

ARBITRATION

UNDER

NEW YORK DOCK II, APPENDIX III

(Jack W. Cassle, Neutral)

In the matter of)	
)	
BUTTE, ANACONDA & PACIFIC)	
RAILWAY COMPANY (BA&P),)	
)	
Carrier,)	Finance Docket No. 28490
)	
and)	
)	
UNITED TRANSPORTATION UNION,)	
T & E (UTU),)	
)	
Organization.)	
)	

ORDER

THE ABOVE-CAPTIONED ACTION having come before the Neutral for the initial phase of the bifurcated hearing as previously ordered and the BA& P having appeared by and through its attorney, Donald C. Robinson, of the firm Poore, Roth & Robinson, P.C., and its President, Mr. John W. Greene, and the UTU having appeared by and through its attorney, David M. McLean, of the firm Knight, Dahood, McLean & Everett, and its Vice-President, Mr. Kenneth Levin, and both parties having had the opportunity to present their witnesses, exhibits and arguments in support of their respective positions and, at the close of such hearing the Neutral having left the record open pending production of documents from the BA& P and the BA& P having provided its Response to such Order for production of documents and the

Neutral having received a written position of the UTU concerning the BA& P's Response to such Order for production of documents and having further received the Response of the BA& P thereto and further exhibits and documentation having been supplied by the parties, the Neutral has declared the record in this initial phase of the bifurcated hearing to be closed and, ruling upon the issues raised therein, makes the following Findings and Order.

A. BACKGROUND

The parties to this dispute are the BUTTE, ANACONDA AND PACIFIC RAILWAY COMPANY, hereinafter referred to as the BA& P, and the UNITED TRANSPORTATION UNION and its LOCAL UNION NO. 887, hereinafter referred to as the UTU

The BA& P is a "carrier by railroad" within the meaning of the Interstate Commerce Act, 49 U.S.C. Section 1, et seq., and the Railway Labor Act, as amended, 45 U.S.C. Section 151 and the UTU is an international labor organization and the duly designated representative of the Enginemen and Trainmen employees of the BA& P

The BA& P railroad lines were constructed in 1892 to connect the copper mines at Butte, Montana with smelting and drying facilities at Anaconda, Montana. It operates approximately 118 miles of railroad within the State of Montana, including about 25 miles between Butte and Anaconda, Montana. It provides freight service only to connecting railroads.

The transportation of copper concentrates, and other related materials has been the principal function of the BA& P railroad operations. Other transportation and shipping operations of the railroad were minimal.

On January 12, 1977, the Atlantic Richfield Company, hereinafter referred to as ARCO, acquired the Anaconda Company. The Anaconda Company's subsidiary, the BA& P was a part of this acquisition. The acquisition of the BA& P could not be completed until approval was granted by the Interstate Commerce Commission, hereinafter referred to as the I.C.C.

On January 17, 1978, the I.C.C. issued its Finance Docket No. 28490 which provided for such acquisition by ARCO and the Anaconda Company and, in addition, provided for certain labor protective conditions commonly known as the New Orleans conditions. Subsequent to this approval, the I.C.C. modified its approval by extending the provisions of what is commonly known as the New York Dock conditions to the employees of the BA& P New York Dock Railway - Control, Docket No. 28250, 360 I.C.C. 60, 76-90 (1979).

These labor protective provisions are applicable to both railroads acquired in this transaction. The Tooele Valley Railroad and the BA& P were separate entities and remain separate entities inasmuch as no consolidation, coordination, interchange, etc. was physically possible due to the location of each. In 1980, the Anaconda Company closed its copper smelter facilities

in Anaconda, Montana, and its copper refinery facilities in Great Falls, Montana. This closure resulted in a reduction of its shipping volume on the BA& P.

In 1981, the Anaconda Company reduced the level of its mining and processing operations in Butte and Anaconda with an additional reduction in shipping volume on the BA& P

On or about February 26, 1982, the UTU wrote to BA& P stating that the railroad's actions required the BA& P to provide for the application of the New York Dock conditions. Meetings, conversations and correspondence between BA& P and the UTU occurred between March and June of 1982.

On or about June 8, 1982, the UTU requested the National Mediation Board to appoint a Neutral member of an arbitration board as provided under the New York Dock conditions.

On June 17, 1982, the BA& P wrote the National Mediation Board indicating its position that the UTU was not entitled to the application of the New York Dock conditions including arbitration of the dispute.

On or about June 24, 1982, the National Mediation Board appointed Jack W. Cassle as the Neutral member of the arbitration board.

The Neutral scheduled the arbitration proceedings to commence on August 17, 1982.

Under date of August 13, 1982, the BA& P, through counsel, sought a declaratory judgment to stop the arbitration, to provide

that the New York Dock conditions were not applicable to the circumstances that created this dispute and to enjoin the UTU from proceeding with arbitration and enforcement of any arbitration award.

On March 1, 1983, the United States District Court for Montana issued its order which mandated proceeding with the arbitration of the dispute.

The BA& P appealed the District Court order but did not pursue such appeal.

On June 6, 1983, a meeting of the parties under the auspices of the Neutral was held in which certain specifics for proceeding with the arbitration were ordered.

Subsequent to this meeting, an agreement to mediate was entered into with such mediation being concluded without success.

Subsequent to the mediation effort, an agreement was reached to bifurcate the proceedings into (a) arbitration of liability issues and (b) arbitration of claims if required.

The arbitration of the issues was completed and the record closed.

B. DISCUSSION

The issue which finally presents itself to this Neutral for determination can be summarized as follows:

WHETHER THE ACQUISITION OF THE BA& P BY THE ATLANTIC RICHFIELD COMPANY AND THE ANACONDA COMPANY IS A TRANSACTION WHICH WOULD ENTITLE THE EMPLOYEES OF THE BA& P AS OF FEBRUARY 15, 1978, TO BENEFITS UNDER NEW YORK DOCK II, APPENDIX III.

On June 17, 1977, the Atlantic Richfield Company and the Anaconda Company filed an Application to acquire control of the Butte, Anaconda & Pacific Railway Company and the Tooele Valley Railway Company pursuant to Section 5(2), of the Interstate Commerce Act under the above-referenced Finance Docket. Several of the statements contained in such Application relevant to this arbitration are as follows:

1.

III

INFORMATION RESPECTING APPLICANT
ATLANTIC RICHFIELD COMPANY

G. "The Atlantic Richfield Company is not controlled by any corporation or corporations. It is the real party in interest to this Application"

2.

IV

INFORMATION RESPECTING APPLICANT
THE ANACONDA COMPANY

G. "The Anaconda Company is a wholly owned subsidiary of the Atlantic Richfield Company. It is the real party in interest to this Application"

3.

VI

INFORMATION RESPECTING THE STATUTORY STANDARDS

C. "No changes in the operations of the railroads are contemplated, and they will continue to render efficient and economical transportation service to the public."

F. "No Carrier employees are expected to be adversely affected; however, to protect the interests of the railroad employees that may be affected a fair and equitable arrangement that the applicants would be willing to accept as a condition for the

Commission's approval of the proposed transaction would be those known as the New Orleans conditions (New Orleans Union Passenger Terminal Case, 282 I.C.C. 271, as modified in Southern Ry. Co. - Control of Georgia Ry. Co., 317 I.C.C. 577, 317 I.C.C. 729, and 320 I.C.C. 377)."

(Emphasis added.)

4. Included with the application is the "Verification of Applicant The Atlantic Richfield Company" consisting of an Affidavit of L. M. Cook, Vice-President of the Atlantic Richfield Company, swearing to the completeness and accuracy of the contents of the Application.

5. Also attached to the Application is the "Verification of Applicant The Anaconda Company" in the form of an Affidavit of Richard B. Steinmetz, Jr., Vice-President and General Counsel of the Anaconda Company, swearing to the completeness and accuracy of the contents of the Application.

6. Attached to the Application as Exhibit 10-a "Information Regarding Employees of B.A.P" are the following representations:

"(i) No such [implementing] agreement has been entered into as a result of the proposed transaction.

(ii) All personnel are covered under the Railroad Retirement Act.

(iii) It is not contemplated that any positions will be effected by the proposed transaction.

(vi) There has been no attrition of positions in the six (6) years preceding the filing of this Application. The Railroad employed one hundred forty-five (145) employees in 1976 and the same number in 1971."

7. Exhibit 11 to the Application "Proposed Notice" states at paragraph (ii):

"The nature of the proposed transaction is for the acquisition of control of the two carriers subject to Part 1 of the Interstate Commerce Act, by persons which are not a carrier, namely, the Atlantic Richfield Company and The Anaconda Company."

8. On January 17, 1978, the Interstate Commerce Commission issued its Order under the above-referenced Finance Docket which included the following provisions:

No change in the current operations of either rail carrier is anticipated as a result of the control sought herein. The two railroads are managed separately under the control of the Anaconda-Mont and their separate management is expected to be continued.

* * * *

No carrier employees are expected to be adversely effected by the proposed control of BAP and TOV by Atlantic Richfield and Anaconda-Del. However, to protect the interests of the railroad employees that may be affected, applicants state their willingness to accept as a condition of the Commission's approval the so-called "New Orleans Conditions". New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1942), as modified in Southern Ry. Co. - Control of Georgia Ry. Co., 317 I.C.C. 557

(1962) and St. Louis Southwestern Ry. - Pur.-Alton & Southern R.R., 342 I.C.C. 498, 522 (1972). RLEA and BRAC maintain that the appropriate employee protective conditions to be imposed are those prescribed in Section 402 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) P.L. 94-210, which amended Section 5(2)(f). That Section provides that employee protective conditions imposed must contain:

provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 USC 565).

The degree of protection to be afforded affected employees, under the amended Section 5(2)(f), has been discussed by the Commission in Oregon Shortline R.R. Co.-Abandonment -Goshen, 354 I.C.C. 76 (1977) and our approval herein is conditioned upon the Applicant's extending that protection to affected employees.

(Emphasis added.)

* * * *

We find that the interests of employees will be protected by the imposition of appropriate conditions

* * * *

It is ordered that:

1. The application is approved and authorized, subject to the terms and conditions referred to above;

9. By decision dated May 20, 1980, under the above-referenced Docket Number and others, the Interstate Commerce Commission ordered:

In accordance with 49 U.S.C. 11347 and our decision reported at 360 I.C.C. 666, each of the prior decisions in the involved proceedings is modified as follows: All prior references to employee protective provisions are deleted. In lieu thereof, consummation of the transaction is made subject to provisions at least as protective of employees as those set forth in Appendix III to the decision in Finance Docket No. 28250, New York Dock Railway-Control-Brooklyn Eastern District Terminal, served February 23, 1979.

The above-referenced Application and Orders are set forth for the purpose of emphasizing the representations made to the Interstate Commerce Commission by the applicants and the reliance thereon by such Agency in granting the permission to the Applicants to acquire the BA& P.

The question then becomes whether such representations and the subsequent grant of authority to acquire the BA& P conditioned thereon are sufficient to form a basis for extending New York Dock II, Appendix III, benefits to UTU members employed as of February 15, 1978.

Counsel for the BA& P has framed the issues in the following manner:

. . . the important part of our case will focus on the aspect of the case that is legally significant to the resolution of the issues presented here, and that is the causal nexus between the new ownership of the Anaconda and its subsidiary, the BA& P Railroad, and the subsequent events that resulted in manpower reductions on the railroad. That is, whether or not the events that resulted in the manpower reductions were

made, "pursuant to" the I.C.C. approval of the merger in January of 1978.

Hearing Transcript, Vol. 3, Page 3.

The UTU, on the other hand, phrased the issue as follows:

. . . the contention of the Organization in this case is that the word "transaction" defines situation or situations where events occur which cause loss of earnings or loss of job opportunities of BA& P employees, particularly UTU operating employees, in those events which directly resulted from the acquisition of the BA& P by ARCO. In other words, to phrase the question in the manner that the Carrier doesn't seem to like, would these adverse effects have occurred but for or except for the acquisition of the BA& P by ARCO.

(Emphasis added.) Hearing Transcript, Vol. 1, Page 38.

In determining this ultimate question then, reference must be made to the statutory scheme involved.

49 U.S.C. 5(2). Unifications, Mergers and Acquisitions of Control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) in this paragraph -

. . . for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefore shall present an application to the Commission,

* * * *

If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an Order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others:

* * * *

(4) The interest of the carrier employees affected.

* * * *

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this Chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its Order of approval the Commission shall include terms and conditions providing that during the period of four (4) years from the effective date of such Order, such transaction will not result in employees of the carrier or carriers by railroad effected by such Order being in a worse position with respect to their employment,

(Emphasis added.)

Details of the requirements of such an Application referred to in 49 U.S.C. 5(2)(b) are set forth in 49 C.F.R. §268.31 as follows:

To the extent applicable to the proposed transaction, each submission shall contain-

(c) With regard to rail employees of the proponent-

(1) A description of all projected changes in employment as a result of the proposed transaction;

(3) For any projected employment decreases, an explanation of how they will be handled and an estimate of the total costs of labor protection associated with the proposed transaction.

A substantive factor in the determination of the issue presented herein involves the definition of the operative term "transaction." At least one court has discussed such a definition and its comments are instructive:

Section 5(2) involves "transactions" to achieve certain stipulated ends; these transactions require the approval of the Commission. There is no definition given of what goes into a "transaction," but it appears to be a catchall referring to the many different elements involved in mergers, leasing agreement, pooling arrangements or joint operations. As often described in other contexts, it is a word "of flexible meaning" and "may comprehend a series of many occurrences depending not so much upon the immediacy of their connection as upon their logical relationship". Texas & NOR Co. v. Brotherhood of Railroad Trainmen, 307 F.2d 151 (1962). See also Smyth v. United States, 293 F.Supp. 387 (1968).

(Emphasis added.)

The BA& P and the UTU have agreed that the acquisition of the BA& P by ARCO and Anaconda was a "transaction" within the

definition of such term set forth in Paragraph 1(a), Appendix III of New York Dock II. The Neutral concurs that the January 17, 1978, acquisition was a transaction and that, if employees of the BA& P were affected by such transaction, they are entitled to New York Dock II benefits.

To determine if BA& P employees were affected by the agreed-upon transaction, it is initially imperative to examine the circumstances surrounding the application for I.C.C. approval.

The record herein contains numerous notices and announcements from the BA& P and the applicants to the BA& P employees and the public relative to the proposed acquisition and its effects on BA& P employees. (UTU Exhibits 6, 11, 12, 13, 14, 15, 16, 19, 21, 22, 24 and 38). Representative of such announcements is the July 7, 1976, letter from John B. M. Place to Anaconda employees, a copy of which was sent to BA& P employees on July 15, 1976, by Leo V. Kelly, President and General Manager of the BA& P. Mr. Place's letter contains the following:

You can be assured that the board of directors and management of Anaconda are unanimous in our view that a merger with Atlantic Richfield would be in the best interest of our employees. We believe that Atlantic Richfield will contribute important strengths to our company. We also believe that the basic businesses in which we are involved are strong businesses, important to our economy, and that in future years we will be in an even better position to serve our

customers, our employees, and the communities in which we operate.

An additional, important factor in analyzing the circumstances surrounding the proposed acquisition is the absence of any implementing agreements between the BA& P and the UTU. The application to the I.C.C. contains the affirmative statement that "No such agreement has been entered into as a result of the proposed transaction." I.C.C. Application, Exhibit 10-a, paragraph (i).

In fact, no need for an implementing agreement existed. No consolidation or coordination could accrue from this transaction due to the physical location of the BA& P and the Tooele Valley Railroad Company. No employee could be adversely affected under these circumstances. Any changes for either railroad in working conditions, rules, switching limits, yard consolidations would have to have been accomplished under the procedures of the Railway Labor Act, as amended.

The BA& P in its presentation, has sought to avoid payment of New York Dock II benefits on the theory that the reductions in work force subsequent to the acquisition of the BA& P occurred solely in response to changes in the economy of the copper industry and that such reductions were not related, in any way, to the acquisition which constituted an agreed-upon transaction.

Such a position is without merit in light of the above cited applicants' submissions to the I.C.C. and the reasonable conclusions and expectations to be drawn therefrom.

It is essential to note that it is a matter of public policy as stated in the Interstate Commerce Act and executed by the I.C.C. that no employees are to be affected by an acquisition or merger of railroads. Such has been basic since the Washington Job Protection Agreement of May, 1936.

The acquisition of a carrier by a non-carrier is rare but not unique. Acquisitions of carriers by carriers involve a recognition by all parties of the changes in operation which, by necessity and the economies of the situation, will accrue or occur. Such changes, and the effects of such changes on employees of the carriers, are provided for by agreements between the carriers and the employee representatives which may or may not be provided to the I.C.C. at the time of a carrier's application for merger. Employees affected by the merger or acquisition within the contemplation of such agreements are extended benefits as provided for in the I.C.C. Order. This procedure normally results in all known effects to or on employees being identified and dealt with in a manner acceptable to the I.C.C.

In the acquisition of the BA& P by ARCO and Anaconda, no such effects were identified or dealt with. Instead, the applicants chose to represent to the I.C.C., the BA& P employees

and the public that there would be no effects. The publicized ARCO and Anaconda announcements contained affirmative and specific representations that the acquisition of the B.A.&P would result in more stability of the employment situation. Reason then can only dictate that the only effects to the employees of the BA& P after the acquisition would be those that might result from economic considerations.

The applicants voluntarily provided for employee protection by the statements and representations contained in their application agreeing to the imposition of conditions which extend benefits to employees who will be affected. It is therefore irrelevant that the employees were affected by economic factors which arose subsequent to the acquisition.

In essence, the issue to be determined by this Neutral is in the nature of contract interpretation. The applicants, by their notices and announcements to the BA& P employees and to the public, and by their representations to the I.C.C. in their application, formed an contract. There was an express contract formed between the applicants and the I.C.C. at the time of the January 17, 1978, Order. There was an implied contract formed when the UTU relied upon the statements in the application and did not object to the application in which ARCO and Anaconda voluntarily conditioned approval upon the imposition of employee protection benefits.

The terms of the express representation by the applicants relating to employee protection are clear and unambiguous. The question becomes one of application of such provisions to the present situation.

Changes in economic conditions are foreseeable to such a degree that it is reasonable to impute knowledge of such factors to the applicants in this case. It is inconceivable to this Neutral that the applicants, with their vast collective knowledge of the world mineral market and the analytical resources available to them, could not have foreseen at least a possibility of a decline in copper production and the resultant effect on the employees of the BA& P at the time they made the affirmative representations of "no adverse effect." It does not strain at reason in the specifics of this transaction to then find that the purpose of the provision for employee protection benefits as a condition of approval was to protect those employees who were affected by such economic factors. This Neutral cannot reasonably conclude that the statements of the applicants in their application for approval of this transaction were made as a meaningless gesture or put forth in bad faith.

It is not a proper defense for the BA& P to claim that under its prior ownership or under other, less financially stable ownership, the effects of the economic downturn on the employees of the BA& P would have been more drastic. No person or entity other than ARCO and the Anaconda Company represented and

committed to and contracted with the I.C.C., the BA& P employees and the public that the employees of the BA& P would be protected and not adversely affected. No person or entity other than ARCO and the Anaconda Company was granted the right to acquire the BA& P based upon such condition.

Stated in light of the analogy of the BA& P's counsel, if the owner of the Orange Julius franchise had made contractual commitments to his employees prior to the time that the price of oranges became exorbitant due to factors beyond his control, he would not be relieved of such contractual obligations unless his contracts so provided. Hearing Transcript, Vol. 3, Page 4.

C. AWARD

The remedy for the affected employees is compensation. Brotherhood of Maintenance of Way Employees v. United States, 81 S.Ct. 913 (1961).

The BA& P is hereby ordered to post the Notice attached hereto at its business office, on all employee bulletin boards for its Enginemen and Trainmen and to take any and all steps to publicize the application of the New York Dock II conditions as applicable to the reductions in force or changes in employment during the period February 15, 1978 through February 14, 1982.

The BA& P is ordered to make available the application form contained herein from the office of the President effective no later than October 1, 1984. Such applications are to be received

by the BA& P at the office of the President during the period beginning October 1, 1984, through October 31, 1984.

The BA& P is granted one (1) calendar month following the receipt of an application to verify the facts of the application and to make arrangement for the payment accruing therefrom.

A dispute arising between an employee and the BA& P as to eligibility, compensation, or application of the provisions of New York Dock II which cannot be resolved between the parties is to be submitted to Neutral, Jack W. Cassle, for final disposition. Such dispute must be presented in writing to the Neutral, Jack W. Cassle, 4510 East 13th Street, Cheyenne, Wyoming 82001 with copies of such being provided to the BA& P and the United Transportation Union.

Such written request for a final determination is to be received by the Neutral no later than January 1, 1985.

THIS ORDER becomes effective on the date of the signature of the second (2nd) Panel Member.

DATE 9/26/84

DATE _____

DATE _____

Jack W. Cassle
JACK W. CASSLE, Chairman and
Neutral Member

JOHN W. GREENE, Carrier Member

KENNETH LEVIN, Organization Member

APPLICATION FOR NEW YORK DOCK II BENEFITS

TO John W. Greene
President & General Manager
Butte, Anaconda & Pacific Railway
P.O. Box 1421
Anaconda, MT 59711

I, _____,
(FULL NAME AS SHOWN ON EMPLOYMENT RECORDS)
was employed by the Butte, Anaconda & Pacific Railway Company on
February 15, 1978, in the position of _____.

I was affected by the actions of the Atlantic Richfield Company
and its subsidiary, the Anaconda Company, during the period from
February 15, 1978, to February 14, 1982, by virtue of a furlough
reduction in hours of work, demotion, transfer and/or relocation
which placed me in a worse position with respect to my employment
than that I was in on February 15, 1978. I have identified below
to the best of my ability the date of each such action and the
effect of such action upon my employment.

Date of 1st action. _____ 19____.

What happened? _____.

Date of 2nd action. _____ 19____.

What happened? _____.

Date of 3rd action. _____ 19____.

What happened? _____.

(If any other dates are necessary, list on reverse side along
with explanation of what happened.)

I request the Butte, Anaconda and Pacific Railway Company to provide me the appropriate benefits of the NEW YORK DOCK II employee protective provisions.

Signature

Date of Application

cc: General Chairman UTU (T)
General Chairman UTU (E)