In the Matter of the Arbitration Between:	Pursuant to Article I, Section 4 of the New York Dock Conditions
THE SOUTHERN RAILWAY COMPANY and THE NORFOLK AND WESTERN RAILWAY COMPANY, Carriers,	ICC Finance Docket No. 29430
and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES (AFL-CIO-CLC), Organization.	OPINION AND AWARD

Date of Hearing: June 11, 1984
Place of Hearing: Atlanta, Georgia
Date of Award: July 17, 1984

Mr. John B. LaRocco
Arbitrator
625 No. 1 Woodside Sierra
Sacramento, CA 95825

APPEARANCES

For the Carriers:

Mr. R. S. Spenski
Assistant Vice President,
Labor Relations
Southern Railway Company
Personnel Department
185 Spring Street
Atlanta, Georgia 30303

Mr. R. C. Steele, Jr.
Assistant Vice President,
Labor Relations
Labor Relations Department
Norfolk and Western Railway
Company
Roanoke, Virginia 24042

For the Organization:

Mr. E. J. Neal
International Vice President
Brotherhood of Railway Clerks
4713 Foxhall Circle, S.W.
Roanoke, Virginia 24018

Mr. M. R. Magnusen
Executive Director - Industry
Relations
Brotherhood of Railway Clerks
3 Research Place
Rockville, Maryland 20850

OPINION

I. BACKGROUND AND SUMMARY OF THE FACTS

By order dated March 19, 1982, incorporated into Finance Docket No. 29430 (Sub No. 1), the Interstate Commerce Commission ("ICC") approved the Norfolk Southern Corporation's petition to acquire and control the Norfolk and Western Railway Company ("NW") and the Southern Railway Company ("SR") including their respective subsidiary and consolidated enterprises. To compensate employees adversely affected by the acquisition, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on all corporate parties pursuant to the relevant enabling statute. 49 U.S.C. §11347.

On or about May 19, 1982, the Carriers and the Organization entered into a general implementing agreement pursuant to Article I, Section 4 of the New York Dock Conditions. Article II, Section 8 of the May 19, 1982, agreement provides:

> "Transactions requiring the relocation or reduction in work force of more than five (5) employees will be handled in accordance with Section 4, Article I, of the New York Dock Conditions."

In essence, the parties deferred the negotiation of specific agreements regarding the more significant transactions which would arise in the years following the corporate

combination. Thus, the Carriers trigger the Article I, Section 4 notice, bargaining and impasse provisions of the New York Dock Conditions whenever they intend to engage in a transaction involving the relocation or reduction in force of six or more employees.

By written notice dated February 15, 1984, the Carriers informed the Organization of their "... intention to coordinate customer accounting functions performed by the NW employees at Roanoke, Virginia, into the SR Customer Accounting Department at Atlanta, Georgia, on or about May 16, 1984 ..." The Carriers' notice contemplated the abolition of thirty-four rank and file NW clerical positions and the establishment of seventeen exempt and partially exempt positions in the SR Customer Accounting Department. Fourteen of the seventeen proposed Atlanta positions would be totally exempt (or excepted) from the relevant SR collective bargaining agreement. The three remaining positions would be generally covered by the SR schedule agreement but expressly excluded from the promotion, assignment and displacement terms contained in the contract.[1]

After eight bargaining sessions, the parties were unable to negotiate an implementing agreement. The Carriers invoked the mandatory interest arbitration procedures of Article I, Section 4(1-4) of the New York Dock

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[1]These will be referred to as PAD or partially excepted positions.

Conditions. An arbitration hearing was held at Atlanta, Georgia, on June 11, 1984. Both parties had filed prehearing submissions and, at the hearing, they presented supplemental legal authority and extensive oral arguments in support of their respective positions. At the Arbitrator's request, the Carriers and the Organization agreed to extend the thirty day time limitation for issuing this decision.

While the parties have not agreed to any specific provision of an implementing agreement governing the instant transaction, there were basically only two major issues which precipitated the deadlock in negotiations. To fully understand these issues, the substantial differences between the customer accounting processes on the NW and the SR must be highlighted.

After a bank credits the NW's account as the result of a direct customer deposit, it sends copies of the check and customer remittance advice to the NW. Customer accounting clerical employees apply the checks to a freight bill, record information on forms and into computers, mail bill reminders to customers, file and reconcile the customers' replies, allocate bates numbers to unapplied cash, balance the Carrier's accounts, initiate collection proceedings and ascertain uncollectibles. Each clerk is assigned to perform a specific task along the assembly line process.

Unlike the NW, the SR Customer Accounting Department is organized according to shipper as opposed to accounting function. Since the SR auditors must perform a variety of

duties, the Carrier requires applicants to either hold a college degree in business or have accumulated equivalent experience. For the past twenty years, the initial bookkeeping tasks associated with posting receipts to the SR customer accounts has not been performed by the SR employees. Instead, the designated bank transmits the amount of revenue, customer names, payments, amounts, and freight bill numbers directly to the SR's computer.

In summary, the NW currently utilizes a labor intensive, functional customer accounting system while the SR operates a technologically advanced, customer oriented accounting process.

Most employees in the SR Customer Accounting Department who occupy positions comparable to the new jobs which will be created at Atlanta are excepted from the SR scheduled agreement. In the past, the SR and the Organization have reached a negotiated agreement on the number of excepted, partially excepted and rank and file positions in the department.

II. THE STATEMENT OF THE ISSUE

The issue presented to the Arbitrator is what shall be the substantive content of an implementing agreement between the Carriers and the Organization covering the impending transaction (as outlined in the Carriers' February 15, 1984, notice) within the parameters of the New York Dock Conditions. From the record developed by the parties as well as their oral arguments, the specific points of

disagreement concern: (1) the Organization's allegation that the transaction contemplates not only the transfer of work from the NW to the SR but also the improper removal of work from the scope of the property agreements, and (2) the most appropriate status for each new Atlanta position. The specific issues manifest the ongoing controversy regarding the extent, if any, which New York Dock implementing agreements may properly preempt collective bargaining agreements.

III. THE POSITIONS OF THE PARTIES

A. The Carriers' Position

The Carriers argue that after carefully evaluating the customer accounting processes on the NW and the SR, they concluded that the methods employed by the SR Customer Accounting Department are far superior to the time consuming, cumbersome NW system. Because accounting tasks are handled on a functional basis, the NW is unable to measure its accounts receivable at any given time. The process is so unwieldy that many payment tracers are sent to shippers who have already paid their freight charges. Thus, consolidating the NW accounts receivable and collection process into the SR Customer Accounting Department will eliminate duplicative tasks, increase overall bookkeeping efficiency, reduce costs and have the capacity to accurately update the NW as well as the SR accounts receivable on a daily basis. While some employees will be detrimentally affected by the transaction, they will be entitled

(provided they are otherwise eligible) to the generous protective benefits contained in the New York Dock Conditions.

The customer accounting work at Roanoke will be transferred to Atlanta. The NW accounts will be handled by utilizing the SR accounting process. Thus, the Carrier proposes (as does the Organization) that the SR schedule agreement should apply to all positions in the consolidated facility.

To insure the success of the coordination, small portions of the collective bargaining agreements must give way to an ICC authorized coordination. Even if the transaction inherently involves the loss of some work presently performed by clerks at Roanoke, the Carriers' capacity to consolidate its forces pursuant to an ICC order is paramount to the scope clauses in the applicable agreements. The Organization is attempting to thwart the entire transaction by insisting that the Carriers retain inefficient operations and superfluous positions. In Finance Docket No. 29430, the ICC found that coordinating the operations of the railroad enterprises will "... offer significant operating benefits to the new system, eliminate redundant facilities, and reduce costs associated with present operations." Subsequent to this transaction, the Carriers will serve their customers more efficiently which is compatible with ICC's express directives. Restrictive provisions of existing collective bargaining agreements

must be subordinated to the Carriers' right to proceed with the transaction. Union Pacific Railroad Co./Western Pacific Railroad Co. v. American Train Dispatchers Association, NYD, May 27, 1984 (Fredenberger, Jr.)

Since there is an implied understanding that the SR agreement governs new positions, the Carriers contend that the appropriate basis for the selection of forces (from all involved employees) is to apportion the new positions among exempt, PAD and rank and file status according to the present percentage of each type of position at Atlanta. Thus, the Carriers propose the establishment of six excepted positions, eight PAD positions and three bid and bump positions.[2] All new positions should be advertised under the SR agreement. The Carriers are agreeable to giving the incumbents of the abolished NW positions a right of first refusal to the new positions provided they satisfy the job qualifications which have been applied to such positions in the past. Consistent with their position, the Carriers propose the following language for an implementing agreement:

> "Article II
> Section 1
> (1) Vacancies shown on Attachment B that are to be bulletined under SR-BRAC agreements will first be offered to the regular occupants of NW positions, indicated

[2]See Attachment A to Carrier's Exhibit A and note positions number 61 through 66, 67 through 74, 81, 87 and 88.

> on Attachment A, to be abolished as a result of this coordination.
>
> The successful NW applicants for such positions will, by making application, indicate their acceptance of the transfer to SR at Atlanta. Employees who do not transfer to SR will exercise their seniority on NW in accordance with their applicable rules and agreements consistent with the provisions of the New York Dock Conditions (Attachment C).
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> (2) Vacancies not filled pursuant to Article II, Section 1, paragraph (1) will be assigned to the successful bidders from the SR Customer and Car Accounting Seniority District."

The Arbitrator, in writing an implementing agreement, is precluded from changing the size of the Carriers' work force and disturbing the SR customer accounting process. Norfolk and Western Railway Co./Illinois Terminal Railroad Co. v. Brotherhood of Locomotive Engineers/United Transportation Union, N.Y.D., Feb. 1, 1982 (Zumas). The decision in this case should be confined to the selection of forces and cannot extend to the number of positions to be established at Atlanta. Brotherhood Railway Carmen v. Baltimore & Ohio Railroad Co./Louisville & Nashville RR. Co., N.Y.D., Jan. 12, 1983 (Fredenberger, Jr.). The size of its work force and the content of each job is strictly a management prerogative. The Carrier also relies on an arbitrator's decision which permitted the Carriers to coordinate the SR rank and file yardmaster positions with the NW non-contract yardmaster positions in consolidated rail yards. The arbitrator ruled that the selection of forces must be made on a fair and equitable basis taking into account the rights and job opportunities of both represented and non-represented

employees. Southern Railway Co./Norfolk and Western Railway Co. v. Railroad Yardmasters, N.Y.D., May 24, 1982 (Peterson). Therefore, the Carriers contend that the status of the seventeen new positions should be determined so that the current ratio of exempt and non-exempt positions is maintained at Atlanta.

Lastly, the Carriers submit that the Organization's proposed implementing agreement calls for monetary benefits which are more than the minimum benefits prescribed by the New York Dock Conditions. Though the parties may negotiate benefits which exceed the New York Dock Conditions, an arbitrator's authority under Article I, Section 4, is limited to awarding only the precise employee protective provisions promulgated by the ICC in the New York Dock Conditions.

The Carriers aver that their proposals constitute a fair and equitable basis for the selection of forces and they urge the Arbitrator to adopt their proposed implementing agreement.

B. The Organization's Position

The Organization raises two challenges to the Carriers' proposed implementing agreement. First, the transaction involves not only the transfer of work from the NW to the SR but also the farming out of work exclusively reserved to the clerical craft. Second, rather than abolishing the NW positions, the positions should be transferred to the SR and retain rank and file status.

The Organization's contracting out allegation is premised on the assumption that filing, collating and organizing checks and other payment information (which has been performed exclusively by clerks on the NW) will, subsequent to the coordination, be immediately delegated to SR's banks. If the NW attempted to directly contract out the work to banks, the Organization's grievances contesting the action would undoubtedly be sustained by a Section Three Board. 45 U.S.C. §153.

The Organization's proposed implementing agreement, in Article II, Section 3, Paragraph 2, declares:

> "Any work assigned to positions listed in Attachment "A" or identified therein, shall not be removed from the Scope of the applicable Agreements ..."

Even though the Organization (like the Carriers) acknowledges that the SR scheduled agreement should govern the new Atlanta positions, the specific SR Scope Rule bars the SR from taking the work transferred from Roanoke and simultaneously conveying the work to its banks. Members of the clerical craft have traditionally, historically and exclusively performed the work on the NW. Article I, Section 2, of the New York Dock Conditions expressly provides that, "... working conditions and all collective bargaining and other rights ... of the railroad's employees under applicable laws and/or existing collective bargaining agreements ... shall be preserved unless changed by future collective bargaining agreements or applicable statutes." 360

I.C.C. 84. As a condition precedent to transferring the NW clerical work to financial institutions, the Carrier must first comply with the notice and bargaining requirements of the Railway Labor Act. 45 U.S.C. §156. The Organization does not quarrel with the Carriers' capacity to coordinate work between the NW and the SR but the New York Dock Conditions which authorize transactions cannot be expanded to allow the Carriers to remove work from under the clerks' scope clause and place the work in outside banking institutions. Taking the Carriers' position to the extreme, they could eventually contract out all clerical work under the guise of a New York Dock transaction. The New York Dock Conditions limit the effect and breadth of transactions by protecting the substantive integrity of existing collective bargaining agreements.

Though the Organization is unable to precisely measure the amount of work currently performed by the NW clerks, which will ostensibly be handled by banking personnel after the transaction, the Organization estimates that thirteen NW positions will be eliminated as a direct consequence of the scope rule violation. Therefore, the Organization petitions the Arbitrator to order the establishment of thirteen more rank and file positions at Atlanta to neutralize the loss of work to outside entities. The arbitrator is vested with the power to compel the Carrier to create more positions than it proposed in accord with the

implied, historical authority which evolved from the 1936 Washington Job Protection Agreement.

The Organization also charges the Carriers with circumventing the collective bargaining agreement by abolishing thirty-four rank and file positions in Roanoke but then unilaterally instituting totally or partially excepted positions in Atlanta. Under the Carriers' proposal, the Organization would hold only three bid and bump positions. The Carriers' transaction hardly justifies such a massive reduction in bid and bump jobs. The status of positions in the SR accounting department has always been negotiated by the parties. Absent an agreement, all new positions must be fully covered by the labor contract. To guarantee that the Atlanta positions will be rank and file and that the incumbents of affected positions in NW will have the absolute right to occupy the Atlanta jobs, the Organization argues that the NW positions should simply be transferred to Atlanta. Thus, the Organization has included the following terms in its proposed implementing agreement:

> ARTICLE I, Section 2: "The notice provided for under Section 1 hereof will list the names, seniority dates and rates of pay of the regular occupants as indicated in Attachment A, whose positions in the NW Office of Assistant Comptroller - Revenues and Systems, Roanoke, Virginia are to be abolished and/or transferred to SR Customer Accounting Department, Atlanta, Georgia, to be performed by employees indicated in Attachment A." and,
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> * * * * *

> ARTICLE II, Section 3, Paragraph 2: "Any work assigned to positions listed in Attachment "A" ... shall continue to be performed by employes fully covered by all the rules of the Agreement."

Giving the incumbents of the abolished positions an absolute right of first refusal to transfer to Atlanta is the most fair and equitable method for the selection of forces. The positions created at Atlanta should reflect, not the present makeup of the SR Accounting Department but rather the status of the current positions in Roanoke. Norfolk and Western Railway Company and Illinois Terminal Railroad Company v. Brotherhood of Locomotive Engineers and United Transportation Union, N.Y.D., February 1, 1982 (Zumas).

Lastly, the Organization takes particular exception to the Carriers' proposition that the occupants of the abolished posts at Roanoke be accorded a right of first refusal to the new Atlanta positions provided the incumbents meet the SR qualifications for the positions. Due to the college degree or equivalent experience requirements, the right of first refusal becomes illusory. All of the incumbents would be denied an opportunity to follow their work because they would be unable to satisfy the unnecessarily stringent job qualifications. Since these incumbents are adversely affected by the transaction, they should follow the work based solely on their seniority accumulated during their tenure on the NW.

The Organization respectfully requests the Arbitrator to adopt its proposed implementing agreement.

IV. DISCUSSION

In its New York Dock Conditions, the ICC broadly defines a transaction as "... any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." 360 I.C.C. 84. Where a transaction may cause the dismissal or displacement of workers, an implementing agreement "... shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case ..." 360 I.C.C. 85. While the ICC clearly authorized merged railroad carriers to undertake transactions, it also plainly provided for the plenary preservation of all existing collective bargaining agreements. In Article I, Section 2, the ICC declared:

> "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." 360 I.C.C. 84.

When the Carriers' authorized transaction contains components which could arguably conflict with the express terms of one or more existing collective bargaining agreements, the issue becomes to what extent, if any, an implementing agreement may supersede both the labor agreements

and the Railway Labor Act. In resolving the issue, the underlying (and sometimes competing) policies of New York Dock must be balanced. The ICC's recent regulatory scheme is designed to encourage merged railroad companies to increase productivity and their ability to compete (with other common carriers) by consolidating operations. Transactions which lead to more efficient operation often conflict with the ICC's specific policy of maintaining stable collective bargaining relationships.

Both parties have cited the Norfolk and Western Railway Company and Illinois Terminal Railroad Company v. Brotherhood of Locomotive Engineers and United Transportation Union Arbitration Award dated February 1, 1982, where Arbitrator Zumas wrote:

> "... Article I, Section 4, does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute or terminate agreement[s] negotiated pursuant to the provisions of the Railway Labor Act."

Therefore, the implementing agreement governing the instant transaction must reasonably accommodate the NW and the SR labor agreements on an issue by issue basis.

A. Issue No. 1

The first issue in this transaction concerns the Organization's assertion that the Carriers are transferring work from the NW to outside parties. According to the

Organization, the applicable scope clauses of both the NW and the SR collective bargaining agreements reserve the disputed work to clerical employees. While the Organization does not seek to bar the Carriers' transaction, it does argue that thirteen additional positions should be created in Atlanta to offset the loss of clerical work which will ultimately flow to financial institutions.

The record before the Arbitrator reflects that the consolidation of customer accounting facilities involves taking work at Roanoke and placing it in Atlanta where it will be performed in the same fashion as customer accounting work has been performed on the SR in the past. The transferred work will inherently undergo a sweeping change because the customer accounting process on the SR is materially different from the method of performing the work on the NW. The transfer of work followed by a necessary transformation in the method of performing the work cannot be characterized as a typical contracting out situation. The transaction would be effectively blocked if the Carriers could not utilize the more efficient SR customer accounting process with the appropriate level of qualified manpower. It is unlikely that this transaction conflicts with the applicable collective bargaining agreements because not only is the record void of any evidence proving the Carriers are using this transaction as a pretext for evading the scope clauses, but also the work transferred to

the consolidated facility will be performed in the same way similar work has been performed on the SR for many years.

Moreover, the Organization is unable to articulate the precise type of clerical work currently being performed at Roanoke which is allegedly being taken out from under the scope of the applicable agreements. Absent evidence demonstrating how the Organization arrived at its estimate that any work allegedly contracted out to the SR's banks results in the abolition of thirteen positions, the establishment of additional positions at Atlanta (regardless of whether or not the Arbitrator is vested with the authority to award more positions) would be based on pure speculation. The appropriate and acceptable selection of forces in an implementing agreement must be rationally connected to the circumstances surrounding the transaction.

Both parties advocated, and the Arbitrator concurs, that the SR scheduled agreement shall govern the new positions. The parties should include in their implementing agreement provisions proposed by the Carriers regarding the number (but not status) of new positions in Atlanta as well as the Carriers' procedure for giving incumbents at Roanoke a right of first refusal to occupy a new position.

B. The Second Issue

Unlike the first issue, the status of the new positions established at Atlanta is not inextricably related to the essence of the Carriers' transaction. While classifying the seventeen new jobs at Atlanta within the full

coverage of the SR schedule agreement will slightly impair the consolidation, the Arbitrator concludes that any detrimental effect on the transaction is outweighed by the need to preserve existing agreements and to promote collective bargaining. Historically and traditionally, the status of positions in the SR Customer Accounting Department has been a proper subject matter of negotiations between the parties. To write an implementing agreement calling for exempt or partially exempt positions would subordinate elements of existing labor contracts and disrupt collective bargaining under the Railway Labor Act without any compelling justification. Although the Carrier has presented a sensible formula for allocating the new positions among rank and file, PAD and exempt status, the implementing agreement must not only provide for the most appropriate selection of forces but also reasonably accommodate the applicable collective bargaining agreements.

Thus, the seventeen new positions at Atlanta should be rank and file positions unless the parties otherwise agree.

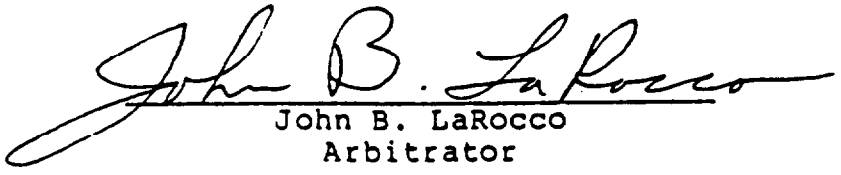
Finally, the Arbitrator notes that the Organization's proposed implementing agreement includes benefits which are well above the floor of employee protective benefits specified in the New York Dock Conditions. The parties, of course, are free to negotiate more lucrative employee protection benefits than those set forth in the New York Dock Conditions, but an arbitrated implementing agreement may

not contain protective provision in excess of the benefits expressly described in the New York Dock Conditions.

AWARD

The Carriers and Organization shall enter into an implementing agreement which is consistent with this Opinion.

Dated: July 17, 1984.



John B. LaRocco
Arbitrator