BEFORE AN ARBITRATION COMMITTEE ESTABLISHED
UNDER NEW YORK DOCK (II) EMPLOYEE PROTECTIVE CONDITIONS

In the Matter of Arbitration Between Missouri Pacific Railroad Company And American Train Dispatchers Association	I.C.C. Finance Docket No. 27773

OPINION AND AWARD

Background

On May 11, 1981, the National Mediation Board appc undersigned Neutral as Chairman of an Arbitration Committee pursuant to the Board's authority under Article I, Section 11 of Appendix III of I.C.C. Finance Docket No. 28250 (hereafter New York Dock (II)). Hearing was held on June 8, 1980 in Washington, D. C. The Missouri Pacific Railroad Co. (hereafter "Carrier") was represented by Nina K. Wuestling, Esq. The American Train Dispatchers Association (hereafter "Association") was represented by Thomas Woodley, Esq. Post-hearing briefs were filed on June 22, 1981; and it was stipulate that the Opinion and Award would be rendered on or before July 31, 1

Statement of Facts

In 1924, the Carrier acquired controlling interest of Texas & Pacific Railroad Company (hereafter "T & P".) As a majority-owned railroad, the T & P was one of more than a dozen Carriers that constituted the Missouri Pacific Line, or System. According to the

Carrier, it began an intensive effort to coordinate the activities of its subsidiaries in 1956. This program produced, among other things the consolidation of several train dispatching offices. It does not appear that any of these train dispatching consolidations combined T & P offices with Carrier offices. In 1967 however, the Carrier and T & P did swap disptaching territories: the train dispatching for Longview, Henderson and Mineola was transferred from Carrier's Houston Office to the T & P's Fort Worth Office; and train dispatching for Alexandria and New Orleans was transferred from the T & P to Carrier. The transfer of territory was accomplished in accordance with the Washington Job Protection Agreement of 1936. Prior to their merger, Carrier operated train disptaching offices at Houston and Palestine, Texas; Kansas City, Missouri; and North Little Rock, Arkansas; the T & P had only one train dispatching office at Fort Worth, Texas.

Carrier and T & P had, and continue to have, separate collective bargaining agreements with the Association. The current agreement between the Association and T & P is dated August 24, 1952. The current agreement between the Association and the Carrier is dated November 30, 1962. In 1966, the Carrier and T & P signed, separately June 16 Mediation Agreement A-7460 with the Association.

In 1974 the Carrier and T & P filed an application with the Interstate Commerce Commission for corporate merger. The Carrier simultaneously sought merger with the Chicago & East Illinois Railroad Company. According to the Carrier, the corporate merger represented only a change in corporate identity: Carrier and T & P had been operating as a unified entity for about ten years.

On May 4, 1976, the Interstate Commerce Commission approved the Carrier, T & P, and Chicago & East Illinois merger. In its Order, the Interstate Commerce Commission recognized the extent to which Carrier and T & P already operated as unified entities, "with assimilated power and equipment, and common department and personnel." In accordance with the requirements set forth in § 5(2)(f) of the Interstate Commerce Act, as amended (45 U.S.C. § 11347), the merger was approved subject to the application of employee-protective conditions contained in New Orleans Union Passenger Terminal Case, 282 I.C.C. 498 (1952), as modified by the arbitration conditions set forth in St. Louis Southwestern Railway - Pur. - Southern Railway, 242 I.C.C. 498 (1972), and by certain provisions of §405 of the Rail Passenger Service Act (45 U.S.C. 565). Pursuant to a Petition for Reconsideration filed in March, 1979 by the Railway Employees Department, AFL-CIO, the I.C.C. reconsidered the appropriate level of employee protection to be imposed on the merger. Accordingly, it ordered that "all employees affected in this transaction shall be afforded the relief set forth in Appendix III of New York Dock Railway - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979)." The U.S. Court of Appeals for the Second Circuit has characterized the New York Dock conditions as "The most favorable of the labor protective provisions contained in both the New Orleans conditions (as clarified in Southern Control II) and Appendix C-1, adopted pursuant to §405 of the Rail Passenger Service Act of 1970." New York Dock Railway v. U.S., 609 F.2nd 83, 91 (1979).

On January 21, 1981, Carrier served the Association with notice of a proposal to consolidate its dispatching functions now performed

at Palestine, Houston and Fort Worth, Texas into a single new office located at Spring, Texas (a suburb of Houston). This notice was served "pursuant to Article 1, Section 4, of Mediation Agreement A-7460 of June 16, 1966." The Association responded five days later contending that "[s]ince the proposed coordination of the train dispatching facility and operations of part of Missouri Pacific Railroad with those of the former Texas and Pacific Railway is clearly a result of the merger of those two Carriers approved by the I.C.C. in Finance Docket No. 27773, the employee-protective conditions imposed therein [New York Dock II] are applicable."

Issue in Dispute

The Association has characterized the issue for arbitration as follows:

> Does the consolidation of the train dispatching functions now being performed in the Fort Worth, Texas office under the scope of the former Texas & Pacific Railway Train Dispatchers Agreement, with those now being performed in the Palestine and Houston, Texas offices under the Missouri Pacific Train Dispatchers' Agreement, as proposed in the Carrier's January 21, 1981 letter and notice (file B 246-471), constitute action taken pursuant to authorizations or approval of the Interstate Commerce Commission in Finance Docket No. 27773, Missouri Pacific Railroad Company - Merger - The Texas & Pacific Railway Company, Etc., thus making applicable the employee protective conditions imposed in that proceeding [New York Dock (II)]?

The Carrier, on the other hand, has posed the following question for arbitration:

> Whether New York Dock II employee protective conditions imposed in Missouri Pacific Railroad Company - Merger - The Texas & Pacific Railway Company, Etc., (I.C.C. Finance Docket No. 27773) are applicable to the transfer of the train dispatching office at Fort Worth, Texas?

Applicable Provisions

The parties to this dispute rely on language contained in three separate employee protection documents to support their respective positions. In terms of chronology, the first of these is the Washington Job Protection Agreement of 1936. That Agreement provides allowances to employees affected by a "coordination." A "coordination" is defined to mean "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." (Underscoring added.) This Agreement also expressly provides for coverage during "the period following the effective date of a coordination during which changes consequent upon coordination are being made effective." The Agreement contains procedural assurances and compensatory allowances for a five year period to affected employees.

The June 16, 1966 Mediation Agreement affords protective benefits for train dispatchers who are displaced and deprived of employment as a result of certain specific types of changes within one carrier's operation, including the consolidation or removal of train dispatching offices. The benefits provide for a five year protective period; allowances earned are not recalculated to reflect subsequent wage increases.

It is important to note that the 1966 Mediation Agreement does not apply to "any transactions subject to approval by the Interstate Commerce Commission or to any transactions covered by the Washington Job Protection Agreement of May 21, 1936."

Finally, Appendix III of New York Dock (II) provides certain protections for employees who have been displaced, dismissed, required to relocate, deprived of benefits, and so forth, as a result of a "transaction." A "transaction" is defined as "any action taken pursuant to authorization of this Commission on which these provisions have been imposed." Among the provisions imposed by Appendix III is a six-year protective period, during which a dismissed or displaced employee's allowance is adjusted to reflect subsequent general wage increases.

FINDINGS

Issues of Arbitrability

The Carrier has challenged the jurisdiction of the Arbitration Committee which has been established under the auspices of the National Mediation Board pursuant to Section 11 of Appendix III on two grounds:

First, the Carrier contends that time limits imposed by Section 11(a) of Appendix III were not complied with. That subsection provides, in part:

> 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 sections 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.

The Carrier notes that it gave notice to the Association of its intent to move the Texas dispatching offices on January 21, 1981. By letter dated April 8, 1981, the Association served notice of its intent to arbitrate pursuant to Article I, Section 11 of Appendix III. Thus, the Carrier contends that by its untimely invocation of Section 11, the Association has waived its right to arbitrate.

This claim is predicated on reading Section 11's reference to 20 days as a window within which a party must act to invoke arbitration. When examined in the context of the entire document, however, it seems clear that the 20 days was meant to provide a minimum period in which the parties were to attempt to reconcile their differences, and only after the expiration of that period could either party invoke arbitration. Obviously, there is a period of delay in seeking arbitration that would constitute laches, but the two month attempt at settlement here was not unreasonable in light of the importance of the issue.

Second, the Carrier argues that "there is also a substantive issue of whether Article I, Section 11, which creates an Arbitration Committee, also empowers the Committee to decide whether this controversy, applicability of Dock II, is arbitrable." In this regard, Carrier relies on that part of Section 11(a) which authorizes referral to arbitration any dispute "with respect to the interpretatic application or enforcement of <u>any provision</u>" (Underscoring added.) The Carrier would remove from Section 11 coverage the question of the Appendix's overall application to a particular event. */

<u>Application of the term "transaction"</u>

The Carrier contends that Appendix III is inapplicable because the proposed action at issue is not one authorized by the I.C.C. Ord nor undertaken pursuant to the I.C.C. Order approving the merger.

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*/ In support of this position the Carrier cites <u>Steelworkers</u> v. <u>Warrior Navigation Co.</u>, 363 U.S. 574 (1960), for the propositio that questions of arbitrability are for the courts to decide, u the agreement states to the contrary, and <u>Railroad Yardmaster o America and Chesapeake and Ohio Ry.</u> and <u>Seaboard Coast Line RR.</u> (I.M. Lieberman, March 1981) for the position that Section 11 r to the arbitration and settlement of disputes which might arise under the parties' agreements implementing Dock II.

Rather, the Carrier claims, the proposed consolidation is a direct result of technological improvements and economic conditions.

In support of this theory, the Carrier introduced evidence regarding the underlying reasons for the move to Spring, Texas. First, the T & P building in Fort Worth, which houses the train dispatching office, had been a financial liability. During the years that attempts were made to sell that building, the Carrier was also acquiring land in the Houston suburb of Spring for a new yard and office park. In 1978 the Fort Worth building was sold with a two year lease-back for office space. In 1981, the office building in Spring was completed and the Carrier was prepared to consolidate its Texas offices at that location. Moreover, the Spring office is equipped with computerized centralized traffic control equipment. The capabilities of this type of equipment are superior to those of the lever type machines currently in use at Fort Worth, Palestine and Houston. Although the new computer system will produce economies, it would not be cost effective to equip all three offices with computer-assisted equipment.

The Carrier thus argues that the proposed consolidation is a result of economic measures and technological improvements that "merely by chance happened to occur after the merger and not the direct result of or in any way connected to the merger." (Carrier Brief, p. 26). In this connection the Carrier states that it would have consolidated the train dispatching offices even in the absence of a merger.

As a corollary to this argument, the Carrier asserts that it could have consolidated the train dispatching functions without I.C.C. approval and that this fact distinguishes the case at issue

here from other situations in which Appendix III benefits have been applied. The Carrier has emphasized the fact that the Commission construed the merger of Carrier and T & P as "nothing more than a consolidation of corporate entities..."

In its Order, the I.C.C. stated:

> The merger application herein does not involve significant changes in the pattern of operation of the MoPac system, but merely represents a simplification of present MoPac corporate structure. The proposed merger is nothing more than a consolidation of the corporate identities of the three applicant railroads, MoPac, T & P, and C & EI. MoPac has controlled the T & P through stock ownership for over 50 years. Texas & Pacific Readjustment, 86 I.C.C. 808 (1924), and has controlled the C & EI through stock ownership for over 10 years, Missouri Pac. R. Co.- Control-Chicago & E.I.R. Co., 327 I.C.C. 279 (1965). MoPac and T & P have been operating as a unified entity with assimilated power and equipment, and common departments and personnel for about 10 years. The C & EI has been operated on an assimilated basis with the other two railroads in the same manner for about 6 years. The operation of these three railroads on an integrated basis means that, unlike a proceeding where one railroad seeks to merge with another unaffiliated railroad, the coordination and combination of departments and personnel of merging railroads will not result in the customary significant economies involved in the elimination of duplicate departments. (Emphasis added), 348 I.C.C. at 419.

The Carrier has contrasted this type of merger with the proceedings involving the Chesapeake & Ohio and the Family Line System (Finance Docket No. 28905). There, the Carrier claims, I.C.C. approval was required to accomplish the wide range of operational changes proposed by the merger carriers, including acquisition of trackage rights and abandonment rights. Thus, decisions to displace employees as a result of the consolidation of yards, interchange operations, and clerical forces are actions taken "pursuant to" Commission authorization and "transactions"

under Appendix III. In this situation, the Carrier claims that I.C.C. authorization was necessary for the merger, but the merger was not necessary to consolidate the dispatching offices. (Carrier Reply Brief, p. 19).

Despite the evidence in the record that the consolidation was a pre-existing plan, the Association argues that the plan's consummation would be "pursuant to" I.C.C. authorization if that action was in accordance with, consistent with, in conformance with or in furtherance of the approval of the I.C.C. Phrased negatively, the Association suggests that a particular act by a Carrier can be viewed as a "transaction" unless that act is not in accordance with the merger plan, not consistent with, presumably, the order of the I.C.C. or not in furtherance of the objectives of the merger. (Association Reply Brief, p. 10). The Association argues that the action here is, indeed, consistent w in accordance with and in furtherance of the merger since the Carrier hopes to realize, through the planned consolidation, certain "additional economies and efficiencies," one of the purposes expresse in the merger application. Thus, where an action will accomplish an objective sought by the merger, it is an action taken "pursuant to authorization of [the] Commission."

The foregoing construction of the term "pursuant to" does not include as an ingredient the concept of causation. Indeed, the Association suggests that if the Commission had meant to require dir causation it would have phrased the definition of transaction to include the term "caused by". Nevertheless, there is considerable distance between the term "caused by" and the Association's formula of "not inconsistent with." The former standard would limit trans-

actions to those acts required by I.C.C. merger approval and it is clear that the Commission has not imposed this standard. In this regard, it is just as obvious that the term "transaction" was not meant to be limited to those issues that were expressly covered in the merger application and Order, as the Carrier suggests. The fact that the I.C.C. did not specifically consider this Carrier's plan to consolidate train dispatching office cannot be viewed as dispositive of the issue here (Carrier Brief, p. 20).

The Carrier's claim that Appendix III conditions apply only to actions which require I.C.C. approval is problematic. To begin, it is not clear from the arbitration cases cited by the Carrier that I.C.C. approval was necessary for the specific actions taken by carriers pursuant to Finance Docket No. 28905. See, for example, BRAC and C&O Ry. and Seaboard Coast Line R.R. (Lieberman, February 28, 1981). That case involved, in part, the coordination of C&O and SCL clerical forces at Richmond, Virginia; it is not clear whether I.C.C. approval was necessary for such coordination or whether it could have been accomplished through the Washington Job Protection Agreement.

It is equally clear, however, that the Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue. 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." Otherwise, terms such as "in accordance with", "subsequent to", "following" and "changes consequent upon" have no meaning; they become empty

words rattling in a semantic vacuum. For example, in the Southern Ry. - Control - Central of Georgia Ry. case, the Commission stated:

> "(T) The 'effect' of subsequent internal technological improvements by either of the (two consolidating) 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 benefit of the conditions." (Underscoring added). Southern Ry. - Control - Central of Georgia Ry., 317 I.C.C. 729, 732 (1963), aff'd sub nom. Railway Labor Executives Assn. v. United States, 226 F. Supp. 521, (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964).

It is the absence of any such causal nexus in this case that defeats the application of the term transaction.

The Carrier was able to demonstrate that its plan to consolidate the train disptaching offices was made independently of the Commission's merger approval. The decision to convert to a single train dispatching office in Spring, Texas was based on the cost of maintaining the building in Fort Worth, the need to provide centralized traffic control through computers, the need to replace outdated equipment now in use, and the availability of Carrier property in Spring. As the Carrier pointed out, it is only happenstance that the consolidation is to occur after the merger; the decision to consolidate was made well before the merger.

The Association's argument, however, does not rest solely on the definition of transaction, as it is written. The Association also points out that "transaction" has been interpreted to include those situations which would be covered under the term "coordination" in the Washington Job Protection Agreement of 1936. Since the Carrier concedes that the proposed consolidation would have been accomplished under the Washington Job Protection Agreement had it

taken place prior to the merger, the Association argues that action would be a "coordination" and, hence, a "transaction." The Association has cited two statements to support its theory that any act that would be a coordination prior to merger is a transaction after a merger. First, in setting out the substance of Appendix III of Dock II, the I.C.C. stated:

> "The labor organizations also request that definition of the term 'transaction' in article 1, section 1(a), be modified to encompass the same situations as the complementary term 'coordination' does in WJPA. These terms are the triggering mechanisms of article 1, section 4 and sections 4 and 5 of WJPA, respectively Since article I, section 4 here is intended to incorporate the full protections of sections 4 and 5 of WJPA, the term 'transaction' should be redefined to set the notice, negotiaiton, and arbitration provisions in motion in the same situations as does the term 'coordination.' We also note that the broad definition is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 et seq., because the event actually affecting the employees might occur at a later date than the initial transaction and arbitration; therefore, we will modify the term 'transaction' so that it will apply to any action taken pursuant to a Commission authorization upon which these conditions are imposed."
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> New York Dock Railway - Control - Brooklyn Eastern Dist., 360 I.C.C. 60, 70 (1979)

Later, in upholding the legality of the Appendix II conditions, the Second Circuit expressed the following opinion as to the terms used by the I.C.C.:

> [8] The definitional provisions contained in the "New York Dock conditions" remain to be discussed. Petitioners' objections to the ICC's definition of the term "transaction" are without merit. Although this definition has no precise ancestor in either the " ew Orleans conditions" (as clarified in Southern Control II) of in the Appendix C-1 conditions, it is clear from the definition itself, as well as from the ICC's expressed intention in formulating this definition itself, as well as from the ICC's expressed intention in formulating this definition, that the goal which the ICC had in mind was to encompass in its definition of "transaction" the same situations that were within the parallel term

> "coordination" employed in the admitted blueprint for all current employee protective packages, the NCPA. We do not believe that this goal is beyond the statutory authority conferred on the ICC in formulating employee protective conditions pursuant to 49 U.S.C. § 11347. Nor do we believe that the ICC's attempt the achieve this goal strays so far from the mark that the term "transaction" needs redefinition by us.
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> New York Dock Rv. v. U.S., 609 F.2d 83, 94 (1979).

On the surface it appears as though both the Commission and the Second Circuit have concluded that the terms transaction and coordination are interchangeable. A closer analysis of the statements reveals, however, that neither forum dealt with the situation encountered here: the lack of a causal nexus between the merger and the Carrier's action.

The I.C.C. comments in the New York Dock II case were made in response to the Organizations' concern that the prior definition would not extend protection to actions taken by a Carrier at a later date. The Organizations sought a redefinition that would cover not only the initial transaction but "future related actions made pursuant to [I.C.C.] approval." 360 I.C.C. at 65. The I.C.C. responded to that objection by expressly covering situations where "the event actually affecting the employees might occur at a later date than the initial transaction yet still be pursuant to our approval... 360 I.C.C. at 70. Both the objection and response deal with the timing of a "transaction" and it is in this context that the Commission equated "coordination" and "transaction." However, neither the objection nor the response supports the proposi that a causal nexus is unnecessary in a transaction. The Second Circuit's opinion does not elaborate on the Commission's earlier analysis and, in light of the Court's express refusal to redefine th

... must be assumed that the Commission's earlier statements ar

to be considered authoritative. Having examined those statements it cannot be said that the Commission's reference to the term "coordination" was intended to defeat the necessity for a causal nexus.

In the sum, the Association has not shown that the proposed consolidation of train dispatching offices is a "transaction" within the meaning of Appendix III, nor has the Association overcome the Carrier's affirmative presentation that the proposed action is not one that was made pursuant to the merger of the Texas & Pacific and Missouri Pacific.

Based on the foregoing, the Committee renders the following:

AWARD

The employee protective conditions of New York Dock II imposed in I.C.C. Finance Docket No. 27773 are not applicable to the proposed consolidation of the train dispatching functions now being performed at Fort Worth, Palestine, and Houston, Texas.

Nicholas Rumos
NEUTRAL MEMBER

C B Bayless
Carrier Member

D E Ellis
Organization Member
I Dissent

Date: July 31, 1981

While the Award was rendered on July 31, 1981, meeting the requirements of Section 11 of New York Dock II, the Arbitrator ruled that the Award would not become effective until an Executive Session, if desired, were held. An Executive Session, at the request of the Union, was held on November 3, 1981. The Arbitrator ruled that the Award would stand as rendered. As a result of the Executive Session the Organization's Dissent is attached.

Nicholas Rumos
NEUTRAL MEMBER

DISSENTING OPINION

The Opinion and Award of the Neutral Member is based on his view that there was no "causal nexus" between the merger of the Missouri Pacific Railroad Company ("MoPac") and the Texas and Pacific Railroad Company ("T&P"), as approved by the Interstate Commerce Commission ("ICC"), and the transaction at issue here; namely, the consolidation of the T&P train dispatching functions at Fort Worth, Texas with those of the MoPac offices at Palestine and Houston, Texas, and the movement of those functions to a new facility in Spring, Texas. The Neutral Member mistakenly relies on immaterial facts, ignores other relevant and critical facts, and misapplies the principles set forth in New York Dock Railway—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), affirmed, 609 F.2d 83 (2nd Cir. 1979).

The Award does not adopt the carrier's main assertion that it could have effectuated this consolidation of separate T&P and MoPac train dispatching facilities in the absence of the ICC's order approving the merger of the two railroads. It is well settled that rail carriers are not free to combine separate operations and facilities without ICC approval, even if the carriers have a parent-subsidiary relationship. 49 U.S.C. Section 5(2), recodified as, 49 U.S.C. §11343(a). See, New York Central Securities Corp. v. U.S., 287 U.S. 12 (1932); United States v. Lowden, 308 U.S. 229 (1939). Thus, the Award's heavy reliance on MoPac's undocumented 'intention' to consolidate these facilities prior to the merger is immaterial. Clearly, the consolidation

could not have taken place — and did not take place — until after the ICC's decision authorizing the merger.

Indeed, a critically important fact which is glossed over in the Award is the existence of the Association's separate schedule agreements governing the T&P train dispatchers and the MoPac train dispatchers. These separate agreements reserve the train dispatching duties to the T&P and MoPac dispatchers under their respective seniority districts. The only way the carrier could effectively disregard these agreements and implement the consolidation is through the ICC's merger approval — and even then it could only be accomplished through the collective bargaining process. New York Dock II, Appendix III, Art. I, Sec. 2 Simply stated, other than the merger action, there is no other vehicle which permits consolidation of facilities operated by different railroads and governed by separate schedule agreements. The cause and effect relationship in these circumstances could hardl be more clear.

Moreover, the Neutral Member mistakenly agreed with the carrier's contention that its consolidation action was based solely on financial and technological reasons unrelated to the merger. In light of this argument, the consolidation occurring after the merger was viewed merely as a "happenstance."

Consolidations like the one in question here are almost always motivated by a desire to increase operational efficiency, reduce costs and enhance profitability. To allow a carrier to escape his employee protective obligations by pointing to these

often-stated reasons would, in effect, eliminate such protections. Unfortunately, that is precisely the result reached in the instant case.

The deficiencies in the Award are best illustrated by the erroneous reliance on the Southern Ry.—Control—Central of Georgia Ry. case — the only authority cited in the decisional portion of the Award. The Neutral Member, in apparently adopting the argument in the carrier's submission, quoted at length the initial ICC decision which noted that the effectuation of technological improvements by the consolidated carriers there was "...too indirect and remote to be considered a result of the transaction...", and therefore the labor protective conditions did not apply. Southern Ry.—Control—Central of Georgia Ry., 317 I.C.C. 729, 732 (1963), aff'd. sub nom, Railway Labor Executives' Assn. v. United States, 226 F.Supp. 521, (E.D.Va.), vacated on other grounds, 379 U.S. 199 (1964).1/

On remand from the Supreme Court, however, the ICC modified its original decision by expanding the labor protective conditions to cover those situations which the carriers felt were outside the protections described by the ICC in the above-quoted language. Southern Railway Co.—Control—Central of Georgia Ry. Co.,

1/ In the first sentence of the quoted paragraph, the ICC stated that "[i]t is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordinatio of the operations of the applicant and the Central or by the shiftin of functions from one to the other." 317 I.C.C. at 732. Although this sentence was omitted from the quotation in the Award, it obviously applies to the coordination or shifting of train dispatching functions from the T&P to the MoPac. Of course, the protective conditions have been considerably expanded under New York Dock II.

331 I.C.C. 151 (1967). Regrettably, by incorporating the carrier's contentions into his Award, the Neutral Member failed to consider the ICC's ruling on remand — a ruling which substantially alters the initial decision of the ICC, and which actually supports the Association's position in the instant case.

Finally, the Award is plainly inconsistent with the language and intent of the New York Dock protective conditions. The post-merger consolidation of train dispatcher facilities involves the "consolidation of employee rosters" which is expressly covered by the ICC's decision in New York Dock II. 360 I.C.C. at 70, 75 [2/]

Furthermore, both the ICC and the Second Circuit Court of Appeals found that the broad term "transaction" embodied the same actions covered by the term "coordination" under the Washington Job Protection Agreement (WJPA). 609 F.2d at 95.[3/] As the Award itself points out, the carrier conceded that the consolidation of the MoPac and T&P train dispatching facilities would be a "coordination" under the WJPA if it had not been for the merger. On the basis of this concession alone, the consolidation should have been found to be a "transaction" as defined in New York Dock II.

For the foregoing reasons, I vigorously dissent.

Dan E. Collins

Dan E. Collins
Organization Member

[2/] Unfortunately, the quotation of the New York Dock II decision in Award (p.13) mistakenly omits this important reference to the consolidation of employee rosters.

[3/] Other Arbitrators have correctly determined that the term "transaction" should be broadly applied to encompass those actions that constitute a "coordination" under the WJPA. Denver & Rio Grande Western R. Co., and Railway Labor Executives' Ass'n., January 9, 1 (Neil P. Spiers); New York Dock Ry. Co. & Brooklyn Eastern District Terminal and Brotherhood of Locomotive Engineers, December 15, 198 (Francis X. Quinn).