

In the Matter of the
Arbitration Between:

DUANE L. MORGAN, et al.

Claimants,

and

ST. JOSEPH TERMINAL RAILROAD
COMPANY and UNION PACIFIC
RAILROAD COMPANY,

Carriers.

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)
) Pursuant to Article I,
) Section 11 of the New York
) Dock Conditions
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) ICC Finance Docket
) No. 30,000
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)

)
) OPINION AND AWARD
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)

Mr. John B. LaRocco
Arbitrator
928 Second Street, Suite 300
Sacramento, California 95814-2278

Date of Award: May 26, 1989

APPEARANCES

For the Claimants:

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Hollingsworth & Sunderland
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For the Carriers:

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OPINION

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (MP) and the Western Pacific Railroad (WP). [ICC Finance Docket No. 30,000, 366 I.C.C. 462 (1982)] To compensate and protect employees affected by the merger, the ICC imposed the employee merger protective conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1980); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. Sec. 11343, 11347.

By a letter of understanding dated November 15, 1988, the parties submitted the following issues to arbitration per Article I, Section 11 of the New York Dock Conditions:

1. Are the substantive questions set forth below arbitrable?

2. Was the withdrawal of the Union Pacific and Santa Fe Railroads from the St. Joseph Terminal and the resulting closure of the Terminal a transaction subject to the New York Dock Protective Conditions imposed by the ICC on the merger of the Union Pacific and Missouri Pacific Railroads?

3. If the answer to question number 2 is in the affirmative, did the Railroads comply with the New York Dock Protective Conditions in connection with

the St. Joseph Terminal and the termination of the clerks petitioning this Board?

4. If the answer to question number 3 is in the affirmative, may the petitioning clerks be deprived of benefits to which they were entitled under New York Dock because of their refusal to accept employment with one of the railroads using the Terminal (the Union Pacific)?

The parties stipulated to a bifurcated arbitration proceeding. They empowered the Arbitrator to rule on Issue 1 and then, if the answer to Issue 1 is affirmative, the parties would submit evidence on the merits and the Arbitrator would resolve Issues 2, 3 and 4.¹ The parties waived the tripartite arbitration committee provided in Article I, Section 11. The parties also agreed to submit Issue 1 on a written record without a hearing. Both parties filed opening and rebuttal submissions. The Arbitrator received the rebuttal submissions on April 24, 1989, closing the record on Issue 1.

II. BACKGROUND AND SUMMARY OF THE FACTS

For many years prior to the 1982 UP-MP merger, the UP and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) jointly owned and operated the St. Joseph Terminal Railroad Company (SJT) which provided its two owners with yard, terminal and interchange facilities at St. Joseph, Missouri. The SJT also rendered transportation services to

¹ The UP and St. Joseph Terminal Railroad Company assert that if Issues 2 through 4 are arbitrable, they would petition the Arbitrator to join the Transportation-Communications International Union as a real party in interest.

area shippers. The MP maintained its own terminal at St. Joseph. The UP did not have any direct track connection to the MP's St. Joseph Terminal. Clerical workers, who maintained and prepared records for the SJT's owners as well as for the SJT itself, were represented by the former Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employes, currently the Transportation-Communications International Union (TCU). These clerical workers held seniority under the SJT working agreement as revised and effective on May 16, 1981. Most, if not all, of the clerks were concurrently covered by the February 7, 1965 Job Stabilization Agreement.

The UP sought, in its merger application, trackage rights over the MP at St. Joseph. The ICC approved the trackage rights request simultaneous with its approval of the UP-MP-WP merger. After the merger was consummated in December, 1982, the UP constructed a connecting track between the UP's Missouri River bridge and the MP's St. Joseph terminal yard and facilities. The trackage rights and rail construction portended the UP's utilization of the MP's St. Joseph Terminal. However, the UP continued to jointly operate the SJT with the Santa Fe.

On May 18, 1984, the UP served the TCU with written notice that the UP and Santa Fe intended to dissolve the SJT. In its May 24, 1984 response, the TCU asserted that ceasing SJT operations was inextricably linked to the UP-MP merger and thus, the impending closure of the SJT

constituted a New York Dock transaction. The UP characterized the SJT dissolution as a "decordination" outside the purview of both the New York Dock Conditions and the 1936 Washington Job Protection Agreement. Despite the disagreement over the applicability of the New York Dock Conditions, the UP and the TCU quickly negotiated an agreement, dated June 7, 1984, providing benefits for employees affected by the imminent closure of the SJT. In summary, the June 7, 1984 Agreement provided SJT clerical employees with two options. First, SJT workers could accept a lump sum separation allowance amounting to one year's pay except for those workers having accrued less than five years of total service.² Second, employees who declined to resign in exchange for the lump sum allowance would be required to bid on vacancies advertised on three UP seniority districts in the Omaha, Nebraska/Council Bluffs, Iowa area. Workers unable to acquire a position at Omaha immediately after the SJT closure, would be recalled to permanent bulletined positions under the provisions of Rule 18 of the UP-TCU collective bargaining agreement.³ The June 7, 1984 Agreement provided that SJT employees procuring positions on the UP would be placed at the bottom of the roster in the

² The exception evidently encompassed only one worker who was offered and presumably accepted a \$6,000 separation allowance.

³ While the record is unclear, these SJT workers would apparently remain on indefinite furloughed status drawing protective pay under the February 2, 1965 Agreement until they acquired a permanent position at Omaha.

appropriate UP seniority district. During negotiations, the UP and TCU discussed dovetailing the seniority of half of the SJT clerical forces into the appropriate UP seniority district based on their prediction that approximately 50% of the SJT workers would opt to move to Omaha. However, a small group of UP clerical workers threatened to sue the TCU if it agreed to partially or wholly consolidate the SJT seniority roster into any UP seniority roster. Although the June 7, 1984 Agreement did not dovetail the seniority of SJT employees into the appropriate UP seniority rosters, the Agreement vested SJT clerks transferring to the UP with full credit for their length of service on the SJT for purposes of computing their vacation, personal leave and similar benefits and exempted the SJT workers from the entry pay progression applicable to newly hired UP employees. Lastly, the June 7, 1984 Agreement provided those SJT employees moving to Omaha with moving expense reimbursement and lump sum transfer allowance.

On August 1, 1984, the SJT ceased all operations. Thereafter, SJT assets were either sold or divided between its owners. The corporation was dissolved.

When the SJT went out of business, sixteen clerical workers held regular assignments on the SJT. One of the sixteen occupied a fully excepted position. One clerical worker also held UP seniority and thus, he exercised his displacement rights on UP Seniority Zone 202. The most senior worker who was on the verge of retirement was given

separation pay to be disbursed in monthly installments until his retirement, at which time his employment relationship with the SJT terminated.

Claimants herein are eight former SJT clerical workers who lost their SJT clerical jobs as a result of the closure. While each Claimant opted for separation pay, they were dissatisfied with the June 7, 1984 Agreement. From Claimants' perspective, they should have been accorded a third option, that is, to collect New York Dock dismissal allowance for up to six years with the right to refuse employment with the UP at Omaha.

Claimants filed suit in the United States District Court for the Western District of Missouri [No. 84-6150-CV-SJ-6], alleging that the TCU breached its duty of fair representation because the TCU failed to unequivocally demand that the third alternative be included in the June 7, 1984 Agreement. Claimants' complaint also charged the UP and TCU with violating the Interstate Commerce Act.⁴ More specifically, Claimants alleged that there was a nexus between the UP-MP merger and the SJT closure mandating the TCU and UP to reach an agreement granting Claimants benefits which strictly conformed to the New York Dock Conditions. Claimants' contention that the TCU and UP were required to negotiate an agreement incorporating provisions giving Claimants six years of full wages without any obligation to

⁴ In addition, Claimants' complaint contained several counts premised on state law including fraud.

accept a UP position in Omaha was based on Claimants' interpretation of Article III of the New York Dock Conditions. Article III, Claimants asserted, permits employees of terminal railroad companies to decline comparable employment on another railroad, where they do not hold pre-existing seniority, if accepting a position on another railroad would require the workers to relocate. In this instance, taking UP positions at Omaha would presumptively entail changes in Claimants' residences. According to Claimants, Article III gave them the absolute right to turn down the Omaha positions without forfeiting any New York Dock protective pay or benefits.

During the litigation, Claimants learned that the UP had informed the Santa Fe in April, 1983 (more than a year before the May 18, 1984 notice to the TCU) of the UP's intention to withdraw from the joint SJT operation. Claimants discovered internal UP and Santa Fe memoranda disclosing that the UP anticipated the TCU's argument that the New York Dock Conditions would apply to employees affected by the SJT dissolution. At a February 28, 1984 meeting of top labor relations officials from the UP and Santa Fe, the UP estimated that its potential labor protection cost stemming from the SJT closure ranged from a minimum of \$400,000 to a maximum of \$4.46 million.⁵

⁵ The latter figure equals six years aggregate pay for all SJT clerical workers.

While the UP realized that the New York Dock Conditions might apply to the SJT closure, its primary position was that the closing was due to a decline in business as opposed to the UP-MP merger. Even if an arbitrator or the ICC ultimately ruled that the New York Dock Conditions applied to the SJT closure, the UP took the firm position that it could nonetheless require SJT employees to accept positions on the UP as a condition of retaining protection for the duration of each SJT employee's protective period. Based on decisions from Special Board of Adjustment No. 605 (the National Arbitration Board for deciding disputes under the February 7, 1965 Agreement), the UP believed that neither it nor the SJT would be liable for employee protective payments provided by the February 7, 1965 Agreement because the SJT was completely ceasing its business. Moreover, as stated earlier in this Opinion, the UP disavowed the applicability of the Washington Job Protection Agreement. Therefore, when it negotiated with the TCU in May and June, 1984, the UP's initial position was that SJT clerical employees were not entitled to any benefits because none of the three protective arrangements (the New York Dock Conditions, the February 7, 1965 Agreement and the Washington Job Protection Agreement) were applicable to the SJT closure.

Upon learning that the UP had definitely decided to shut down the SJT more than a year before the May 18, 1984 notice, the TCU demanded that the UP submit two questions to a New York Dock Section 11 Arbitration Committee. The

issues were whether the SJT closure was related to the UP-MP merger (and thus, a New York Dock transaction) and whether the New York Dock Conditions, if applicable, required that the seniority of the SJT employees be dovetailed with the seniority of UP clerical workers. Although the UP invited and even urged Claimants to participate in the arbitration proceedings, they declined to do so. Claimants charged that the UP and the TCU "staged" the arbitration to circumvent the pending lawsuit.

The Section 11 Arbitration Committee, with T. Page Sharp sitting as the neutral, issued its decision on February 4, 1986. BRAC v. UP, NYD Sec. 11 ARB (The Sharp decision). Having the benefit of documents discovered through the litigation as well as numerous depositions, the Arbitration Committee ruled that, subsequent to the SJT closure, the MP performed terminal functions for the UP. The Arbitration Committee specifically found that the UP had closely followed a scheme, originating before the merger, to shift its yard and switching operations from the SJT to the MP's St. Joseph Terminal. Thus, the cessation of operations at the SJT was related to the 1982 merger. Next, the Committee adjudged that the New York Dock Conditions did not require the UP and TCU to incorporate into their agreement a provision dovetailing the seniority of SJT and UP employees on appropriate UP seniority rosters because only a modicum of clerical work was transferred to the UP. The UP shifted approximately 7 hours of clerical work from the SJT to the

UP station at Marysville, Kansas. The Committee concluded that the TCU would have entered into the June 7, 1984 Agreement even if it had known about both the Carrier's plan to shut down the SJT and the Carrier's internal estimates of its possible labor protection costs. The Committee ruled that the June 7, 1984 Agreement was "...superior to the protective benefits which we would be enabled to award under the terms of New York Dock ..." especially since all SJT clerks were given a separation allowance option which was not among the benefits set forth in the New York Dock Conditions.

On June 3, 1986, the Federal District Court terminated Claimants' lawsuit short of a plenary trial. The Court granted the Defendants' Motion for Summary Judgment on the duty of fair representation claim. It dismissed without prejudice Claimants' causes of action pertaining to the Interstate Commerce Act because although the Court had subject matter jurisdiction, the ICC had primary jurisdiction to adjudicate the claims.⁶ Without engaging in an extensive analysis, the Eight Circuit Court of Appeals affirmed the District Court's orders and judgment on April 10, 1987.

On November 24, 1987, Claimants demanded that the UP arbitrate the question of their entitlement to New York Dock benefits. The parties eventually agreed on a statement of

⁶ The Court also granted Defendant's Motion for Summary Judgment on the state law claims because they were preempted by the Railway Labor Act and the Interstate Commerce Act.

the issues in dispute. To reiterate, the threshold issue is whether or not the three agreed-upon substantive issues are arbitrable.

III. THE POSITIONS OF THE PARTIES

A. The Carriers' Position

The Carriers contend that the substantive issues have already been decided. Under the doctrine of res judicata, Claimants are not entitled to relitigate the issues in the hope of convincing some forum to award Claimants six years of pay each while they simply sit at home.

The Carriers stress that they could have pursued various alternatives when the SJT ceased doing business. First, the Carrier could have "decoordinated" the jointly-run facility which would not constitute a coordination under the 1936 Washington Job Protection Agreement. Second, inasmuch as the SJT had suffered a substantial decline in business, the decline in business formula under the February 7, 1965 Agreement would negate all job stabilization protection. Third, the UP took the position that the SJT closure was unrelated to the merger. If the Carriers prevailed on these arguments, SJT clerks would not receive any protection.

Nonetheless, the Carrier knew it would have to address TCU's argument that the New York Dock Conditions governed the closure. Due to the uncertainty concerning the applicability of New York Dock or any other protective

arrangement to the SJT closure, the Carrier calculated best and worst case protective liability scenarios but it never conceded that Claimants were presumptively entitled to \$4.4 million in protective payments.

Although the Carriers had a chance to avoid paying any employee protection, the UP entered into the June 7, 1984 Agreement with the TCU so the UP and Santa Fe could quickly close the SJT. The four corners of the June 7, 1984 Agreement contain all the rights and obligations of the former SJT workers. Claimants accepted the benefits of this Agreement since they opted for lump sum separation allowances. As demonstrated by the disposition of Claimants' lawsuit, neither the depositions nor the material discovered by Claimants uncovered any fraud surrounding the negotiations culminating in the June 7, 1984 Agreement.

In addition, the Sharp decision decided the merits of all three substantive issues in this case. The Sharp decision found that the SJT closure was merger-related. It also concluded that Claimants are forever bound by the June 7, 1984 Agreement because the Agreement contains benefits far in excess of the benefits that the Sharp Arbitration Committee would have been able to award under the New York Dock Conditions. The Sharp decision recognized that but for the June 7, 1984 Agreement, Claimants would not have been entitled to a separation allowance. The Sharp Committee definitively ruled that the New York Dock Conditions required Claimants to accept employment with the UP even if

they changed their residences. Claimants are bound by the Sharp decision because they were given every opportunity to participate in the proceedings. Claimants recklessly forewent the arbitration process and unsuccessfully pursued their claims in the courts.

Next, the United States District Court determined that Claimants' allegations were unmeritorious. The Court ruled that Claimants had little likelihood of prevailing on their claims before the ICC. And, while the Court found that the issue of relocation remains hotly contested, the Court noted that a string of ICC and arbitration decisions held that employees are required to change their residences as a condition of retaining New York Dock protection. Finally, the Court decided that the TCU did not breach its duty of fair representation when it negotiated an agreement that did not strictly adhere to the benefits specified in the New York Dock Conditions. The Court also alluded to the Sharp Committee's finding that the benefits under the June 7, 1984 Agreement were greater than those available to Claimants under the New York Dock Conditions.

Finally, the Carriers argue that the substantive issues are not arbitrable because the issues are barred by laches. Claimants improvidently pursued protracted litigation without achieving any success instead of prudently raising their allegations before Arbitrator Sharp (which they were invited to do). Claimants did not request arbitration of their claims until more than four years after the June 7,