

DAVID DO L NICK . . . ARBITRATOR

333 NORTH MICHIGAN AVENUE CHICAGO, ILLINOIS 60601

784-4222

Home 784-2326
312 TELEPHONE 332-6730

July 20, 1983

Mr. J. D. Gereaux, Carrier Member
Norfolk and Western Railway Company
8 North Jefferson Street
Roanoke, Virginia 24042

279-0
arbitration

Mr. D. E. Collins, Organization Member
President, American Train Dispatchers
Association
1401 South Harlem Avenue
Berwyn, Illinois 60402

20

Re: American Train Dispatchers
Association and Norfolk and
Western Railway Company
Former AC&Y Train Dispatchers

Gentlemen:

Enclosed to each of you is a copy of my
proposed findings, award, and implementing agreement in
the dispute submitted to the Consolidated Arbitration
Committee under the Agreement between the parties dated
April 12, 1983.

I have carefully read and studied all submissions,
replies thereto, rebuttal briefs and voluminous exhibits.
Although I have checked and rechecked my writings, there
very well may be errors of dates, references and mis-
spellings. If you will call or write me of these, I will
make the necessary corrections.

Please advise me at your earliest convenience
if the findings, the award and the implementing agreement
are acceptable to both of you. If so, I will sign three
copies and mail them to you for your signatures. Should
either or both of you desire an executive session, please
give me several alternate dates when you are both available
and I will do my best to accommodate you.

Very truly yours,

David Dolnick

DAVID DOLNICK

DD/eh
enclosures

ATDA photocopies made 7/21/83 for:

Mr. R. E. Johnson Mr. G. P. MacDougall
Mr. J. C. Spinelli, Gen. Chmn. AC&Y (N&W)
Mr. E. C. Nye, Jr., Gen. Chmn. W&LE (N&W)

PROCEEDINGS BEFORE A CONSOLIDATED
ARBITRATION COMMITTEE ESTABLISHED
BY THE PARTIES IN AN AGREEMENT
DATED APRIL 12, 1983

PARTIES
TO THE
DISPUTE:

American Train Dispatchers Association

and

Norfolk and Western Railway Company

QUESTIONS BEFORE THE CONSOLIDATED ARBITRATION COMMITTEE:

Those submitted by the Organization:

Question #1

YES

Is the merger of the AC&Y into NW among the possible future related transactions referred to in recital V and Section 2 of the January 10, 1962 Agreement?

Question #2

YES

Does the WJPA apply to all of NW's Train Dispatchers in the Akron and Brewster, Ohio offices who will be affected by NW's proposed elimination of the (former AC&Y) train dispatching facility at Akron, Ohio and coordination of same into NW's train dispatching facility at Brewster, Ohio?

Question #3

If the answer to Question #1 above is in the affirmative, do Sections 1 and 2 of the January 10, 1962 Agreement contemplate application to all of NW's Train Dispatchers in the Akron and Brewster, Ohio offices who will be affected by the changes proposed in NW's September 29, 1982 notice, including protection based on compensation received (and hours worked) in the twelve calendar month period immediately preceding the month in which affected by such changes?

Question #4

NW For the purpose of application of the January 10, 1962 Agreement to train dispatchers affected by the changes proposed in NW's September 29, 1982 notice, shall the term "general locality", as it is used in Section 1(b) of the January 10, 1962 Agreement and in the Memorandum of Understanding referred in Question #5 below, be defined as an area within twenty-five (25) miles from an employee's point of employment as train dispatcher on the date so affected?

Question #5

NW Under the provisions of Paragraph 5 of one of the Memoranda of Understanding attached to the January 10, 1962 Agreement, reading:

"5. In construing the last paragraph of Section 1(b) of said Agreement concerning the right of the Norfolk & Western to transfer the work of the employees protected under said Agreement, it is clearly understood and agreed that the Norfolk & Western may not transfer any employee (as distinguished from work) to another job within his craft or class beyond the same general locality as his point of employment on the date affected without the consent of his representative and that the refusal of such representative to agree to the transfer of such employee without the employee's consent shall not be subject to arbitration as provided in Section 1(d) of this Agreement."

May NW unilaterally require any Train Dispatcher protected by the January 10, 1962 Agreement and affected by the coordination of the former AC&Y train dispatching facility into the NW facility at Brewster, Ohio, to transfer to a job beyond the general locality of his employment on the date he is affected by said coordination in order to maintain eligibility for maximum compensation protection?

Question #6

NO

Are all of NW's Train Dispatchers in the Akron and Brewster, Ohio offices who will be affected by NW's proposed elimination of the former AC&Y train dispatching facility at Akron, Ohio and consolidation of same into NW's train dispatching facility at Brewster, Ohio, entitled to receive protective benefits no less favorable than those required by the ICC in Finance Docket No. 29805 (i.e. New York Dock-II) in connection with AC&Y's corporate merger into NW on or about January 1, 1982?

Question #7

1st

If the answer to Question #6 above is in the affirmative, is NW required to negotiate with ATDA towards an implementing agreement with respect to application of the terms and conditions of New York Dock-II pursuant to (Article I) Section 4 thereof?

Those submitted by the Carrier:

Question #1

1-5

Which, if any, of NW's train dispatchers in the Akron, Ohio and Brewster, Ohio offices who will be adversely affected by NW's elimination of the former AC&Y train dispatching facility at Akron, Ohio and the consolidation of the same into NW's train dispatching facility at Brewster, Ohio will be entitled to the protections afforded under the merger protection agreement of January 10, 1982?

Question #2

1st

Are the New York Dock II Conditions, imposed by the ICC in Finance Docket No. 29805, involving the merger of AC&Y into NW for corporate simplification, applicable to the consolidation of offices described in question 1 above?

Question #3

1st

(a) If the answer to question 2 is negative, does the Implementing Agreement proposed by the Carrier which is attached to its submission, meet the criteria set

forth in Section 1(b) of the January 10, 1962 Merger Agreement and in the Washington Job Protection Agreement of May, 1936 as amended by the parties for the purposes of the said January 10, 1962 Agreement, in effecting the transfer of the train dispatching office and territory of the Akron District, former Akron, Canton & Youngstown Railroad, Akron, Ohio to the train dispatching office at Brewster, Ohio as described in the Carrier's notice of September 29, 1982?

(b) If the answer to (a) is "No", what terms would be appropriate for application in this particular case?

PRELIMINARY STATEMENT:

The American Train Dispatchers Association is herein referred to as the "Organization", the Norfolk and Western Railway Company is herein referred to as the "Carrier" and sometimes as "NW", the Memorandum of Agreement dated April 12, 1983, wherein the parties established the Consolidated Arbitration Committee and defined the issues and procedures thereunder is herein referred to as the "Agreement".

The Agreement arose because of a dispute, which is best stated in the Agreement "as to the applicability of

(1) The Washington Job Protection Agreement of May, 1936 ("WJPA") and the "Agreement Effective January 10, 1962 and Four Attached Memoranda of Understanding For Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514" (January 10, 1962 Agreement)", and

(2) the employee protective conditions required by the Interstate Commerce Commission ("ICC") in connection with the merger of the former Akron, Canton and Youngstown Railroad ("AC&Y") into NW in ICC Finance Docket No. 29805 (New York Dock Ry-Control-Brooklyn Eastern Dist., 360 I.C.C. 60, 80-94 (1979) ("New York Dock-II"))

to the proposal contained in NW's notice dated September 29, 1982 announcing intention to transfer the train dispatching office and territory under the jurisdiction of the AC&Y train dispatching office at Akron, Ohio to the NW train dispatching office at Brewster, Ohio.

The Consolidated Arbitration Committee consists of three members. Mr. J. D. Gereaux is designated as the Carrier member, Mr. D. E. Collins is designated as the Organization member and Mr. David Dolnick is designated as the Chairman and third member.

Pursuant to the provisions of the Agreement, each party prepared written submissions and exhibits, exchanged copies and also sent copies to the Chairman and neutral member.

A hearing before the Consolidated Arbitration Committee, hereinafter referred to as the "Arbitration Committee" was held on Monday, May 2, 1983, in Hotel Roanoke in Roanoke, Virginia. All interested parties, including the members of the Arbitration Committee, were present, each party participated in the proceedings, and each summarized and argued its position.

Also, pursuant to paragraph 6 of the Agreement each party elected and did submit post hearing briefs within the time limits therein provided.

BACKGROUND FACTS:

On March 17, 1961, Carrier filed a joint application with the Interstate Commerce Commission, hereinafter referred to as "ICC", under Section 5 (a) of the Interstate Commerce Act for Authority to merge properties and franchises of The New York, Chicago and St. Louis Railroad Company, hereinafter referred to as "NKP", into NW, to lease lines of railroad and certain franchises of other properties of the Wabash Railroad Company, hereinafter referred to as the "Wabash" and to accomplish other related transactions. This application was assigned ICC Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514.

Sometime thereafter the Carrier entered into discussions to purchase The Akron, Canton & Youngstown Railroad Company, hereinafter referred to as "AC&Y". After several meetings, no agreement was reached.

On September 15, 1961, AC&Y filed a petition with the ICC for leave to intervene and for inclusion in the NW-NKP merger transaction. Meetings between this Carrier and AC&Y resumed. In a letter dated December 6, 1961, this Carrier made an offer to AC&Y to purchase its shares of common stock. This offer was accepted. On December 11, 1961, AC&Y withdrew its intervening petition filed with the ICC. On January 10, 1962, the Carrier filed a petition with the ICC for the approval of its purchase of AC&Y common stock. It was approved by the ICC in Finance

Docket No. 21920, on June 24, 1964, and the acquisition of the AC&Y common stock became effective on October 16, 1964. In the same order dated June 24, 1964, the ICC also approved the merger of properties, leases and franchises in Finance Dockets Nos. 21510, 21511, 21512, 21513, and 21514. All these mergers, acquisitions, leases and franchises also became effective October 16, 1964.

Prior to the approval of the above mentioned Finance Dockets, this Carrier and a number of organizations representing its employes, including this Organization, entered into a Merger Protective Agreement on April 16, 1962. The effective date of that Merger Protective Agreement is noted therein as January 10, 1962, but Section 4 thereof states the following:

The foregoing represents an agreed settlement of protection of the interests of the employees of the carrier involved in the afore-described transactions as represented by their authorized and recognized bargaining representatives signatory hereto, pursuant to 5(2) (f) of the Interstate Commerce Act and applicable provisions of the Railway Labor Act, as amended, which shall become applicable only in the event of approval by the Commission and consummation of any or all of the above-designated applications now pending before it. It shall be considered and construed as a separate agreement between Norfolk & Western and each of the labor organizations signatory hereto.

The "above-described transactions" and the "above-designated applications" refer to the substantive issues in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514. Finance Docket No. 21920 is not mentioned even though the petition was filed on January 10, 1962.

In an agreement dated September 22, 1981, The Akron, Canton & Youngstown Railroad, an Ohio corporation, was merged into AC&Y Railroad, Inc. (AC&Y), a Virginia corporation. On December 24, 1981, with a service date of December 31, 1981, the ICC issued the following NOTICE OF EXEMPTION in Finance Docket No. 29805:

On December 18, 1981, the Norfolk and Western Railway Company (NW) notified the Commission that its wholly owned subsidiary, The Akron, Canton and Youngstown Railroad Company (Akron) will merge into AC&Y Railroad, Inc. (AC&Y), a wholly owned subsidiary of NW. AC&Y will be the surviving company, and subsequently it will merge into NW, with NW the surviving company. The transactions are within the corporate family and come within the exemption described at 49 C.F.R. 1111.5 (c) (3). The mergers will not result in any change in service levels, operations, or the competitive balance with carriers outside the corporate family. The purpose of the mergers is corporate simplification.

As a condition to use the exemption, any Akron and AC&Y employees affected by the merger shall be protected pursuant to New York Dock Ry.-Control-Brooklyn Eastern Dist., 300 I.C.C. 60 (1979). This will satisfy the statutory requirements of 49 U.S.C. 10505 (g) (2). (Emphasis retained)

Pursuant to Section 1(b) of the January 10, 1982 Merger Protection Agreement, the Carrier, on September 24, 1982, served notice on the Organization of its intention to close the train dispatching office at Akron, Ohio and to assign that work to the train dispatching office at Brewster, Ohio. This notice suggested that the parties meet and negotiate an implementing agreement.

Conferences between the parties followed. On January 14, 1983, the Organization wrote to the Carrier, in part, as follows:

This is to formally serve notice of our desire to enter into an implementing agreement with respect to NW's proposal referred to above, under the provisions of Section 5 of the Washington Job Protection Agreement of May, 1936, Section 1(b) of the "Agreement Effective January 10, 1962 and Four Attached Memoranda of Understanding for Protection of Employees In Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514" and Appendix III, Section 4 of the employee protective conditions (New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979)) required as part of the ultimate merger of the AC&Y into the NW (ICC Finance Docket No. 29805) on or about January 1, 1982, for the protection of all Train Dispatchers affected by said proposal.

In a letter dated February 9, 1983, the Carrier submitted the following question to an Arbitration Committee established pursuant to Section 1(d) of the January 10, 1962 Merger Protection Agreement:

(a) Does the implementing agreement proposed by the Carrier, attached as Carrier's Exhibit "C" meet the criteria set forth in Section 1(b) of the January 10, 1962 Merger Agreement and in the Washington Job Protection Agreement of May, 1936 as amended by the parties for the purposes of the said January 10, 1962 Agreement, in effecting the transfer of the train dispatching office and territory of the Akron District, former Akron, Canton & Youngstown Railroad, Akron, Ohio to the train dispatching office at Brewster, Ohio as described in the Carrier's notice of September 29, 1982?

(b) If the answer to (a) is "No", what terms would be appropriate for application in this particular case?

The Organization responded in two letters both dated February 24, 1983. In the letter that refers to Carrier's letter of September 24, 1982, and which implies knowledge of Carrier's letter dated February 9, 1983, the Organization wrote, in part, as follows:

Because of our dispute as to the application and/or interpretation of the WJPA and January 10, 1962 Agreement regarding changes proposed in your notice, this is formal notification under the provisions of Section 1(d) of the January 10, 1962 Agreement to refer such dispute to an arbitration committee for decision.

In addition, because of our similar dispute as to the concurrent application of the New York Dock II pursuant to ICC Finance Docket No. 29505, this is also formal notification under the provisions of (Appendix III, Article I) Section 11 of New York Dock-II to refer this dispute to an arbitration committee for decision.

In order for timely and efficient resolution of these disputes, this is to request your agreement to refer them to a single consolidated arbitration committee, rather than two separate committees ...

The Agreement of April 12, 1953, previously referred to, followed.

POSITION OF THE PARTIES:

Organization

The position of the Organization is as follows:

1. Sections 1(c) and 1(d) of the January 10, 1962 Agreement are applicable to AC&Y employees under Section 2 of that Agreement.
 2. Under the June 24, 1964 ICC orders which were consummated on October 16, 1964, the Carrier took into its employment, as of the latter date, all train dispatchers except those of the AC&Y.
 3. Similarly, the Carrier assumed all Train Dispatchers' Agreements as of October 16, 1964, except the one with AC&Y.
 4. The merger of AC&Y into NW is among the possible future merger transactions provided for in Section 2 of the January 10, 1962 Agreement.
 5. The elimination of the train dispatching office at Akron, Ohio and the transfer or consolidation of the work into Carrier's facility at Brewster, Ohio is a "coordination" within the meaning and intent of Section 2(a) of the Washington Job Protection Agreement. The date of hire or promotion is irrelevant to the application of the WJPA, except as otherwise provided in Section 7 thereof. The WJPA, therefore, applies to all of Carrier's train dispatchers who will be affected by the closing of the Akron, Ohio office and coordinating the operation into Carrier's office in Brewster, Ohio.
-

6. The Carrier did not take AC&Y train dispatchers into its employment until December 31, 1981, when the ICC issued a Notice of Exemption in Finance Docket No. 29805. The merger between AC&Y and NW was not consummated until January 1, 1982. For more than 18 years following October 16, 1964, AC&Y was separately operated. *EMERGENCY POSITION* It follows that all AC&Y train dispatchers affected by Carrier's changes proposed on September 29, 1982, are covered by the provisions of Sections 1 and 2 of the January 10, 1962 Agreement, "including protection based on compensation received (and hours worked) in the twelve calendar month period immediately preceding the month in which affected by such change".

7. It is also the Organization's position that any transfer of train dispatchers by reason of the NW-AC&Y merger should be defined as "an area within twenty-five (25) miles from an employee's point of employment as defined in Section 51(c) of the June 28, 1968 Implementing Agreement which interprets the language in Section (b) of the January 10, 1962 Agreement.

8. Further, it is the position of the Organization that the Carrier may not under Paragraph 5 of a Memorandum of Understanding attached to the January 10, 1962 Agreement require a train dispatcher to transfer to another job in his craft or class beyond the same general locality of his point of employment on the date affected without consent of his representative. The Carrier may

only transfer work. Any refusal of a representative to agree to an employee's transfer is not subject to arbitration under Section 1(c) of the January 10, 1962 Agreement.

9. The NW-AC&Y "control" ended December 31, 1981. The "merger" of AC&Y into NW was consummated on January 1, 1982. The consolidation of the Akron and Brewster facilities is not taken pursuant to "control" but rather under the "merger". This is supported by ICC's order of December 24, 1981, with a service date of December 31, 1981, which required that New York Dock-II employee protective conditions be applied. The application of the benefits in New York Dock-II is not intended to duplicate those in the WJPA and in the January 10, 1962 Agreement, "but only that the protective benefits should be no less favorable to the affected Train Dispatchers than those provided in any of the arrangements" (Emphasis retained).

10. Carrier is requested to negotiate with the Organization for an implementing agreement concerning the application of the terms and conditions of the New York Dock-II requirements.

Carrier

The position of the Carrier is as follows:

(a) The protection of benefits afforded by the New York Dock conditions are not applicable "because there is no causal connection between the intended changes and the ICC order approving the merger of the AC&Y into NW for corporate simplification purposes". It was not the 1982 merger of the AC&Y and NW that precipitated the consolidation of the Akron and Brewster train dispatching facilities. This consolidation would have occurred in any event because the Carrier has the right to do so under the January 10, 1962 Agreement. This is not a "transaction" within the meaning and coverage of New York Dock-II. The proposed consolidation is solely attributable to the conditions of the January 10, 1962 Agreement, which was consummated on October 16, 1964.

(b) The operations of AC&Y and NW "have been increasingly coordinated since 1964". Since 1964 the AC&Y and NW have been operating as a single system. This is recognized by the ICC order in Finance Docket 29805 dated December 24, 1981. Here, the proposed changes were not contemplated or taken pursuant to that ICC order.

(c) Employees hired after October 16, 1964, are not entitled to benefits under the January 10, 1962 Merger Protection Agreement because Section 1(b) limits these benefits to "present

employees" as of January 10, 1962 up to and including October 16, 1964. This is so even though the actual merger of AC&Y into NW did not take place until January 1, 1982. Those hired after October 16, 1964 are not "present employees". The consolidation of the Akron and Brewster dispatching offices was not taken under the authorization or approval of ICC Finance Docket No. 29805.

(d) Recital V and Section 2 of the January 10, 1962 Merger Agreement consider the merger of the AC&Y into NW as a possible transaction. Two other possibilities are contemplated in the language. One is the "control" of the AC&Y acquired by the NW on October 16, 1964. By the acquisition of the AC&Y capital stock, the NW had "control" as provided in the January 10, 1962 Merger Agreement. In the alternative it also "leased" the AC&Y properties which has the same effect.

(e) Carrier is under no obligation under any agreement to offer WJPA protection to affected former AC&Y employees. If the WJPA applies to such affected employees then neither the January 10, 1962 Merger Agreement nor the New York Dock Conditions are applicable. The terms and procedures of all three cannot be concurrently applied.

(f) Carrier's proposal does not contemplate the transfer of train dispatchers "beyond the general vicinity of his employment ...". Brewster is not beyond the general locality of Akron.

(g) The intent and purpose of the January 10, 1962 Merger Agreement is to indemnify an employe against lost wages when he is unable to work or receives less compensation due to coordination. An employe who refuses placement is entitled to no protective pay.

DISCUSSION AND OPINION:

This decision, including the preliminary statement, the position of the parties, the discussion and opinion, the findings, the award and the implementing agreement is exclusively the work of the neutral member of the Arbitration Committee. He alone bears the sole responsibility for all that is herein written; he alone initially reached all of the conclusions and answers to questions presented by the parties; he alone prepared the award and the implementing agreement. It is his sincere hope that his findings, his award and his implementing agreement will be acceptable to both parties and that the partisan members of the Arbitration Committee will indicate their assent thereto. At a minimum, he will, however, regretfully accept the assent thereto by one partisan member of the Arbitration Committee.

Of the three questions proposed by the Carrier and seven questions raised by the Organization, the first and perhaps the most important issue before the Arbitration Committee is whether or not the train dispatchers of the former ACFY who were

hired after October 16, 1964 and before January 1, 1982, who may
be adversely affected by the elimination of the Akron, Ohio
dispatching office and the coordination of the same into NW's
train dispatching office at Brewster, Ohio, are entitled to
protective benefits under Merger Protection Agreement dated
January 10, 1962? The answer to that question, after a careful
and exhaustive study of all of the voluminous written data
presented by the parties and the oral arguments at the hearing,
is "yes". All former AC&Y train dispatchers in active service on
January 1, 1982 are entitled to protective benefits under the
Merger Protective Agreement effective January 10, 1962.

Item V of the January 10, 1962 Merger Protection
Agreement reads as follows:

... certain other applications may be later
filed with the Commission under Section 5(a)
of the Act involving the lease, control by
or merger into Norfolk & Western of the Akron,
Canton & Youngstown Railroad Company and
Pittsburgh & West Virginia Railway or transactions
may be undertaken by the carrier heretofore
named including Nickel Plate and Wabash involving
the diversion of Wabash traffic from the
Canadian National Railway to Nickel Plate, or
the diversion of Nickel Plate passenger
operations from the LaSalle Street Station
(Rock Island Lines) in Chicago, Illinois to the
Chicago and Western Indiana Railroad (Dearborn
Street Station), Chicago, Illinois, which
applications or transactions may have adverse
effects upon employees represented by the labor
organizations parties hereto, the extent to
which is not now determinable.

Transmittal letters dated December 11, 1961 and December 18, 1961, from Carrier's Assistant General Counsel to NW Senior Vice President John P. Fishwick merely state in each case that drafts of labor agreements are enclosed. Presumably, these were preliminary drafts of the Merger Protective Agreement which later became effective January 10, 1962. In a letter dated December 27, 1961 to Mr. Stuart T. Saunders, NW President, Mr. Fishwick wrote that "Section 2 is to be rewritten in consultation with Mr. Hicket in order to clarify its meaning ... this section is intended to limit employment protection to employees of the N & W, Nickel Plate and Wabash and, in addition, the AC&Y and Pittsburgh West Virginia in the event that the applications under Sections 5(a) are approved". This, says the Carrier, clearly indicates "that, at the time this language was drafted, the Carrier was referring only to its contemplated control through stock ownership and not to some hypothetical post merger transaction as now contended by the Organization". Whatever the contemplation or intent these letters do not determine the intent of the parties. They represent no mutual agreement.

For additional support, Carrier quotes from a letter dated October 10, 1964, from Mr. Fishwick to the General Chairman of the Brotherhood of Railway Trainmen wherein Mr. Fishwick, referring to the same item V, states that "The applications

referred to relates to stock control of AC&Y and lease of P&WV, and the transactions referred to are the transfer of Wabash traffic from Canadian Railways to Nickel Plate and the diversion of Nickel passenger trains from LaSalle Street to Dearborn Street. There is nothing in this paragraph which indicates in any way that a separate application is required for either of those transactions .. (Emphasis retained).

: Aside from the fact that this letter is a self serving document, it is significant that the control of AC&Y is not a "transaction". Only the transfer of Wabash traffic and the diversion of Nickel Plate passenger trains are "transactions" which do not require additional applications to the ICC.

Carrier agrees that AC&Y employes are covered under the January 10, 1962 Merger Agreement, but only those who were in active service on October 16, 1964.

Although NW acquired the capital stock of AC&Y on or about December 11, 1961, and the acquisition was approved by the ICC in Finance Docket No. 21920 on June 24, 1964, the fact is that the AC&Y remained a separate and distinct entity until January 1, 1982. It remained an Ohio corporation until on or about September 22, 1981 and a Virginia corporation as AC&Y Railroad, Inc., until on or about December 31, 1981. NW and AC&Y Railroad, Inc. merged on January 1, 1982 after the ICC issued its order in Finance Docket No. 29805.

As owner of the AC&Y capital stock, NW obviously had authority to direct the operation of that railroad as it deemed best to its interest. It did so, by electing officers of AC&Y who appointed operating personnel to carry out the appropriate orders and directives. It is immaterial that NW supervisors were assigned to operate AC&Y facilities or that a single time table was issued. The fact remains that all train dispatchers remained employees of AC&Y and not of NW. They worked and were paid under the rules of the schedule agreement between AC&Y and ATDA. The joint time table was merely a joint venture between two railroad companies.

After the mergers in Docket Nos. 21510, 21511, 21512, 21513, and 21514 were approved by the ICC on October 16, 1964, the January 10, 1962 Merger Protection Agreement became applicable in all its terms. To give effect to the terms and conditions of the January 10, 1962 Merger Protective Agreement, this Carrier and this Organization entered into an implementing agreement on June 28, 1968. Section 1 of that agreement reads as follows:

(a) Effective October 16, 1964, Norfolk and Western took into its employment all employees represented by the American Train Dispatchers Association employed by the New York, Chicago and St. Louis Railroad Company (including the Wheeling and Lake Erie District), the Matash Railroad Company and the Pittsburgh and West Virginia Railway Company and none of the present employees defined herein of any said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights or privileges pertaining thereto, at any time during such employment, as provided in the Merger Agreement of January 10, 1962.

This agreement is signed by Carrier representatives, by the Organization's President and by four (4) General Chairmen, each representing train dispatchers on the aforementioned railroads.

Not included in this implementing agreement are the train dispatchers who were working for the AC&Y. The reason is obvious. They were employees of the AC&Y. They were not employees of NW on October 16, 1964; they were not employees of NW on June 28, 1968, they first became employees of NW on January 1, 1982. Before that last date the NW did not exercise "control" over them, nor did the NW as a corporate entity "control" the operation of the AC&Y within the meaning and intent of Item V of the January 10, 1962 Merger Protection Agreement. Nor did the NW lease the equipment and facilities of the AC&Y.

"Control", as used in the January 10, 1962 Merger Protection Agreement, includes the employment of employees of a railroad merged into NW or leased by NW. "Control" does not exist when a stockholder who owns all or a majority of the capital stock of a railroad directs its operation. "Control" must be complete in every detail. Without the employment of AC&Y train dispatchers, NW did not acquire complete control of the AC&Y. Only on January 1, 1982, when AC&Y merged with NW did the former AC&Y train dispatchers become employees of NW and only then did NW fully "control" the operation of the facilities and the employees of the AC&Y. Only then did the NW have authority to coordinate

the locations at Akron and Brewster, Ohio. From October 16, 1961, when the ICC approved NW's petition to purchase AC&Y common stock, until January 1, 1982, when AC&Y merged into NW, NW did not "control" the AC&Y as contemplated in the January 10, 1962 Merger Protective Agreement.

Train dispatchers of former AC&Y are covered by the January 10, 1962 Merger Protective Agreement. Section 2 of said Agreement reads as follows:

It is further agreed that all of the provisions set forth in Section 1(a) of this Agreement respecting protection to be afforded employees in the event of merger of Nickel Plate into Norfolk & Western shall except as provided in Section 3 hereof apply and be afforded by Norfolk & Western to employees involved in each of the related transactions heretofore designated or described in this Agreement and, in addition, except as provided in Section 3 hereof the provisions of Sections 1(b), (c) and (d) shall apply and be afforded by Norfolk & Western to employees of Mahan, The Akron, Canton & Youngstown Railroad Company and Pittsburgh and West Virginia Railway in the event said line or lines are leased to, controlled by or merged into Norfolk & Western with equal force and effect as if they had been repeated herein with specific reference to each such transaction.

AC&Y merged into Norfolk & Western on January 1, 1982. All of the terms and conditions in Section 1(a), 1(b), 1(c) and 1(d) are applicable to train dispatchers of former AC&Y who were in active service on January 1, 1982.

With certain additions and modifications as they appear in Section 3 and Section 1(b) of the January 10, 1962 Merger Protection Agreement, the Washington Job Protection Agreement of 1936, as provided in Section 1(a) of that January 10, 1962 Merger Protection Agreement, applies and covers train dispatchers of former AC&Y in active service on January 1, 1982. This includes all who have been promoted to train dispatchers as of January 1, 1982. It follows that the twelve month "test period" is the twelve months immediately affected by the change.

The Organization contends that the term "general locality" as it is used in Section 1(b) of the January 10, 1962 Merger Protection Agreement is the area within twenty-five (25) miles from an employee's point of employment, as defined in Section 5(c) of the June 28, 1968 Implementing Agreement, which reads as follows:

The term "general locality" as used in this agreement is defined to mean an area within twenty-five miles from employee's point of employment as train dispatcher on the date affected, such mileage to be computed by the most direct and practicable highway route.

Carrier contends that it does not contemplate the transfer of employees beyond their general locality. This Arbitration Committee, therefore, has no authority to receive hypothetical questions. But the Memorandum of Agreement dated April 12, 1983, which established this Arbitration Committee says in paragraph 6

thereof that "The Committee shall make findings and render a written award with respect to each dispute listed". Question No. 4, heretofore quoted, is listed by the Organization. The Arbitration Committee is obligated to answer this question.

Carrier states that the distance between the train dispatching offices at Akron and Brewster is 34 miles. It cites precedents wherein The Disputes Committee in Docket No. 18 held that under the WJPA a distance of 48.68 miles did not require a change in residence and Award 421 of Special Board of Adjustment No. 605 held that a distance of 43 miles of commuting did not require a change in residence.

In Award 421 of Special Board of Adjustment No. 605 the Board was required to interpret ambiguous language in an agreement. Had the claimant in that case bid for a position he would have had to travel 43 miles. That Board held that 43 miles "as we view it, is marginal".

In Docket No. 18 the travel route was changed by use of a bridge instead of a ferry to cross the Mississippi River. It held that the change of the route was "within the provisions of the Agreement of May, 1936, Washington, D.C."

Here, however, the parties have discussed and they have negotiated an agreement of what constitutes "general locality". They have agreed that "general locality" is defined "to mean an

area within twenty-five miles from an employee's point of employment as train dispatcher on the date affected". But the June 28, 1962 Agreement does not cover AC&Y train dispatchers for the reasons heretofore stated. AC&Y did not merge into N&W until January 1, 1982. Twenty-five (25) miles may not be a proper and precise definition of "general locality" with respect to former AC&Y train dispatchers. The parties need to consider the circumstances of the train dispatchers at AC&Y locations to determine an equitable definition. The next item discussed is an example.

In another Memorandum of Understanding also executed on January 10, 1962, and attached to the January 10, 1962 Merger Protective Agreement, paragraph 5 thereof reads as follows:

5. In construing the last paragraph of Section 1(b) of said Agreement concerning the right of the Norfolk & Western to transfer the work of the employees protected under said Agreement, it is clearly understood and agreed that the Norfolk & Western may not transfer any employee (as distinguished from work) to another job within his craft or class beyond the same general locality as his point of employment on the date affected without the consent of his representative and that the refusal of such representative to agree to the transfer of such employee without the employee's consent shall not be subject to arbitration as provided in Section 1(d) of this Agreement.

It is the normal intent of the January 10, 1962 Merger Protective Agreement to indemnify an employee against lost earnings when, through no fault of his own, he earns less than had normal

work hours been available or through no fault of his own is unable to work due to coordination. It is not the intent of the Agreement for an employe to receive protective pay when a job assignment within his class or craft is available to him and he voluntarily refuses to accept that assignment.

The parties in negotiations and in mutual agreements set the rules when, how, and under what circumstances protective benefits are available. Section 1(b) of the January 10, 1962 Agreement provides that the Carrier has the right to transfer the work of the protected employees "throughout the merged or consolidated system". It provides that the Organization will cooperate and will enter into an implementing agreement to that end. Section 1(b) also provides that "implementing agreements will be negotiated to permit the assignment of employees who do not follow their work to other jobs within their craft or class in the same general locality as their point of employment on the date affected whether or not such jobs are within the same seniority district, without liability to furloughed employees who may be affected thereby". This language appears in the last paragraph of said Section 1(b).

Paragraph 5 of the Memorandum of Understanding dated January 10, 1962, affected employees in the ranges approved by the ICF in Finance Booklets 21510, 21511, 21512, 21513, and 21514. That is the intent as shown in the first paragraph of that Memorandum of Understanding. Train Dispatchers of the former ACDY

are not involved in that Memorandum of Understanding. The merger of AC&Y into NW did not occur until January 1, 1982, after the ICC approved Finance Docket No. 29805. Whatever may have been the employment conditions of the train dispatchers who were affected by the approval of the five Finance Dockets first above mentioned, they may or may not have been comparable to those train dispatchers who may be affected by the coordination of the Akron and Brewster train dispatching offices, which are only 34 miles apart.

To permit AC&Y employees to deliberately refuse a transfer to another merged and consolidated system would do violence to the purposes and intent of the January 10, 1962 Merger Protection Agreement. The Organization is obligated to negotiate an implementing agreement to effectuate this purpose. Akron and Brewster are only 34 miles apart. It would be inequitable and totally contrary to the purposes of the January 10, 1962 Merger Protection Agreement for a former AC&Y train dispatcher now at Akron, Ohio to refuse a transfer to Brewster, Ohio.

Organization's questions 4 and 5 need to be jointly considered in the light of special circumstances and conditions relating to the AC&Y operations. If the intended transfers are within reasonable distance of each destination, then the twenty-five (25) mile definition of "general locality" should not apply. ?

The twenty-five mile definition of "general locality" and paragraph 5 of the Memorandum of Understanding attached to the January 10, 1962 Merger Protection Agreement shall apply only to transfers of train dispatchers employed by the former railroads merged in NW by ICC orders approved in Finance Dockets 21510, 21511, 21512, 21513, and 21514. Neither should apply to former AC&Y train dispatchers.

Whether or not New York Dock-II conditions apply to former AC&Y train dispatchers depends on whether or not the transfer of train dispatching office from Akron to Brewster, Ohio is a "transaction" taken pursuant to the ICC approval in Finance Docket No. 29805.

On December 24, 1981, the ICC issued the following NOTICE OF EXEMPTION in Finance Docket No. 29805:

On December 18, 1981, the Norfolk and Western Railway Company (NW) notified the Commission that its wholly owned subsidiary, The Akron, Canton and Youngstown Railroad Company (Akron) will merge into AC&Y Railroad, Inc. (AC&Y) a wholly owned subsidiary of NW. AC&Y will be the surviving company and subsequently it will merge into NW, with NW the surviving company. The transactions are within a corporate family and come within the exemption described at 49 C.F.R. 1181.5(c) (3). The mergers will not result in any change in service levels, operations, or competitive balance with carriers outside corporate family. The purpose of the mergers is corporate simplification.

As a condition to use the exemption, any Akron and AC&Y employees affected by the merger shall be protected pursuant to New York Dock Ry-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). This shall satisfy the statutory requirements of 49 U.S.C. 10505 (g) (2).

The proposed transfer of train dispatching from Akron to Brewster was not taken pursuant to the above ICC order in Finance Docket No. 29805. It is not a "transaction" under the New York Dock-II Conditions. It is, rather a "coordination" permissible in the January 10, 1962 Merger Protective Agreement. The change was contemplated long before December 24, 1981 and the notice to coordinate the two train dispatching stations was served subsequent to the ICC approval of Finance Docket No. 29805 as well as after the merger of the AC&Y into NW was consummated. Under these circumstances, the terms "transaction" and "coordination" are in no way synonymous. The coordination of the two train dispatching stations was not an act resulting from the order in Finance Docket 29805. It follows that the employee protective conditions of New York Dock-II, in Finance Docket No. 29805, are not applicable to the transfer of train dispatching from the former AC&Y office at Akron, Ohio to the NW office at Brewster, Ohio. This coordination was not taken pursuant to any authorization by the ICC.

FINDINGS:

For all of the reasons stated in the Discussion and Opinion, the Consolidated Arbitration Committee makes the following findings:

1. By reason of the Memorandum of Agreement entered into by and between the Carrier and the Organization on April 12, 1983, this Consolidated Arbitration Committee has jurisdiction to render a written award on each of the issues raised by each of the parties.

2. On the questions presented by the Organization as they appear in Attachment "A" of the April 12, 1983 Memorandum of Agreement, the answers of the Consolidated Arbitration Committee are as follows:

(a) To Question #1, the answer is "Yes".

(b) To Question #2, the answer is that the NJPA applies to all former ACKY train dispatchers who are affected by NW's proposed elimination of the train dispatching office at Akron, Ohio and the coordination of the same into NW's train dispatching facility at Brewster, Ohio, as modified in the January 10, 1982 Manger Protective Agreement.

- (c) To Question #3, the answer is that Sections 1 and 2 of the January 10, 1962 Agreement apply to all former AC&Y train dispatchers in active service on January 10, 1962, or October 16, 1964, or on January 1, 1982, who will be affected by the changes proposed in NW's September 29, 1982 notice, including protection based on compensation received (and hours worked) in the twelve calendar month period immediately preceding the month in which they are affected by such changes.
- (d) To Question #4, the answer is "No".
- (e) To Question #5, the answer is "No".
- (f) To Question #6, the answer is "No".
- (g) To Question #7, the answer is obviously "No".

3. On the questions presented by the Carrier as they appear in Attachment "B" to the April 12, 1983 Memorandum of Agreement, the answer of the Consolidated Arbitration Committee is as follows:

- (a) To Question #1 the answer is that all former AC&Y train dispatchers at Akron, Ohio and Brewster, Ohio offices who were in active service on January 10, 1962 or on October 16, 1964, or on January 1, 1982 and who will be adversely affected by NW's elimination of the former AC&Y train dispatching facility at Akron, Ohio, will be entitled to the protections afforded under the merger protection agreement of January 10, 1962.
- (b) To Question #2 the answer is "No".
- (c) To Question #3 (a) the answer is "No", and to #3 (b) the answer is that attached to these findings and to the subsequent award and made a part hereof as if it appeared here verbatim is an implementing agreement containing all of the terms and conditions applicable to all of the answers of all the questions of both parties as expressed in these findings.

AWARD

Each of the questions propounded by the Organization and by the Carrier in Attachments "A" and "B" to the Memorandum of Agreement dated April 12, 1983, are answered in accordance with the findings. Attached hereto is an implementing agreement between the parties containing all of the terms and conditions discussed above and included in the findings, which by reference is made a part of this award and is valid as if the said terms and conditions of said implementing agreement were verbatim contained in this award. This implementing agreement is valid and becomes final and binding upon all parties on the date of the execution of this award.

CONSOLIDATED ARBITRATION COMMITTEE

DAVID DOLNICK, Chairman and Neutral Member

M. E. COLLINS, Organization Member

J. D. GERRARD, Carrier Member

DATED:

IMPLEMENTING AGREEMENT

By notice dated September 29, 1982, the Norfolk and Western Railway Company (hereinafter referred to as "NW") served notice upon the American Train Dispatchers Association (hereinafter referred to as "ATDA") of its intention to transfer the territory under the jurisdiction of the train dispatching office at Akron, Ohio (former Akron, Canton & Youngstown Railroad Company ("AC&Y")) to the train dispatching office at Brewster, Ohio, on or about January 2, 1983.

The purpose of this agreement is the practical implementation of the NW's September 29, 1982 notice and the resolution of disputes that have arisen in connection therewith.

WHEREAS, by order dated June 24, 1964, the Interstate Commerce Commission approved the NW's acquisition of the AC&Y common stock (Finance Docket No. 21920), as well as other transactions, and the January 10, 1962 merger protection agreement; and

WHEREAS, the effective date of all of these transactions was October 16, 1964; and

WHEREAS, the AC&Y merged into NW on January 1, 1965; and

WHEREAS, pursuant to the provisions of Section 1 (b) of the agreement effective January 10, 1962, NW shall be entitled to transfer the work of the employees throughout the merged or

consolidated system and that the labor organizations will enter into implementing agreements providing for the transfer of employees to follow their work and the employees, their organization and the Carrier will cooperate to that end;

NOW, THEREFORE, pursuant to the aforesaid agreement of January 10, 1962, the parties signatory hereto mutually agree that, as pertains to train dispatchers represented by the Organization signatory hereto, the train dispatching office and territory of the Akron District, former AC&Y, Akron, Ohio will be transferred to the train dispatching office at Brewster, Ohio as described by Carrier's notice dated September 29, 1962 and attached hereto as Attachment "A", subject to the following:

ARTICLE I

Effective with the changes described in Attachment "A" hereto train dispatchers on the AC&Y District dispatchers office roster whose names do not appear on the Brewster train dispatchers roster will be dovetailed into the Brewster train dispatchers roster in accordance with their seniority dates, and such train dispatchers shall thereafter be subject to the provisions of the former Wheeling and Lake Erie Agreement effective November 1, 1947 as amended and supplemented. A copy of such combined seniority roster as it will stand on the effective date of the changes described in Attachment "A" is attached hereto as Attachment "B".

ARTICLE II

NW will qualify dispatchers now working in the Akron, Ohio dispatching office on territory on which they are not already qualified as set forth in Attachment "C" attached hereto.

ARTICLE III

An employe whose position is abolished or an employe who is displaced as a result thereof will exercise his seniority in accordance with existing rules and agreements.

ARTICLE IV

Section 1

Subject to Section 2 of this Article IV, all former ACHY train dispatchers in active service on January 10, 1962, or on October 16, 1964, or on January 1, 1962, and affected by this coordination will receive the benefits provided for in the January 10, 1962 Wager Protection Agreement subject to the terms and conditions as set forth therein.

Section 2

There shall be no duplication or pyramiding of benefits receivable by an employee under this agreement and any other agreement or protective arrangement. In the event an employee is eligible for protection under this agreement and other agreement(s)

or protective arrangement(s), such employee shall, within thirty (30) days after the date of this coordination, make an election in writing as to whether he desires to retain the protection and benefits available to him under any of the other agreements or protective arrangements or to receive the protection and benefits provided under the provisions of this agreement. In the event the employee fails to make such election within the said 30-day period, he shall be deemed to have elected the protection and benefits provided under provisions of this agreement to the exclusion of protection and benefits under any other agreement or arrangement.

In the event of any conflict between the provisions of this agreement and prior employee protective agreements or protective arrangements, the provisions hereof shall govern as to all matters, except for the election permitted in this section.

ARTICLE V

Active Service:

The term "active service", for the purpose of this agreement, is defined to include all former ACRV employees who were working or holding an assignment as train dispatcher, or in the process of transferring from one assignment to another (whether or not January 10, 1962, or October 16, 1964, or January 1, 1968, as the

case may be, was a work day), all extra employees who were working or were available for service as train dispatcher on January 10, 1964, or on October 16, 1964, or on January 1, 1982, as the case may be, and who are expected to respond when called for service as train dispatcher.

ARTICLE VI

This agreement shall be implemented upon fifteen (15) days bulletin board notice to the employees involved, with copy to the general and office chairmen, showing the positions to be abolished, the name and seniority dates of the regular occupants and the date the change will be made.

ARTICLE VII

Where rules, other agreements or practices conflict with this agreement the provisions of this agreement shall apply.

Signed at Roanoke, Virginia this _____ day of _____, 1983.

FOR AMERICAN TRAIN DISPATCHERS
ASSOCIATION:

FOR NORFOLK AND WESTERN RAILWAY
COMPANY:

General Chairman

Assistant Vice President
Labor Relations

General Chairman

APPROVED:

Vice President

Vice President

September 29, 1982

All Pittsburgh Division, Akron District, former Akron, Canton and Youngstown Railroad (AC&Y) Train Dispatchers

All Pittsburgh Division, former Wheeling and Lake Erie (WLE) Train Dispatchers,

Notice is hereby given of the Carrier's intention to transfer the train dispatching office and territory of the Akron District, former Akron, Canton & Youngstown Railroad, Akron, Ohio, to the train dispatching office at Brewster, Ohio, on or about January 2, 1983.

Concurrent with the above changes, the following positions will be abolished on or about January 2, 1983:

Akron, Ohio

<u>Position</u>	<u>Present Incumbent</u>
1st Trick Dispatcher	W. S. Barnes
2nd Trick Dispatcher	J. C. Spinelli
Relief	L. C. Geissman

The territory of the AC&Y District extends from Delphos, Ohio M.P. 0, to McGadore, Ohio, M.P. 169.3, which will be assigned to the train dispatcher at Brewster, Ohio now handling the west end territory.

Upon consolidation of the Akron, Ohio Train Dispatching Office into the Brewster, Ohio Train Dispatching Office, the controlling agreement will be the former Wheeling and Lake Erie Agreement effective November 1, 1947, as amended and supplemented.

It is estimated twenty-two (22) dispatchers will be affected by the above change.

The above operational change is being made to improve the efficiency of train movement on the Pittsburgh Division and to effect economies over and above the present method of operation.

M. O. Finley

M. O. Finley
Superintendent Transportation
Chief Dispatcher

W. W. Huyett

W. W. Huyett
Chief Train Dispatcher

NORFOLK AND WESTERN RAILWAY COMPANY

Dispatchers - Pittsburgh Division
W&LE and Akron District

January 2, 1983

Rank	Name	Soc. Sec. No.	Sen. Date	Remarks
1	Condon, W. G.	705-12-9496	7-05-46	
2	Litten, J. R.	286-18-9259	8-24-49	
3	Copeland, R.	705-12-9557	1-19-50	Prom
4	Robinson, P. E.	290-16-4582	5-11-50	Disb
5	Huyett, W. W.	510-12-6479	10-31-52	
6	Finley, M. O.	235-22-7540	12-11-53	Prom
7	Williams, E. R.	715-10-8980	3-07-55	Prom
8	Terry, V. N.	290-24-9977	6-14-60	
9	Barns, W. S.	301-22-8415	8-16-61	Disb.
10	Mentro, R. M.	285-34-0941	9-26-61	
11	Donato, R. J.	276-24-8833	6-12-62	
12	Zureich, D. N.	294-34-3584	4-17-63	Prom
13	Snyder, Jr., R. N.	308-38-7213	4-29-63	
14	Haggober, V. A.	295-24-8470	6-12-66	
15	Geissman, L. C.	287-28-8962	5-25-67	
16	Decker, D. L.	277-38-8322	11-19-67	
17	Spinelli, J. C.	276-24-0325	12-17-67	
18	Shaul, R. R.	293-16-1037	7-13-68	
19	Nye, Jr., E. L.	272-36-4671	6-16-69	
20	Hess, E.	223-72-7112	4-02-70	
21	Gray, J. L.	277-38-8502	7-01-70	Prom
22	Hupp, W. E.	299-32-2107	7-17-74	
23	Garritano, F. P.	282-42-9836	7-18-74	
24	Feebles, T. W.	301-46-8846	8-28-75	
25	Grettinger, S.	297-46-3447	7-21-78	
26	Hanner, L. D.	301-42-6262	11-11-80	