Arbitration pursuant to Article I - Section 4 of the employee protective conditions developed in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) as provided in ICC Finance Docket No. 30095

PARTIES	The Baltimore and Ohio Railroad Company)	
	The Newburgh and South Shore Railway Company)	
TO	)	
	and)	DECISION
DISPUTE	)	
	United Transportation Union)	
	Brotherhood of Locomotive Engineers)	

QUESTIONS AT ISSUE:

1. Do the provisions of Articles I - B., III, IV, V and VIII of the Carriers' proposed agreement meet the conditions of and provide an appropriate basis for the selection and assignment of forces in an application of New York Dock Conditions with respect to B&O's acquisition of Newburgh and South Shore facilities which was the subject of the Carrier's January 5, 1983 notice?

2. If the answer to #1 is negative, then what would be the appropriate bases in these Articles?

BACKGROUND:

On March 28, 1983, the Interstate Commerce Commission (ICC) served its Decision in Finance Docket No. 30095 approving the application of the Baltimore and Ohio Railroad Company (B&O) for authority under 49 U.S.C. 11343 - 11345 to acquire the principal assets of the Newburgh and South Shore Railway Company (N&SS) and to integrate the operations of N&SS into the operations of B&O. The Commission in its Decision imposed conditions for the protection of employees set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979) (New York Dock Conditions).

On January 5, 1983, B&O and N&SS had served notice upon the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) pursuant to Article I, Section 4 of the New York Dock Conditions. The notice stated that B&O intended to purchase and operate the N&SS as part of the B&O Cleveland Terminal Yard operation. The notice also stated that there were four regular B&O yard assignments and one regular N&SS yard assignment working in the Cleveland area and that after the purchase it was not anticipated that the total number of regular yard assignments would be reduced. The notice further stated it was contemplated that certain N&SS yard service employees holding regular or extra assignments would have their seniority transferred to B&O and would appear on the appropriate rosters protecting B&O assignments after which such employees would work under rules applicable to B&O employees.

Further pursuant to Article I, Section 4 of the New York Dock Conditions, the parties met for the purpose of reaching agreement with respect to the selection and assignment of forces made necessary by the transaction. The Carriers submitted a written propoosal. However, the parties were unable to reach agreement, and the dispute remained unresolved.

Thereafter, the Carriers invoked the arbitration procedures of Article I, Section 4 of the New York Dock Conditions. The parties did not select a Neutral Referee as provided in Article I, Section 4 and as further provided therein the Carriers applied to the National Mediation Board for appointment of a Referee. That agency appointed the undersigned on June 22, 1983.

Hearing was held in this matter pursuant to Article I, Section 4(a)(1) on July 21, 1983. The parties presented prehearing submissions and oral argument, and at the conclusion of the hearing the parties requested and were granted the opportunity to file post hearing briefs. The parties agreed to extend the time for a Decision in this case beyond that specified in Article I, Section 4(a)(3). All parties filed post hearing briefs.

During the hearing the parties also agreed that if prior to Decision in this case the Decision issued in Baltimore & Ohio RR. Co. - Newburgh & South Shore Ry. Co. and Bro. Maintenance of Way Employees - United Steel Workers of America (Seidenberg, Neutral), an Article I, Section 4 proceeding involving some of the same issues as the instant case, that Decision should be considered by this Neutral Referee. A decision in that case was rendered August 31, 1983, and this Neutral received a copy on September 6.

FINDINGS:

The parties have complied with the procedural requirements of Article I, Section 4 of the New York Dock Conditions, and the questions at issue noted above are properly before this Neutral for determination.

N&SS is a small switching and terminal company controlled by United States Steel Corporation. It operates approximately six miles of main line and twenty-two miles of side, yard and miscellaneous tracks in the Cleveland, Ohio area. B&O and N&SS facilities in the Cleveland area are in close proximity. Under the transaction authorized by the ICC in this case, B&O would integrate all N&SS operations into B&O operations in the

Cleveland Terminal Yard. Presently there are four B&O assignments and one N&SS assignment operating in the yard. B&O proposes to transfer the N&SS assignment to the B&O and also to transfer five active N&SS trainmen and enginemen to man that assignment. Upon transfer the five would become B&O employees, their seniority dovetailed into B&O seniority rosters, and they would work under applicable B&O agreements.

In addressing the Questions at Issue in this case the parties have raised matters of jurisdiction, procedure and substance. The ultimate disposition of the Questions at Issue turns upon resolution of these matters.

Authority of Neutral to Consider UTU Proposal for Implementing Agreement

In their post hearing brief the Carriers have raised an issue which they insist must be resolved at the outset of this proceeding. The Carriers urge that the UTU's written proposal for an implementing agreement, first made known to the Carriers in the UTU's prehearing brief, should not be considered because that proposal was advanced only during arbitration and not during negotiations. The Carriers argue that the UTU's action undermines the intent of Article I, Section 4 with respect to negotiations for an implementing agreement.

The Carriers' point is well taken that all proposals for an implementing agreement should be presented and discussed by the parties during negotiations under Article I, Section 4. Otherwise, the opportunity for a mutual, voluntary agreement will be diminished.

However, it does not follow that a Neutral Referee acting pursuant to Article I, Section 4 may not consider a proposal for an

implementing arrangement not presented or considered during negotiations for an agreement. In order for a Neutral Referee to discharge his responsibilities under Article I, Section 4 the Neutral Referee must be free to consider any and all proposals for an implementing arrangement. The Carriers' position in the instant case effectively would confine the Neutral's consideration to the Carriers' proposal.

In the final analysis any damage to the negotiating process perceived by the Carrier is outweighed by the necessity for the Neutral Referee to have the fullest possible access to the parties positions on issues with respect to which the Neutral Referee in fulfilling his duties under Article I, Section 4 ". . . should play a major role in formulating or devising a scheme for the rearrangement of forces where the parties have not been able to settle this matter." Durango & Silverton Narrow Gauge RR. Co. - Acquisition and Operation, Finance Docket No. 29096.

Accordingly, the Neutral Referee concludes that the UTU's written proposal for an implementing arrangement may be considered in this proceeding.

Transfer of Employment Relationships of N&SS Employees to B&O

As noted above the Carriers propose to transfer five active N&SS employees to B&O to man the transferred N&SS assignment. As of July 1983 seventy-four N&SS operating employees maintained rights to the N&SS assignment working in the Cleveland Terminal Yard. Forty-nine employees, fifteen of whom were actively employed, held seniority rights to trainmen positions on the N&SS. Twenty-five held rights to firemen positions,

twenty-three of whom also held rights as engineers. Nine trainmen were actively employed, three holding regular positions and six working from an extra board. Six firemen-engineers were actively employed.

The Carriers emphasize that the transaction in this case is limited,not involving either acquisition of N&SS or all of its personnel. The Carriers argue that the New York Dock Conditions deal solely in terms of this specific transaction. While the Carriers acknowledge the number of trainmen and enginemen having an employment relationship (active, leave of absence, furloughed or disabled) with the N&SS, the Carriers argue that the only N&SS employees affected by the transaction in this case are those five specified in its January 5, 1983, notice. The Carriers argue that the reassignment only of those five N&SS employees was made necessary by the transaction and accordingly that they are the only employees properly subject to an implementing agreement or arrangement under Article I, Section 4 of the New York Dock Conditions.

The Carriers support their contentions with an implementing agreement reached under Article I, Section 4 with the Brotherhood of Railway Airline and Steamship Clerks (BRAC) involving the same transaction. That agreement covers only active N&SS clerical employees as transferrable to B&O and relegates those in inactive status to first consideration as new hires on the B&O,which the Carriers propose to do in the instant case. The Carriers urge that the implementing arrangement resulting from this arbitration should give similar treatment to all N&SS enginemen and trainmen.

The Carriers argue that economically they could not absorb the costs of transferring the employment relationships of all N&SS

trainmen and enginemen to B&O. The Carriers contend that should they be required to do so implementation of the transaction would be jeopardized. The Carriers point out that the N&SS currently is in poor economic condition, facing bankruptcy, and that the transaction in this case would remedy that situation. The Carriers argue that if the transaction becomes economically infeasible and the N&SS fails, all trainmen and enginemen having an employment relationship with the N&SS will be in a worse position than if the Carriers' proposal to transfer five is adopted in the instant case.

Noting the similarity in the provisions of the Amtrak C-1 Labor Protective Conditions and the New York Dock Conditions, the Carriers cite several arbitration awards holding that employees on furlough, leave of absence or otherwise not holding a position at the time of a transaction are not adversely affected by the transaction and thus are not entitled to the allowances provided in the Amtrak C-1 Conditions. By analogy the Carriers argue that the N&SS inactive trainmen and enginemen (furloughed, leave of absence or disabled) are not affected by the transaction in this case and thus are not entitled to the benefits of the New York Dock Conditions. The Carriers urge that the protections of those conditions extend only to employees dismissed or displaced as a result of the transaction and by definition an employee must be active before he becomes dismissed or displaced. The Carrier contends that nothing in the New York Dock Conditions guarantees all future work opportunities to inactive employees.

The Carriers argue that the transfer of the employment relationships of all N&SS trainmen and enginemen to B&O would effectively determine the size of B&O's work force. The Carriers cite a Decision under Article I, Section 4 by this Neutral Referee involving the B&O which held that determination of the size of the Carrier's work force is a matter exclusively for the Carrier and beyond the jurisdiction of a Neutral Referee acting under Article I, Section 4 of the New York Dock Conditions.

The UTU disputes the Carriers' characterization of the transaction in this case as a limited acquisition. The Organization points out that the Carriers applied for and were granted authority for the transaction under 49 U.S.C. §11343 covering "a purchase, lease or contract to operate property of another carrier" and not under 49 U.S.C. §10101 governing acquisitions. The Organization further contends that the "integration" of N&SS facilities into B&O facilities in actuality represents a coordination or consolidation of the Carriers' Cleveland Terminal Yard operations.

The UTU denies that it challenges the Carriers' right to determine the size of their work force. The Organization interposes no objection to the Carriers' decision to add one crew to the B&O Cleveland Terminal Yard operations or to utilize five employees to man that crew. The UTU claims that it challenges only the manner or method by which those five positions are to be filled.

The UTU argues that under the New York Dock Conditions imposed by the ICC and under 49 U.S.C. §11347, pursuant to which the Carriers brought their application for ICC approval of the transaction in this case, the interests of all N&SS employees, active and inactive, must be

protected. The Organization points to a Decision by Neutral Referee Neil P. Speirs under Article I, Section 4 of the Oregon Short Line III Conditions, essentially the same as the New York Dock Conditions, involving the sale of a narrow gauge railroad line by the Denver & Rio Grande Western Railroad to the Durango & Silverton Narrow Gauge Railroad. Neutral Referee Speirs included furloughed employees within the scope of the arbitrated implementing arrangement flowing from his Decision, and the Organization urges that the same should be done in this case.

The UTU argues that the Amtrak C-1 arbitration awards relied upon by the Carriers are inapposite. There the issue was whether employees were entitled to dismissal or displacement allowances. The Organization contends that in the instant case a determination as to the selection of forces must precede any question of whether particular individuals are entitled to specific allowances under the New York Dock Conditions. Article I, Section 4 clearly provides that the selection of forces shall be "from all employees involved on a basis accepted as appropriate for application in the particular case. . . ." The UTU argues that the Carriers' proposal on this issue would place the adverse effects of the transaction disproportionately upon N&SS employees.

The UTU attacks the Carriers' reliance upon economic considerations in support of their position in this case. The Organization contends that there is no factual basis for the arguments because the Carrier will reap a substantial return on its investment. The Organization also urges that it is the function of a Neutral Referee under Article I, Section 4 of the New York Dock Conditions to assure that the assignment of forces

made necessary by the transaction shall be on an equitable basis. The Organization asserts that the Neutral has no jurisdiction to entertain arguments of economic impact in determining what the terms of the arbitrated implementing arrangement should be.

The UTU analogizes the Carriers' proposal on this issue to a pattern of conduct rejected by the ICC in Southern Ry. - Control - Central of Georgia Ry., 331 ICC 151 (1967). In that case Southern attempted to minimize the number of employees adversely affected by avoiding displacement of Southern employees at the facilities which absorbed the work of the Central of Georgia. Central employees bore the brunt of all displacements. As that plan for selection of forces was rejected by the ICC so should the Carriers' plan be rejected by the Neutral Referee in the instant case.

The issue of whether under the transaction in this case N&SS employees not selected by the Carriers for transfer to B&O nevertheless should be transferred by virtue of an arbitrated implementing arrangement under Article I, Section 4 of the New York Dock Conditions was resolved by Neutral Referee Seidenberg in his Decision of August 31, 1983. While that Decision involved the maintenance of way craft it also dealt with many of the same arguments advanced by the parties in the instant case. The Decision reads in pertinent part:

> When we next turn to the putative contractual relation between the B&O and the N&SS employees whom the B&O did not want to add to its work force, or who were in a furloughed status at the time the ICC approved the application for purchase, we conclude that all the N&SS employees were involved in the transaction and had viable rights that should be protected and not vitiated by this proceeding. While it is unquestioned that the B&O has the sole discretion to determine the size

> of the work force it wants to use from N&SS forces. No Neutral can prescribe the size of the work force that must be utilized. However, this does not mean that the B&O can, or should be permitted, unilaterally to extinguish the vested seniority and pension rights of inactive N&SS employees. The B&O intends to operate on N&SS property and it is inappropriate for the B&O to take action that would cause the N&SS to lose permanently their recall rights to work on N&SS territory, if the exigencies of operations should warrant such a happy state. We find the B&O's amended proposal to hire inactive N&SS employees as new B&O employees, is not a satisfactory resolution of this problem.
>
> We find the instant situation does not represent situation where the carrier is abandoning a property or closing an office. The B&O intends to integrate and operate the N&SS property as part of its Cleveland Yard. Consequently, this continued operation will require the services of maintenance of way employees. We find that it is only fair and just to permit N&SS employees active and inactive, under appropriate circumstances, to have a priority to perform work on the N&SS property. It seems particularly appropriate to preserve the seniority of these 16 employees whose seniority covers a range from 33 to 4 years. All the N&SS employees should be on a seniority roster and not be excluded from whatever work opportunities might develop in due course in the N&SS area.

This Neutral finds the rationale of the Seidenberg Decision applicable to the trainmen and enginemen in the instant case. Analysis of the Decision reveals no patent error. This Neutral finds the Decision persuasive as to the issue in this case.

In the final analysis this Neutral Referee must conclude that the Organization's proposal on this issue is fairer and more equitable to all employees affected by the transaction than the Carriers' proposal. Accordingly, the Organization's proposal is included in the attached implementing arrangement.

Authority of Neutral Under Article I, Section 4
to Apply B&O Agreements to Former N&SS Employees

As noted above, in their notice of January 5, 1983, the Carriers proposed that all former N&SS employees to be transferred to B&O thereafter would work under B&O agreements. The UTU proposes that the N&SS employees transferred to B&O work under existing N&SS agreements.

In the Carriers' view the fact that N&SS is bordering upon bankruptcy is reason enough to place all transferred employees under the B&O agreements. The Carriers contend the requirement that they apply the existing N&SS agreement and rules to transferred employees would be so expensive that the Carriers would be required to reevaluate the economic feasibility of the transaction. The Carriers point out that an acquisition of trackage rights granted by the ICC in Finance Docket No. 24309 was never consummated because the projected cost of labor protective conditions rendered the transaction economically infeasible and impractical. The Carriers warn that the transaction in the instant case may suffer the same fate should they be required to apply existing N&SS agreements.

The Carriers also compare the economic situation of the N&SS with the Rock Island at the time of the so-called Miami Accord (Van Wart, Neutral) which determined that a Carrier exercising trackage rights pursuant to a directed service order from the ICC was not obligated by existing agreements to take into its employment employees of the Rock Island where the acquiring Carrier had no need for such employees. Maintaining that transfer of even the five N&SS enginemen and trainmen

essentially was "fortuitous," the Carriers argue that there is no basis for requiring application of existing N&SS agreements where the Carrier has no real need for the employees transferred.

The Carriers maintain that there is nothing in the New York Dock Conditions which restricts the authority of a Neutral Referee acting under Article I, Section 4 from placing employees transferring to a purchasing Carrier under the agreements and rules of the purchasing Carrier, in this instance the B&O.

The Carriers specifically urge that no such restriction appears in Article I, Section 2 of the conditions which reads:

> 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 statutes.

The Carriers point out that the ICC drew Section 2 from the Amtrak C-1 conditions and that the Section did not originate with respect to any merger, acquisition or control transaction such as the one in the instant case. The Carriers contend that Section 2 is not dispositive of the question of agreement application and preservation in transactions where one Carrier acquires the physical assets of another and the latter Carrier ceases to operate.

The Carriers urge that inasmuch as the question of agreement application and preservation is one for negotiation under Article I, Section 4 it is appropriately one for determination by a Neutral Referee under that Section when negotiations fail to produce an accord. The

Carriers argue that had the ICC intended the contrary it would have so held. As the Carriers read the ICC's June 3, 1981, decision in Durango & Silverton Narrow Gauge RR. Co. - Acquisition and Operation, Finance Docket 29096 and its January 4, 1982, decision in Bro. of Locomotive Engineers v. Louisville and Nashville RR. Co. and Missouri Pacific RR. Co., Finance Docket No. 29735 the Commission has strongly indicated that a Neutral Referee under Article I, Section 4 has the jurisdiction to determine agreement applicability and preservation.

The Carriers cite two arbitration awards under Article I, Section 4 of the New York Dock Conditions, one by Neutral Jacob Seidenberg arising out of Conrail's acquisition of the Detroit Terminal Railroad Company and one by Neutral Robert Peterson involving common point consolidations by the Norfolk and Western Railway Company and the Southern Railway. The Carriers argue those awards stand for the proposition that employees transferred from one Carrier to another may and should be placed under the agreements of the Carrier to which transferred.

Finally the Carriers contend that nothing in the Railway Labor Act, 45 U.S.C. §§151, et seq., restricts a Neutral Referee acting under Article I, Section 4 from determining questions of agreement applicability and preservation. The Carriers' theory in support of this argument rests upon 49 U.S.C. §11341(a) which provides:

> A Carrier, corporation or person participating in a transaction is exempt from antitrust laws and from all other law, including state and municipal law, as necessary to let that person carry out the transaction, hold, maintain and operate property, and exercise control or franchises acquired through the transaction.

The Carrier contends that this proposition has been recognized by the Commission in Union Pacific - Control - Missouri Pacific; Western Pacific, 366 ICC 459 and the courts in Bro. of Locomotive Engineers v Chicago and Northwestern Ry. Co., 314 F2d 424 (8 Cir. 1963).

The UTU urges that a Neutral Referee under Article I, Section 4 has the jurisdiction to preserve the collective bargaining rights of employees affected by a transaction but does not have the jurisdiction to alter the rates of pay,rules or other collective bargaining rights of those employees. In support of this proposition the Organization places heavy reliance upon a line of decisions rendered under Article I, Section 4 of the New York Dock Conditions holding that a Neutral Referee has no authority to alter rates of pay, rules or other benefits preserved by Section 2 of the New York Dock Conditions. Among these decisions are Southern Ry. Co. and Bro. of Railroad Signalmen, decided October 5, 1982, and Intl. Assn. of Machinists and Aerospace Workers and Baltimore and Ohio RR. Co.; Louisville and Nashville RR. Co., decided January 19, 1983, both of which were rendered by the Neutral Referee in this case.

The UTU argues that the plain wording of Article I, Section 2 of the New York Dock Conditions mandates preservation of N&SS employee rights under existing agreements. The Organization also contends that Section 2 implements the requirements of 49 U.S.C. §11347 providing that where the ICC is required to impose labor protective conditions, as it is in the instant case, the ICC ". . . shall require the Carrier to provide a fair arrangement at least as protective of the interests of the employees who are affected by the transaction as the terms imposed under this section

for February 5, 1976, and the terms established under Section 565 of Title 45. . . ." The Organization further contends that such benefits must be preserved until changed in accordance with the provisions of the Railway Labor Act, 45 U.S.C. §156.

Finally, the UTU contends that although a Neutral Referee under Article I, Section 4 has no jurisdiction to modify existing collective bargaining agreements, it does not follow that the Neutral has no jurisdiction to preserve such agreements. As the UTU reads Article I, Section 2, such preservation is mandated. The UTU contends that the arbitrated implementing arrangement in this case should contain specific provisions meeting that requirement.

The arguments advanced and the authorities relied upon by the Carriers and the UTU on this point have been dealt with, in one form or another, by the line of arbitration awards under Article I, Section 4 cited by the UTU. Those decisions hold that a Neutral Referee has no jurisdiction under Article I, Section 4 to modify existing collective bargaining agreements. As noted above, two of those decisions, one on this property, were rendered by this Neutral Referee. Furthermore, Neutral Referee Seidenberg in the face of substantially similar arguments as advanced in the instant case declined to depart from this line of cases in his August 31, 1983, Decision. This Neutral finds no compelling reason to reach a contrary result here.

In the instant case the Organization seeks affirmative provisions in the arbitrated implementing arrangement which would specify the continuity of collective bargaining rights for both N&SS employees and

B&O employees. Such effort by the UTU injects an element not present in the Southern Ry. - Signalmen and B&O - IAM decisions rendered by this Neutral Referee.

As noted above, the UTU specifically argues that the Neutral Referee has and must exercise jurisdiction to include such provisions in the arbitrated implementing arrangement in this case. Analysis of the UTU's proposals for inclusion in the arbitrated implementing agreement reveals that they do nothing more than implement the rights of N&SS and B&O employees under existing agreements. Neutral Referee Seidenberg included similar provisions in the arbitrated implementing arrangement arising from his August 31 Decision. This Neutral Referee concludes that jurisdiction exists under Article I, Section 4 to include such provisions in the arbitrated implementing arrangement and that the provisions proposed by the UTU should be included in the attached arrangement.

Seniority of N&SS Employees Transferring to B&O

The parties disagree with respect to how the seniority of N&SS employees transferring to B&O should be treated. The Carrier proposes to dovetail their seniority into existing B&O rosters, give them preferential selection for work on the former N&SS properties and allow them to exercise seniority at locations other than the Cleveland Terminal under certain conditions. The BLE, which represents the B&O engineers, objects to any seniority modification which would extend the seniority of N&SS transferees beyond the Cleveland Terminal. The UTU agrees and proposes that transferred N&SS employees acquire seniority rights only to positions in the Cleveland Terminal.