In the Matter of Arbitration Between

Union Pacific Railroad Company
Western Pacific Railroad Company
Sacramento Northern Railway Company

-and-

United Transportation Union
Sacramento Northern
Western Pacific

OPINION
AND
AWARDS

Pursuant to New York Dock Conditions, Article 1, Section 11 ICC Finance Docket No. 28250

Twelve Organization Questions

The undersigned, Charles M. Rehmus, was nominated by the National Mediation Board to sit as referee with the parties to resolve these questions.

Hearings were held in Salt Lake City, Utah on January 23 and 24, 1986. The parties waived their right to appoint members to a Section 11 arbitration committee and requested the referee to sit and render answers alone.

Appearing for the Companies:

A. C. Hallberg, Director of Labor Relations (UP)

Dianne R. Woolsey, Assistant Manager, Labor Relations (UP)

Appearing for the Union:

Kenneth Levin, International Vice President (UTU)

Norman J. Lucas, General Chairman, UTU/SN

H. A. Siler, General Chairman, UTU/WP

The UTU/SN filed a General Brief and Exhibits on December 9, 1985. The Carrier filed its Brief on January 18, 1986. The

UTU/WP stated its position regarding Questions 2 and 12 in writing and orally on January 23 and 24, 1986. The record was therefore closed after January 24, 1986.

ARBITRABILITY ISSUES

The Union raised 13 Questions regarding the New York Dock Conditions applied to the consolidation by the Union Pacific Railroad Company of the Western Pacific Railroad Company (WP) with the latter's subsidiary, the Sacramento Northern Railway Company (SN), and other issues. The Carrier objected to the arbitrability of four of these; Questions 2, 11, 12 and 13; on the basis that they involved neither the interpretation of New York Dock Conditions nor issues related to the fourteen claims brought by SN trainmen for New York Dock protection that were also presented to me. It was also noted that Questions 2 and 12 involved the interests of the UTU/WP.

After considering the matter, I advised the parties by letter of December 18, 1985 that I had concluded that Questions 1-12 were all properly before me. While it is true that Questions 2, 11 and 12 do not involve New York Dock interpretation or claims, each of the 12 was raised and argued before Referee Phipps in his New York Dock Section 4 hearing in January of 1985. He referred these 12 Questions to a Section 11 referee, although he could have, had he so chosen, answered them himself as a part of the award and Inplementing Agreement that set the conditions for approval of the consolidation. Pursuant to his recommendation, the Union in timely fashion sought answers to

the 12 Questions from a Section 11 referee. Hence all 12 are properly before me.

The same reasoning does not apply to Question 13. Not only does it relate to a transaction which has not yet and may never take place, it was not a Question submitted to Referee Phipps. Under these circumstances I think Question 13 is hypothetical and is not appropriate for presentation to me at this time.

The interest of the UTU/WP in Questions 2 and 12 is acknowledged and was protected by allowing the UTU/WP General Chairman to make appropriate presentations at the hearing.

QUESTION NO. 1

"Will the Health and Welfare Benefits for all Sacramento Northern Employees be preserved in their entirety?"

Section 2 of New York Dock provides that unless future bargaining or applicable statutes require a change, all negotiated benefits of a consolidated railroad's employees are preserved. Section 8 of New York Dock provides that employees of a railroad affected by a transaction shall not be deprived of benefits attached to their previous employment. Since the Implementing Agreement for the consolidation here created prior rights SN employees and preserved their existing labor agreement, all Health and Welfare Benefits of SN employees who continue to work prior rights SN assignments are preserved. Further, and contrary to the Carrier's Brief, if a displaced SN employee who was or should have been protected subsequently is furloughed, he is still protected and his fringe benefits remain intact. This

is required by Section 8, just as if he had originally been dismissed.

The problem arises here because the Implementing Agreement contemplates the possibility in Article 4 that a prior rights SN employee may come to work on WP assignments or comingled SN-WP assignments. They are then "subject to the appropriate Western Pacific Collective Bargaining Agreement." Fringe benefits such as Health and Welfare arise under collective bargaining agreements. At what point or length of service under the WP contract does a prior rights SN employee shift to the different WP Health and Welfare Plan, if ever? Certainly employees cannot shift back and forth between plans on a weekly or even a monthly basis. This is a problem best solved by negotiation, but it is not clear from the record that the parties have ever directly addressed this issue. They should do so now.

Answer to Question 1

Prior rights SN employees who continue to work on prior rights SN assignments will maintain their existing Health and Welfare Benefits. The same is true for displaced SN employees entitled to protective benefits, should they subsequently be furloughed.

The parties shall attempt to negotiate regarding the benefit plan shift, if any, of prior rights SN employees working under the terms of the WP agreement. Jurisdiction of this issue is retained. If the parties have not resolved it within 90 days of the date of this award, they may return for a final answer.

QUESTION NO. 2

"Will all Sacramento Northern employees be considered as 'protected employees' under the Western Pacific Crew Consist Agreement?"

On May 13, 1981 the WP tentatively agreed on a Crew Consist Agreement with the UTU. As of this date, the WP has not notified the Organization that it wishes to effectuate the Agreement. Hence Question 2 is prospective only. Certainly prior rights SN employees working SN assignments have not made the commitments of the UTU/WP and would not be eligible for contemplated short crew payments or sharing in productivity funds. But the same would not be true of prior rights SN employees then working under the WP bargaining agreement.

Answer to Question 2

On and after the effective date of the Western Pacific Crew Consist Agreement those prior rights SN employees working under the WP/UTU collective bargaining agreement will be entitled to an appropriate share in any payments or fund distributions resulting from the Crew Consist Agreement.

QUESTIONS NO. 3 and 4

"How will decline in business be treated for purposes of computing employee protection under New York Dock Conditions?"
"Shall the burden of proof under a 'decline in business' be the Carrier's?"

Given the extended consideration of these questions that were involved in ruling on the fourteen employee protection claims presented to me, no lengthy discussion of or specific answers to these questions are appropriate here. Each case turns on its own

facts. Essentially, these questions are best answered by reference to the New York Dock Conditions themselves and the many interpretative awards cited by the parties. Further, as noted with regard to the fourteen claims, not all SN brakemen were adversely affected by the transactions that were undertaken after the coordination, even though all were potentially affected by the consolidation transaction itself. Each individual claiming protection must still identify a specific transaction the anticipation or the actuality of which resulted in his dismissal or displacement. In the alternative, he must identify the chain of bumping in anticipation of or after a specific transaction that finally resulted in his dismissal or displacement. The burden then shifts to the Carrier to show that a decline in business or other causes resulted in the adverse effect. I concluded after considering those fourteen claims, however, that both the individual's and the Carrier's burdens of refuting the claims and arguments of the other must be satisfied by reference to specific facts and events rather than unsupported statements and allegations.

QUESTION NO. 5

"When shall employees be required to move their residence to preserve their full guarantee?

Under Section 5(a) of the New York Dock Conditions a displaced employee is not required to change his place of residence to minimize a carrier's protection obligation. If he is required to move as the result of a transaction, he receives

a moving allowance under Section 9.

While SN trainmen traditionally exercised their seniority to accept assignments throughout the SN's geographic territory without relocating or moving allowances, they often or sometimes received deadhead payments to and/or from outlying assignments. Today, the Union asserts, the Carrier is treating Oroville and Stockton as some SN trainmens' home terminal but is no longer making deadhead payments. To the extent these assignments result from transactions originating in the consolidation, the affected employees who move their residence are entitled to moving expenses.

Answer to Question No. 5

Those individuals who move their residence more than 30 miles in order to protect the comingled Oroville roadswitcher assignment, or those who move their residence more than 30 miles to protect the Stockton "steel train" assignment, shall receive the benefits to which they are entitled under Section 9 of the New York Dock Conditions.

QUESTION NO. 6

> "In the computation of a displaced/dismissed employee's monthly guarantee, are 'hours worked' to be considered in connection with compensation earned to arrive at the employee's monthly guarantee as well as the hourly guarantee?"

On their face, paragraphs 2 and 3 of Section 5 of the New York Dock Conditions suggest the answer to this question should be affirmative. Paragraph 2 directs that a displacement allowance shall be determined by calculating separately both "total

compensation received" and "total time for which [a displaced individual] was paid" during the test period, and paragraph 3 that he be paid in the guarantee period for excess time worked over "the aforesaid average monthly time paid for."

In support of this position the Union cites Referee Rohman's award interpreting Appendix C-1. Without going into detail, Appendix C-1 was issued by the Secretary of Labor to protect employees adversely affected by the discontinuance in 1970 of intercity rail passenger service. Appendix C-1 is the forerunner of the New York Dock Conditions and the language in issue here is identical with its forerunner. Referee Rohman concluded in 1971 that the UP's calculation of the earnings factor only, without the time factor, would deviate from the express provisions of Appendix C-1 which specifies the computation of both factors to determine displacement allowances. Similarly, and also in 1971, Referee Matthew Kelly in Delaware and Hudson and the UTU concluded, ". . . a displaced employee ought not to be required to work more hours in a given month of his protective period than the average time worked, or paid for, in his test year." Referee Preston Moore ruled in AMTRAK 27-11 in 1980 that "time is a factor to be considered." In that case the trains available to a passenger service protection pool were reduced from 40 to 30 per month, which required that conductors who remained in the pool work nearly 25 percent longer to maintain their former wages. Finally, the Union construes certain statements made in the Carrier's Brief to Referee Phipps as supporting its position

on this Question.

The Carrier concedes that the language quoted here from New York Dock is copied directly from Appendix C-1. But it notes that C-1 dealt with the unique situation of discontinuance of passenger service. Hence the pertinent language ordinarily involved a situation where employees moved from passenger service, which had its own working conditions and rates of pay, to freight service with different conditions and rates of pay. The Carrier argues that here, where SN employees remain in freight/yard service and are covered by the same working conditions and rates of pay as before the consolidation, the time factor is irrelevant and should be ignored. In support of this argument it notes that Referee Rohman reversed his position on this issue in 1972, only a year later, and that Referees Dorsey and Zumas also reached the conclusion that "average monthly time paid for" should be construed as "total time for which paid." (Carrier's Exs. F, K, and L). Finally, both parties refer to certain awards in which the referee accepted as his own an agreement between the parties on this issue, which confuses the matter.

What is in issue in this case is primarily arbitrary payments--usually in the form of mileage arbitraries--made to adversely affected employees during their test periods. The Union contends that in computing the total time factor for a displaced or dismissed employee the calculation should be limited to the actual time he was on duty. The Carrier contends

to the contrary that it should be the total time for which an adversely affected employee was actually paid during his test period, as customarily expressed in mileage.

After careful consideration of this issue, I have concluded that the more reasonable interpretation of the phrase "total time for which he was paid" means the number of hours for which an adversely affected employee was paid, even if expressed in mileage, rather than the number of clock hours actually worked. This is particularly the case where one is converting arbitraries paid during the test period to monthly guarantees during the protected period. This was the conclusion the better-reasoned referees' opinions came to in construing Appendix C-1 in relation to arbitrary payments before AMTRAK, and even though it was conceded that in the conversion from passenger to freight service it might work an occasional injustice. It is not an unjust interpretation and is reasonable here where both before and after the transactions the employees worked only in freight and yard service.

Answer to Question 6

In the calculation of displaced or dismissed employee's monthly guarantees, in both the test and the protective periods, "hours worked" shall include all compensation paid for time rather than actual hours on duty.

QUESTION NO. 7

"What method must Carrier use to notify its employees in advance of existence of higher paid job sequences to preserve full guarantee?"

Answer to Question 7

The Company shall provide displaced employees with necessary advance information on the projected earnings of jobs to allow them to meet their obigations to exercise their seniority rights to positions earning more than their guarantees or to the highest-rated positions available to them. So long as they bid in accordance with the information provided, they will remain fully protected.

QUESTION NO. 8

> "In applying the guarantee, shall the displacement of junior employees from the higher paid assignments be limited to one for one, for off-set purposes?"

Section 5(b) of the New York Dock Conditions requires that displaced employees exercise their seniority to obtain available higher-paying positions in their area than those which they had been holding. If they do not choose to do so they will be treated for guarantee purposes as if they held the higher-paying position they declined. The Union requests that only one protected individual be so treated per higher-paying available job, with junior individuals having neither obligation to bid for it nor their guarantee offset. The argument seems simply to be that creation of one highly-paid job with adverse working conditions could result in guarantee offsets for many individuals.

The Carrier responds that this is not the intent of New York Dock and has never been the way it has applied similar guarantees, including Appendix C-1, and it has done so unchal-

lenged to this time. I note only that New York Dock attempts to guarantee income; by its very nature a transaction implies a change in jobs and/or working conditions.

Answer to Question 8

The answer is negative. Each displaced employee is obligated by the New York Dock Conditions to exercise his seniority to obtain higher paying positions if such become available in their area of residence. Each who fails to do so is subject to a guarantee off-set in accordance with Section 5(b).

QUESTION NO. 9

> "Shall authorized individuals who lost time in their 'test period' in order to conduct or participate in United Transportation Union business be qualified to claim these days as earnings throughout their `test period?'"

The Union contends that Union officers' work in resolving grievances throughout the year is of benefit to both employees and the Carrier. Yet if a part-time Union officer becomes protected his guarantee is adversely affected by the fact that he took days off duirng his test period to conduct Union business, thereby lowering his test period earnings. He also loses if the Carrier deducts for similar days in the guarantee period. The Union also notes that the Carrier has agreed with its point of view here in other locations and circumstances.

The Carrier responds that there is no authority for this claim in New York Dock. Regardless of the equities, the Union lost the opportunity to negotiate benefits of this kind, and go beyond the requirements of New York Dock, when it failed to

reach agreement with the Carrier in negotiations that preceded the Section 4 arbitration.

It is still an issue requiring settlement in negotiation.

Answer to Question 9

No provision is made in the New York Dock Conditions to restore lost earnings resulting from voluntary unpaid absences, including those for Union business. The question must therefore be answered negatively.

QUESTION NO. 10

> "Are Sacramento Northern Trainmen required to displace on any assignment located more than 30 miles from their place of residence in order to preserve their full guarantees? If the answer is affirmative, would such trainmen be entitled to moving allowances pursuant to Section 9 of New York Dock?"

Essentially, this Question raises much the same issues as Question 5. It arises because SN trainmen formerly received deadhead payments for assignments to the Sacramento Extra Board that went through Stockton. They apparently did pay their own costs to go to and return from assignments in Yuba City. Today they receive assignments originating in Stockton and Oroville, the latter considerably farther than Yuba City, without compensation for either. The 30-mile radius has been traditional in the industry. The Carrier again responds that SN trainmen traditionally protected all assignments on the SN without receiving moving expenses.

Answer to Question 10

Those SN trainmen who are displaced by a transaction are not

required by Section 5(b) of New York Dock to change their place of residence to preserve their full guarantee. If they do choose to change their place of residence at a distance of more than 30 miles in order to move closer to assignments arising from transactions, as at Oroville or Stockton at the present time, they are entitled to Moving Expenses as provided in Section 9 of New York Dock.

QUESTION NO. 11

"Under the provisions of Article 2 of the March 1, 1985 Implementing Agreement between the UP, WP, SN and the UTU/WP and UTU/SN, must the Carrier continue annually to reprint, revise and separately maintain the SN Conductors' and Brakemens' Seniority Rosters?"

Answer to Question 11

The answer is affirmative.

QUESTION NO. 12

"Under the provisions of Article 4 of the March 1, 1985 Implementing Agreement between the UP, WP, SN and the UTU/WP and UTU/SN, is the Carrier required to pro-rate (apportion) and/or adjust mileage resulting from the combining of WP and SN assignments which operate between Sacramento and Stockton, CA or any other portion of former SN trackage? Further, must the number of prior rights positions on extra boards be determined in the same manner?"

Article 4 of the March 1, 1985 Implementing Agreement orders apportionment of mileage and positions in the event that after coordination the Carrier combines or comingles assignments to operate on both SN and WP trackage. Apparently the Carrier has done so with regard to the Oroville roadswitcher and the

Sacramento Westside switcher assignments. It has refused to do so with regard to the "steel train" assignment between Sacramento and Stockton even though it did so by agreement with the BLE. This is the underlying issue raised by this question.

The trackage between Oroville and Stockton, CA is WP-owned trackage and would therefore ordinarily be considered exclusive prior rights trackage for WP trainmen. In 1955, however, in ICC Finance Docket 18617, SN trainmen were granted the right to operate the steel train over this WP trackage. They continued to do so until the April 13, 1985 transaction when the Carrier returned this portion of the steel train assignment to WP trainmen. As was discussed in detail earlier, the Carrier created a new regular SN assignment to operate the steel train from Stockton to Pittsburg, CA and protected under New York Dock those SN trainmen whose earnings were adversely affected as a result of the transaction.

In light of this history I cannot conclude that SN trainmen had exclusive prior rights on the Sacramento-Stockton WP trackage or that the appropriate protection of those who had operated the steel train over it requires that they receive pro-rated mileage or share positions with WP trainmen because of it. As noted earlier, the Carriers' voluntary agreements with other organizations or in other circumstances are irrelevant to the terms of the arbitrated Implementing Agreement here.

Answer to Question 12

The Carrier is required to apportion mileage and/or posi-

tions on combined or comingled assignments over exclusive prior rights WP and SN trackage. The trackage between Sacramento and Stockton does not meet this criterion, however, and thus as this question relates to this segment of track the answer is negative.

Charles M. Rehmus
Referee

February 14, 1986