnings."

Referee Bernstein's findings were cited by Referee A. Robert Lowry in a 1990 case involving the TCU and New Jersey Transit, in which it was held:

"The fact that an employe obtained a position carrying an hourly rate of pay equal to or exceeding that of the position from which displaced is not definitive as to whether he was placed in a worse position with respect to his compensation. Rather, Referee Bernstein shows that a comparison must be made of the earnings produced in the month under consideration with the guarantee and the hours whose earnings are to be compared with the 'average monthly time paid for' shall be those first occurring in the month being compared. Because of the variable components included in the computation of test period guarantees and the variable conditions affecting earnings during the protective period, it is virtually impossible to determine if an employe has been placed in a worse position with respect to his compensation until such a comparison has been made."

Other recent arbitration awards have contradicted Referee Bernstein's findings, however, placing a burden on the employees to show that there was a decrease in the employee's compensation. Some arbitrators have denied claims for the railroad to provide a TPA to allow the employee to determine whether he suffered a loss in earnings. For instance, in a 1990 dispute involving the BRS and CSX, Referee Marty E. Zusman held as follows:

"Finding no evidence of language or practice requiring Carrier to calculate a TPA where no evidence exists that the employee has suffered a loss and is within the meaning of the Oregon Short Line Protective Provisions as a 'displaced employee,' we must answer the question [that the Carrier be required to provide a TPA for each of the named Claimants] in the negative."

Referee Peterson, in a 1992 New York Dock case involving the BMWE and the Soo Line, rejected Referee Bernstein's findings under WJPA, holding that the employees were required to establish both that there was a loss of compensation and that the loss was caused by the transaction. Peterson stated:

"This Board likewise fails to find by language or practice that the NY Dock Conditions

require a carrier to provide a TPA to an employee merely because he would be affected by a job abolishment or sustain a loss of compensation. In our view, the NY Dock Conditions clearly intend that employees not be given a TPA or be certified as entitled to the protective benefits of the NY Dock Conditions until they have been adversely affected as a result of the transaction as concerns their compensation and rules governing their working conditions....

Certainly, to give employees a TPA simply on the basis of the position they occupied being abolished, much less because they were in the employ of the Carrier at the time of a transaction, would be tantamount to placing the burden of proof upon the Carrier to show that there was no causal nexus between any loss of future compensation and the transaction, instead of, as the NY Dock Conditions contemplate, the employees being required to show the manner in which they had been adversely affected in the first instance so as to be entitled to a protective allowance."

Peterson recognized that his findings placed a difficult burden on the employees, but pointed out that paycheck stubs could be relied on by employees to track any adverse effect on their earnings. These recent arbitration decisions make it more apparent than ever that the employees have a greater burden in proving their eligibility for benefits under New York Dock, making it more important for each employee to maintain records on their compensation and time.

It must be emphasized again that the employees' burden of proof extends beyond simply showing that the employee was affected by the transaction and suffered a decrease in compensation. Even though Section 11 indicates that the carrier has the burden of proving that something other than the transaction caused the decrease, recent arbitration cases have shifted the burden of proof under Section 11 more to the employees. The employees have historically relied on Section 11 as placing the burden of proof on the carrier after meeting their initial burden, pointing to the following ICC interpretation of Section 11:

"It is the carrier's burden, once employees have identified the transaction and the injury, to prove that factors other than the transaction caused the injury."

Until recent years, awards under WJPA and New York Dock had consistently confirmed that if it was shown that the employee was affected by the transaction and his compensation was reduced, the railroad was required to provide a displacement allowance unless it could show that the reduction was caused by something other than the transaction. In an early decision under WJPA, Referee Bernstein outlined the controlling principle as follows:

"Section 6(a) is quite explicit that the 'worse(ned) position' must be 'as a result of such coordination.' If it can be shown that the difference in 'compensation' is due to some cause unrelated to the coordination, the allowance would not be due...the eligibility of an employee for an allowance depends on whether any of the difference in compensation is a result of the coordination. Once direct involvement in a coordination is shown and monthly compensation falls below the test period average, the employee presumptively is eligible for a displacement allowance. <u>If the Carrier can show that despite the merger-based change in the work situation the first loss of earnings stems from some other cause, a Section 6 allowance is not due</u>." (Emphasis added)

As indicated in the awards cited under Section 1, arbitrators have indicated that it is not sufficient to show that an employee was affected by a transaction and was placed in a worse position with respect to his compensation or working conditions. It must also be shown that the adverse effect was due to the transaction.

In a recent case involving the BRS and CSX, Referee Arthur T. Van Wart held that it was not sufficient to show that an employee was affected by a line abandonment and was not earning the compensation in his new position equal to that of his former position. He held, contrary to Section 11, that it was the Brotherhood's burden to also show that the decreased compensation was caused by the transaction, stating as follows:

"The Carrier properly contested the employees Organization simplistic theory, because the Claimant was displaced, he was ergo, thereby, entitled under OSLC to a 'test period average' and a 'displacement allowance.' Article 11(c) of OSLC requires more than the obligation to identify the transaction. The Claimant must also demonstrate that his abandonment compensation was less than the compensation on the position from which displaced and that the deficit was directly caused by the abandonment." (Emphasis added)

In another case involving the Carmen and the Maine Central Railroad, Referee Peterson reaffirmed the employee's burden to show a causal nexus, stating as follows:

"...the adverse effect must be a direct result of the transaction and not the result of other causes; the mere loss or reduction in earnings per se does not render or place an employee in the status of a 'displaced' employee; the protective benefits arrangements are not intended to afford absolute and complete financial protection to any railroad employee who might be in some way 'tangentially' adversely affected by a merger or coordination; the petitioner must show a causal relationship between his furlough or reduction in compensation and the transaction; and, a defined transaction must be the causative element which leads to the worse position."

Although Section 11 indicates that the railroad has the burden of proving that the adverse effect was caused by something other than the transaction, arbitrators have not accepted the employees' position on the burden of proof in recent New York Dock cases. Therefore, employees must recognize the importance of retaining records and documents that could establish that the transaction did, in fact, cause them to be placed in a worse position.

SECTION 12 - LOSSES FROM HOME REMOVAL:

This section outlines the provisions covering employees who are required to move their place of residence in connection with a transaction. Section 12 is intended to protect the employee against any loss in the sale of his home and establishes a process for resolving disputes over home values, losses, etc.

ARTICLE II

Article II establishes the right of a furloughed or dismissed employee to request a transfer to another craft. Such transfer is contingent on the employee becoming qualified. The railroad is obligated to provide necessary training at no cost to the employee. An employee who requests assignment to another craft must accept a position considered to be comparable employment at the risk of forfeiting benefits.

ARTICLE III

Article III covers the obligation of employees to accept employment with another carrier in transactions involving terminal companies.

ARTICLE IV

Article IV extends benefits to non-represented employees.

ARTICLE V

Article V indicates that benefits available to employees under conditions preceding New York Dock were preserved.