Before
ROBERT J. ABLES
Arbitrator

CSX Transportation, Inc., Employer and American Train Dispatchers Association, Organization	Dispute Concerning New York Dock Conditions

Proceedings:	Robert J. Ables, Washington, D. C., appointed by the National Mediation Board on April 27, 1988, as neutral referee to decide this dispute. Pre-hearing submissions by each party received by the neutral referee on June 16, 1988. Arbitration hearing: Jacksonville, Florida; June 23, 1988. Post-hearing submissions concerning Public Law Board No. 3829 received by the neutral referee on June 30, 1988. Post-hearing briefs received: July 25, 1988. Carrier submission with respect to the decision in Public Law Board No. 3829 received by the arbitrator: October 11, 1988.
Date of Decision:	November 11, 1988.

CSX Transportation, Inc.

and

American Train Dispatchers Association

Dispute Concerning New York Dock Conditions

OPINION

I. ISSUE

This dispute is simple to identify but difficult to resolve.

It is, after authorized merger of railroads, the next step in a series of steps to effect the efficiencies and economies contemplated by Interstate Commerce Commission when it authorized the merger, with certain built-in,

statutory, protection for employees adversely affected by the merger (consolidation, coordination, etc.), requiring thereby an award favoring the carrier. In the alternative, it is such a big step as to constitute a difference in kind, raising very large questions about the fundamental relationship of labor and management during active merger action in the railroad industry, requiring, possibly, an award favorable to the union.

In a metaphor, the question is whether railroads, such as this one, propose to get a foot in the door to potentially big, big changes in employee protective considerations after merger and, if so, what to do about it, and, if not, to help stop so much litigation about what is a relatively small labor problem in the scheme of things for the four employees involved in this dispute, represented by their union, American Train Dispatchers Association (ATDA).[1/]

1/ The arbitrator's vantage point is as author of probably the first published treatise of employee protection in the railroad industry in the United States and service as neutral referee in subsequent evolving problems. Report of the Presidential Railroad Commission, Appendix Volume III, "The History of and Experience Under Railroad Employee Protection Plans" (1962).

II. FACTS

CSX Transportation, Inc. (CSXT), one of the nation's largest railroads, evolving after mergers of the Seaboard Coastline Railroad and Louisville and Nashville Railroad, which merged with the Chesapeake and Ohio Railroad and the Baltimore and Ohio Railroad, asks to have it determined in this proceeding that the "New York Dock" employee protection conditions prescribed by the Interstate Commerce Commission, when it authorized the underlying railroad mergers, which were exempted from the anti-trust laws, should be considered such that the work of four, union, high-ranked dispatchers (of locomotive power)[2/] in the coal producing area around Corbin, Kentucky, be transferred to Jacksonville, Florida where the company is near completing plans to centralize, for the entire system, all such power distribution, and where the work in dispute would be performed by non-bargaining unit employees (non-contract dispatchers).

The fundamental dispute between the parties, CSXT and ATDA, is not so much the content or application of New York Dock protective conditions for the four contract dispatchers affected by the planned change, as it is the right of the company to abolish those four jobs at Corbin, Kentucky and not give the work of those

---

2/ Now known as "Assistant Chief/Power" or, as in this proceeding, "contract dispatchers".

jobs to contract dispatchers, at Jacksonville, since dispatching of locomotive power is still required in Corbin as much, if not more, as before.

The contest is not new.

For 10 years, the parties have been locked in arbitration proceedings, or in court, whether the classification rule of one of the parties' collective bargaining agreement must be construed to preserve the dispatching work for contract dispatchers, as the union maintains, or not, as the carrier maintains.

The latest round in this litigation favors the carrier.[3/]

3/ Very pertinent to the question and to the present proceeding is that, in October, 1988, CSXT submitted to this arbitrator the decision of Herbert L. Marx, Jr., chairman and neutral member of Public Law Board No. 3829, concurred in by the CSXT representative of that board, favoring the carrier's position on the question. After a long recitation of previous litigation in the question, the arbitrator, in his findings, noted: that there exists, now, in Jacksonville the position of Power Coordinator -- a management job; the union's argument was unpersuasive that such management work duplicates, replaces or substitutes for covered -- contract -- dispatcher jobs; and that the carrier was persuasive "the new positions, at or near the top of the management hierarchy of the Operations Control Center, are concerned with overall system-wide control and direction, overseeing the continuing functions of those in the Train Dispatcher Group". Opinion p. 9. Arbitrator Marx concluded the union had not shown that the management level positions established at Jacksonville fit the definition of positions, the duties of which fall within the scope of the train dispatcher group. Thus, he denied the claim to classify dispatching work in issue as within the train dispatcher classification.

The union, considering the contingency of an adverse finding under Public Law Board No. 3829, argues, in the present proceeding, that the present arbitrator may still find under New York Dock that "the work of power distribution now being performed at Corbin should be performed by agreement employees at Jacksonville because the carrier cannot show that to do otherwise is necessary to effectuate the Commission's original order". It argues further that, because there are assistant chief positions at Jacksonville, "it is the carrier's burden to convince this panel that depriving agreement dispatchers of their work is necessary to effectuate the Commission's control order". ATDA pre-hearing submission, Opinion, pp. 7 and 14.

The union has been on a failing track on neutral decisions on these matters. It points to no recent decision by court, arbitrator, Interstate Commerce Commission or other neutral tribunal, preserving work of the kind in issue under New York Dock or other employee protective conditions, upon authorized merger.

The carrier, to the contrary, is alive with decisions supporting its asserted right to take implementing action to effect economies and efficiencies of operations.

It argues here that precedent is so clear and substantial, stare decisis controls, obviating thereby need to examine further the legal basis of its decision to

transfer locomotive power dispatching work from Corbin to Jacksonville under systemwide, centralized, control.[4/]

In any event, the carrier argues the implementing agreement it proposed to the union following it having served a New York Dock Article 1, Section 4 notice on the ATDA on February 12, 1988 ("to transfer certain work associated with train operations to Jacksonville, Florida", proposing in this respect the abolishment of four (4) CSXT Assistant Chief/Power positions at Corbin, Kentucky) "fully and adequately protects the interests of the affected employees" and is consistent with conditions imposed by the Interstate Commerce Commission in relevant proceedings (Finance Dockets 30053, 31033 and 31106) and "with implementing agreements previously negotiated between the parties in similar transactions". Pre-hearing submission, pp. 3 and 4.

In support of its argument that proposed actions under New York Dock conditions (New York Dock Ry-Control -- Brooklyn East. Dist. 60 I.C.C. 60 (1979)) are not different from previous authorized actions involving this and other merged railroads, the carrier relies primarily on the following referee decisions: David H. Brown (December 16, 1986); H. Raymond Cluster (November 23, 1982);

4/ Transfer of other than locomotive power dispatching duties by Assistant Chief/Power is not involved in this dispute because unit employees have been assigned such work.

Robert O. Harris (May 19, 1987), sustained by the Interstate Commerce Commission, with dissent, on June 10, 1988;[5] and Robert E. Peterson (May 24, 1982).[6]

---

[5] The ATDA has advised it will appeal this decision.

[6] Special deference at the "trial" level is given to decisions of labor arbitrators as contrasted, for example, with the Interstate Commerce Commission decisions which lately seem to treat decisions of neutral arbitrators, who are selected by the parties or appointed by the National Mediation Board, as decisions by Interstate Commerce Commission Administrative Law Judges, with "remand" and other like action. See, for example, I.C.C. Decision, Finance Docket No. 30905 (Sub. No. 22), CSX Corp. - Control - Chessie System, Inc. and Seabord Coast Line Industries, Inc. (June 8, 1988). At the arbitration level, the railroad industry should enjoy no special status. Arbitrators who decide cases about the operation and therefore the safety of nuclear power or ammunitions plants, deep coal mining operations and the like, or whether thousands of employees should lose their pensions on a buy-out, need no special review cushion before appropriate court consideration to maintain the essence of arbitration, which should be final and binding decisions, with very narrow exceptions, recognizing that difficult questions in dynamic times -- like employee protection after merger -- may produce unclear and, possibly contrary, results, to be resolved by new agreements, changes in law, etc.

III. FINDINGS

A series of favorable awards on the application of New York Dock conditions is better than none but none of those referenced awards is hard precedent, on-point, concerning transferring work which clearly has been done by contract employees and where that work remains to be done after the consolidating action, as here.

Arbitrator Brown, in a dispute between this company and the UTU on New York Dock conditions, had before him the question whether a tentative agreement for the selection and assignment of conductors and trainmen was equitable. The ultimate decision allocating work on a percentage basis between these two covered crafts does not reach the question of abolishing work of covered employees to be done by non-contract employees.

Arbitrator Cluster was concerned with the number of yard assignments resulting from a consolidation. The arbitrator made a series of findings on: protection for (covered) engineers off the consolidated railroads; an order selection list to fill regular and extra yard engineer positions in the consolidated terminal; home road rules under "schedule", i.e., union agreements; and certain travel allowances under consolidated yard conditions. None of these findings reaches the present question.

Arbitrator Harris, in a dispute concerning New York Dock conditions between the Norfolk and Western Railway Company, Southern Railway Company, and the American Train Dispatchers Association, had before him a proposed transfer of work "of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia". Opinion, p. 2. The N&W, a product of earlier mergers, did not itself have an agreement with the ATDA but the union had agreements with each of the railroads which had merged into the N&W. When the merged company proposed to assign power distribution in a "power bureau" to non-ATDA dispatchers, the ATDA, in a dispute before the Third Division of the National Railroad Adjustment Board, prevailed, following which the parties agreed that "supervisors" who worked out of such power bureau would be represented by ATDA. The Southern Railroad, however, controlled its distribution of power out of Atlanta, with non-contract dispatchers. The question before the arbitrator was the effect on bargaining rights when the merged carrier proposed to concentrate power distribution for the entire system in Atlanta using non-contract dispatchers. The arbitrator, noting the "unusual rearrangement" (p. 9) concerning contract and non-contract dispatchers, decided that the "central issue" (p. 11) in the case was the

reconciliation of Sections 2 and 4 of Appendix I to New York Dock.[7/]

Concentrating on this issue of relative authority under the Railway Labor Act and the Interstate Commerce Act for a substantial part of his opinion, the arbitrator then reaches what was the question in dispute, which was whether the resulting work of distributing power was to be done by contract or non-contract dispatchers. In an opinion going off on representation rights, to be determined by the National Mediation Board,[8/] but noting that the carrier, in its last proposed implementing agreement, offered to consider awarding new dispatcher positions in Atlanta to covered dispatchers, the arbitrator concluded he could not change the terms of New York Dock and, because the union proposed an implementing agreement

---

7/ This is a heavy litigated matter involving the precedence of the Railway Labor Act or the Interstate Commerce Act in New York Dock employee protection conditions, where the parties cannot agree on an implementing agreement following an authorized merger. The question, following a number of arbitration and court decisions, seems settled in favor of the Interstate Commerce Act.

8/ The Interstate Commerce Commission found this explanation to be "confusing". I.C.C. Decision, Finance Docket No. 29430 (Sub. No. 20, Norfolk Southern Corp. - Control - Norfolk & Western Railway Co. and Southern Railway Co. (June 10, 1988), p. 5.

and one such by the carrier being beyond the terms of New York Dock, they could not be acted on, but that the carrier's second proposal "will be placed in effect" (p. 17). Presumably, the carrier's second proposal was adopted on the basis it did not exceed New York Dock, although such presumption is by inference, since the opinion does not identify the basis for the conclusion. The employee member, in a strong dissent, did not accept the arbitrator's decision favoring the carrier's position.

Arbitrator Peterson, in a dispute between the Southern and N&W Railroads as the employer and the Railroad Yardmasters of America, had before him whether proposed implementing agreements provided an appropriate basis for the selection of forces. He adopted a "fair and reasonable" standard, noting that "consideration could not be given to a supposed superiority of rights for represented employees to retain job opportunities to the detriment of non-represented, non-contract, employees by the same job class or craft" (p. 17) where the union contract provides that non-contract employees -- presumably doing the same work as contract employees -- "shall have afforded substantially the same levels of protection as afforded to members of labor organizations" ibid. in selection of forces. Since the union held no representation rights at the surviving yard under the proposed rearrangement of forces, the union agreement could not be extended to the yard.

The Brown decision did not involve work transferred to uncovered employees. The Cluster decision was a garden variety dispute under New York Dock as to which covered employees get resulting work. Harris was lost -- which happens to all arbitrators in different cases, during changing times, in cases argued by very able attorneys -- as here -- with a dizzying array of court, arbitration and agency awards. The Peterson case did not involve management people doing scope work.

These are not ringing decisions demanding their adoption in this dispute, as the carrier argues.

Each of such decisions however is a bit in a mosaic favoring the consensus of neutrals that a railroad should have reasonable opportunity to effectuate the improvements of operations and cost it persuaded the Interstate Commerce Commission was the object of the proposed merger sufficient to be granted authority to make implementing changes without undue concern about restrictions under otherwise applicable anti-trust law.

But the question remains: how far?

For the first time under New York Dock, based on the sophisticated submissions of the parties, the question is clear: can contract jobs be abolished and the work, still to be performed in those jobs, be transferred to non-contract employees at a different location ?

It must be clear. The work in issue is not to be done by unrepresented, non-supervisory, employees, or union employees represented by another craft off another railroad, or by road and yard employees with different seniority rights. The work is to be done by managers, "low level" managers, as the carrier makes clear -- but managers.

Scattering its shots somewhat, the union here argued various theories to support its claim that the employer was violating applicable agreements by not letting contract locomotive power dispatchers at Corbin follow their work to Jacksonville. It argued precedence of the Railway Labor Act over the Interstate Commerce Act and of Section 2 over Section 4 of Article I of New York Dock, and the scope rule, with many footnoted references to court decisions on employee protection conditions upon authorized merger. In its pre-hearing brief, the union made what may be taken as a collateral argument on the effect of the carrier's action on the union, as distinct from employees affected by this transaction. It notes that, although the centralization of train dispatching functions was contemplated, "de-unionization of an integral part of the operation -- the distribution of locomotive power -- was in [no] way alluded to" by the Commission authorizing the overall consolidation. (p. 10.)

By the time of post-hearing brief, the union argued strongly that the effect of the carrier's proposal "is

to take the work out of the union's jurisdiction" and that if the carrier's position in this dispute is accepted:

> The carrier can use New York Dock time after time as a tool to reduce its organized work force and the influence and ability of this organization to represent its employees in the process. (pp. 3 and 4).

The union's concern is real -- which is not to say sufficient to sustain its claim.

A "coordination" was a term more commonly used than merger, in earlier times going back to the Washington Job Protection Agreement of 1936, describing changes to make railroad operations more efficient and less costly. They frequently were limited to consolidating yards or tracks. Now, whole companies are absorbed in mergers, sometimes repeatedly. Displacement of employees and concomittant need for protection from the effects of such actions, as prescribed by statute[9/] and underlying protective conditions prescribed by the Interstate Commerce Commission or Department of Transportation (for airline mergers) are now much more widespread.

9/ 49 U.S.C. & 11341, et seq.

As a determined tide is hard to stop, it is with increasing difficulty neutrals can see a particular consolidation, change in operation, purchase of new equipment, or application of new technology, as not being within the intent of the Commission's blessing when it approved the merger. The Commission could not reasonably anticipate all the changes -- either in kind or degree -- that would logically flow from its authorization to merge carriers. Absent the parties themselves agreeing how to accommodate the changes, neutrals are hard-put to consider substituting their judgment for that of carriers why the change either will not effect the economies and efficiencies projected or that some artificial bar, like limits of New York Dock conditions or the public interest connection between authorized mergers and changes, prevent the proposed operational changes.

In this case, the carrier's action may be seen as a first <u>new</u> step, having the potential of union busting. It will not be found however that this was a purpose of the carrier. (If so, the decision might have gone for the union.)

Despite protestations to the contrary, the union relied heavily on a favorable award in the scope dispute before arbitrator Marx. If the union had prevailed, the decision here could have flowed logically that distribution of power, at least in Corbin, Kentucky, should be done by contract dispatchers, particularly as the carrier

accepts such operations as being "unique" to other carrier operations, with its special requirements for movement of coal, often inter-divisional as well as local.

That decision having gone against the union, the only basis for deciding this New York Dock question in the union's favor is to find the coal movement work so special that only Corbin locomotive power dispatchers can do the job (at Jacksonville),[10/] or that the Interstate Commerce Commission order permitting this underlying merger contained at least an implicit bar against allowing consolidations permitting transfer of bargaining unit work to managers.

The union has not shown either of these conditions.

Clearly, distribution of power for locomotives at Corbin can be done at Jacksonville, the same as presently -- or soon will be -- done for all other points on the entire system, permitting obvious efficiencies and thus economies, as information about all power needs is centralized with the dispatchers and policy deciders in one place to make rational decisions that far-flung, complex operations seem to require.

10/ Where this power distribution work is to be done no longer is in question. It will be done in Jacksonville.

It is also pertinent in the carrier's favor that CSXT has used non-contract power distribution dispatchers at Jacksonville for a long time, thus eliminating any thought that, in this operation, it is consolidating power dispatch responsibilities with a purpose of taking the work from the union.

As to the Commission's order containing any bar to the disputed transfer, the Commission traditionally has shied away from being too specific in these matters and there is no history, precedent or other legal basis to infer that the Commission intended to include a bar to the disputed transfer.

That part of the organization's case, therefore, asking that New York Dock conditions be interpreted or applied to require Corbin, Kentucky contract locomotive power dispatchers to follow the work to Jacksonville is denied.

Subject to this finding, there is no legal or fair reason not to authorize the protective conditions for the four identifiable assistant chief/power dispatchers at Corbin the same protective conditions as was extended to about 20 other unit employees under an implementing agreement by the parties on January 9, 1988.[11/]

11/ The parties disagree whether the agreement on January 9, 1988 was meant to apply to the four unit employees involved in this dispute. Except for following the work, as the union urges in its proposed implementing agreement -- but which is denied -- the question is academic because the carrier is willing to extend the same protection to the four unit employees at Corbin, Kentucky as it provided to other unit employees not involved in this dispute.

IV. DECISION

The claim that four Assistant Chiefs/Power at Corbin, Kentucky shall follow their work to Jacksonville, Florida is denied.

Subject to this denial, the implementing agreement of the parties on January 9, 1988 shall apply to such unit employees.

Robert J. Ables
Neutral Referee

Dated: November 11, 1990